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No. ~~68035-8~~ 68035-8

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

MARK S. PELOQUIN and
JENNIFER W. PELOQUIN, a married couple,

Plaintiffs/Appellants,

v.

REGINALD SORDENSTONE and
CAROL SORDENSTONE, a married couple,

Defendants/Respondents.

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COURT OF APPEALS DIVISION I
STATE OF WASHINGTON

DEFENDANTS-RESPONDENTS' BRIEF

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I. INTRODUCTION

The scope of a prescriptive easement is derived from the historic use of a property. When a trial court is faced with the question of how a piece of property was used over the past thirty years, the credibility of the witnesses who testify about that use is of utmost importance. In the present case, the trial court's unchallenged findings of fact on the credibility of the key witnesses, in large part, dictated the outcome of this case.

The Peloquins initiated this lawsuit seeking access rights over the first 160 feet of the Sordenstones' Driveway. The trial court heard testimony from four prior owners of the Peloquin Property: Gary Goodale, Marcia Cook, Michael Gross, and Magdalena Rangel Gross. The trial court heard testimony from the one prior owner who lived at the Sordenstone Property from 1980 until 2008: Michael Sweeney.

After observing the witnesses' demeanor and evaluating their testimony, the trial court made two very important credibility determinations. First, the trial court found that the credibility of all of the prior owners of the Peloquin Property was troubling. The trial court found that all of the prior owners of the Peloquin Property exaggerated the amount and extent of their use of the Sordenstones' Driveway. Second,

the trial court determined that Michael Sweeney was a reasonable and persuasive witness, and that he was one of the few people who was out on the Sordenstone Property and near the Peloquin Property for a significant period of time. These credibility findings are unchallenged and are the starting point for this Court's analysis on appeal.

The Peloquins' appeal relies very heavily on testimony that the trial court did not believe, and the Peloquins improperly ask this Court to rely solely on the Report of Proceedings, without acknowledging the trial court's unchallenged findings and credibility determinations. The Peloquins are asking this Court to try the case all over again, to act as a trial court of second resort, and expand the very narrow prescriptive easement to which the trial court ruled the Peloquins were entitled. Specifically, the Peloquins request a massive expansion of their prescriptive easement to use the Sordenstones' Driveway for: (1) regular access to the shop at the rear of the Peloquin Property; (2) commercial, customer and third-party access; (3) pedestrian access; and (4) construction staging and maintenance access. It is not the role of this Court, however, to decide this case devoid of the trial court's findings of fact and conclusions of law.

The crux of the Peloquins' appeal is their complaint that the trial court's ruling is just not fair, because it does not allow the Peloquins to use the Sordenstones' Driveway in all the ways the Peloquins would like. The Peloquins want to be able to use the Sordenstones' Driveway (which is the Sordenstones' only access to their property) to facilitate multiple potential businesses they plan to run out of their shop, and for construction staging and access for a massive remodel and second story addition to the shop. The Peloquins are entitled to engage in any lawful activities they would like in their shop; however, the Peloquins failed to meet their burden at trial to prove they are entitled to use the Sordenstones' Driveway to facilitate all of those activities.

II. RESTATEMENT OF ISSUES

1. Whether the trial court's unchallenged findings of fact and the credible evidence at trial support the narrow scope of the prescriptive easement ordered by the trial court?
2. Whether the trial court acted within its broad discretion in fashioning an equitable remedy when it required the Peloquins to close their gate that opens onto the Sordenstones' Driveway when the gate is not in use?

III. RESTATEMENT OF THE CHALLENGED FINDINGS AND CONCLUSIONS

The Peloquins assigned error to the following findings of fact and conclusions of law:

A. **Challenged Findings Of Fact**

1. Finding Of Fact Number 29: “This Court finds it persuasive that Michael Sweeney did not observe trucks or other commercial or retail traffic. The Court also finds it persuasive that Michael Sweeney would have known whether trucks or other commercial type traffic were using the Disputed Area.”

2. Finding Of Fact Number 37: “Third, the Court finds that the credibility of the prior landowners of the Peloquin Property to be slightly troubling because unlike Michael Sweeney, some of the prior owners of the Peloquin Property do have a stake in the outcome of this proceeding. Particularly, the Grosses are potential defendants since they sold the Peloquin Property to the Peloquins.”

3. Finding Of Fact Number 42: “Gary Goodale testified that his use of the Disputed Area was irregular as well.”

4. Finding Of Fact Number 56: “Historic use of the Disputed Area was for limited personal use.”

5. Finding Of Fact Number 57: “There was no foot traffic over the Disputed Area.”

6. Finding Of Fact Number 58: “There was no commercial use of the Disputed Area.”

7. Finding Of Fact Number 59: “The nature of the historic use of the Disputed Area was limited, infrequent personal use by personal vehicles.”

8. Finding Of Fact Number 62: “The gate on the Peloquin Property was always closed after it was used.”

9. Finding Of Fact Number 67: “No blocking of the Disputed Area occurred or was allowed. No vehicles were parked back there. No foot traffic occurred there.”

B. Challenged Conclusions Of Law

1. Conclusion Of Law Number 14: “The evidence proved that the historic use of the Disputed Area was for limited personal use.”¹

2. Conclusion Of Law Number 15: “The Court will order the scope of this limited prescriptive easement as follows:

- (a) The Sordenstones’ gate may remain, but it needs to be unlocked.

¹ The Peloquins did not challenge the remaining portion of Conclusion of Law Number 14 where the trial court stated, “The Court finds that a limited prescriptive easement was in existence and is in existence.”

(b) The fenced gate between the Disputed Area and the Peloquin Property (the Peloquins' Gate), must be closed unless it is actively in use.

(c) The fence and gate on the Peloquin Property have historically been maintained in good condition, but the Court has doubts that it can order the Peloquins to maintain the gate and fence in a particular condition.

(d) There can be no blocking of the Disputed Area.

(e) There can be no vehicles parked in the Disputed Area.

(f) There can be no commercial, retail, business or public use of the Disputed Area. Driving one's personal passenger vehicle and [sic] and/or out of the Disputed Area with products is not considered a business or commercial use of the Disputed Area.

(g) No customers may use the Disputed Area.

(h) No visitors may use the Disputed Area.

(i) No members of the public may use the Disputed Area.

(j) The Disputed Area cannot be used for deliveries or pickups of products or materials.

- (k) No foot traffic over the Disputed Area.
- (l) No deliveries or mail over the Disputed Area.
- (m) No third party vehicles accessing the Disputed Area.
- (n) Emergency access by fire trucks, ambulances, aid cars, or other emergency governmental vehicles is permitted over the Disputed Area.”

3. Conclusion Of Law Number 17: “The scope of the prescriptive easement is for occasional and irregular personal access by personal or family vehicle.”²

4. Conclusion Of Law Number 18: “The Court notes that on at least two documented occasions, construction vehicles were allowed back over the Disputed Area. The Court does not find this use to be part of the prescriptive easement. The Court finds that was an accommodation and an express permissive use by Michael Sweeney, and it was outside the prescriptive easement grant.”

² The Peloquins did not challenge the remaining portion of Conclusion of Law No. 17, where the trial court stated: “This Court will not specify the number of visits permitted.”

IV. STATEMENT OF THE CASE

A. **The Trial Court's *Unchallenged Findings Of Fact.***

All of the trial court's unchallenged findings of fact are taken as verities in this appeal.³

1. **The Trial Court's *Unchallenged Findings Of Fact Regarding The Lay Of The Land.***

The Sordenstones purchased their dream home on Vashon Island on May 26, 2009.⁴ The Sordenstone Property, located at 10631 SW 116th Street on the north end of Vashon Island, is situated on approximately six acres of land. FOF ¶ 3-4. One of the property features that was most attractive to the Sordenstones was the long winding driveway leading back to the secluded house. RP 457:22-458:5.

The driveway, which is accessed off of SW 116th Street, is the Sordenstones' only access to their property and to their home. FOF ¶ 6. The first 160 feet of the Sordenstones' driveway is approximately 30 feet wide, and is bordered on the west by a nature preserve, and on the east by the boundary of the Peloquin Property. FOF ¶ 5, 8. This 30 foot by 160

³ *In re Contested Election of Schoessler*, 140 Wn.2d 368, 385, 998 P.2d 818 (2000).

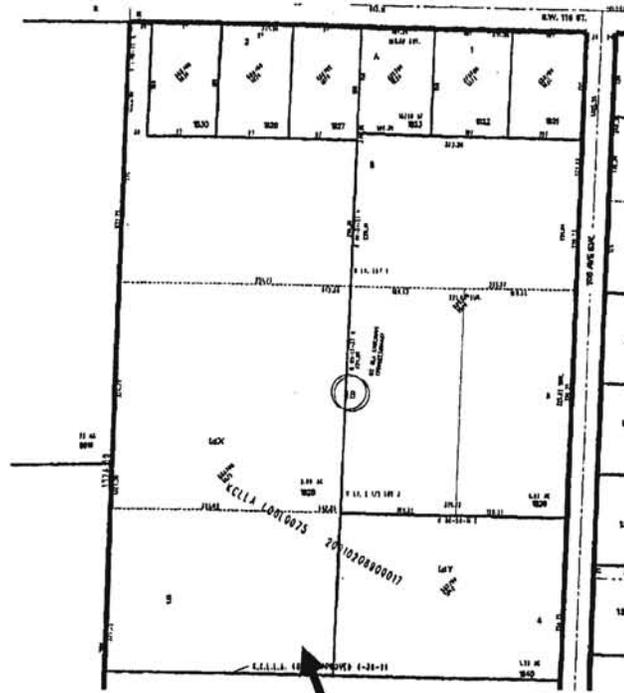
⁴ Finding of Fact ¶ 3, CP 980. The trial court's Amended Findings of Fact and Conclusions of Law are found at CP 979-994. For clarity, citations to the Amended Findings of Fact ("FOF") and Conclusions of Law ("COL") will be to a specific paragraph number instead of the CP reference; *see also* RP 457:22-458:5.

foot section of the Sordenstones' driveway, the "Disputed Area," was the area at issue in the trial court proceedings. FOF ¶ 5.

The Peloquin Property, located at 10625 SW 116th Street, is situated to the east of the Sordenstone Property. FOF ¶ 2. The Peloquin Property faces SW 116th Street. FOF ¶ 9. The Peloquins have access to their property, including their own two-car garage and their own driveway, directly from SW 116th Street. FOF ¶ 10. The Peloquins have a 1,100 square-foot shop behind their residence, which they can access by walking through their own property. FOF ¶ 11-12.

In the map below (Tr. Ex. 39), the Sordenstones' Property is the larger parcel on the left of the map, where the arrow is pointing. The Sordenstones' Property runs from the arrow up to the road at the top of the map. The Disputed Area is the small strip of land at the top, left of the map. The Peloquin Property is adjacent to the Disputed Area.

Assessor's Plat of Vashon Heights
Vol. 46 pg. 22-23



TRIAL EXHIBIT 39 - pg. 1

The trial court found that the Sordenstone Property and Peloquin Property used to be parts of one large parcel owned by William Fitzpatrick. FOF ¶ 13. In the early 1970s, William Fitzpatrick subdivided the large parcel of land into four separate lots. FOF ¶ 14. Three of those lots border SW 116th Street. *Id.* One of those three lots eventually became the Peloquin Property. *Id.* There is a fourth lot behind the three parcels on SW 116th Street that is now the Sordenstone Property. *Id.*

When William Fitzpatrick subdivided the properties, he left a 30 foot-wide strip of land to the west of the Peloquin Property so that the back parcel (the Sordenstone Property) would have a dedicated access to SW 116th Street. FOF ¶ 15. This 30-foot wide strip of land is the Sordenstones' driveway and was the Disputed Area at trial. *Id.*

The trial court found that the Disputed Area was very clearly maintained as a means to access the Sordenstone Property. FOF ¶ 16. There was never a written or recorded easement for the owners of the Peloquin Property to use the Disputed Area. FOF ¶ 7. The trial court found no evidence that William Fitzpatrick intended an easement for the owners of the Peloquin Property. FOF ¶ 68. After the Peloquin and Sordenstone Properties were subdivided, access to the Peloquin Property has always been available directly from SW 116th Street. FOF ¶ 17.

2. The Trial Court's *Unchallenged* Finding That Michael Sweeney Was A Credible, Reasonable And Persuasive Witness.

The Sordenstones purchased their property from Michael Sweeney on May 26, 2009. FOF ¶ 24. Michael Sweeney's late wife, Cathleen Carr (also known as Cathleen C. Shreve), had purchased the Sordenstone Property from William Fitzpatrick in 1974. FOF ¶ 23. Cathleen Carr and Michael Sweeney built a home on the Sordenstone Property in 1979, and

moved in and were married on the front porch of the home in 1980. *Id.* Michael Sweeney lived at the home on the Sordenstone Property for approximately twenty-eight years, from 1980 until 2008. *Id.*

In its findings of fact and conclusions of law, the trial court noted that it had the opportunity to view the demeanor of the witnesses and to evaluate their testimony and credibility. FOF ¶ 25. The trial court noted that it evaluated the witnesses' testimony both internally and externally. *Id.* The trial court evaluated the testimony externally by comparing the testimony to the admitted documents and to the testimony of other witnesses. *Id.*

In an unchallenged finding of fact, the trial court found that Michael Sweeney was a "reasonable and persuasive" witness based on both his "demeanor and the consistency of his testimony." FOF ¶ 27. Michael Sweeney was one of the few people who was on the Sordenstone Property and near the Peloquin Property for a significant period of time. FOF ¶ 26. In another unchallenged finding of fact, the trial court found it persuasive that Michael Sweeney could tell whether there was constant use being made of the Disputed Area, and whether commercial use of the Disputed Area was occurring. FOF ¶ 33.

3. The Trial Court's *Unchallenged* Finding Of Fact That The Prior Owners Of The Peloquin Property Were Not Credible And Exaggerated The Amount And Extent Of Their Use Of The Disputed Area.

Gary Goodale entered into a real estate contract with William Fitzpatrick for the Peloquin Property in 1972. FOF ¶ 18. At the time, the Peloquin Property was a vacant, undeveloped lot. *Id.* Gary Goodale obtained a warranty fulfillment deed in 1982. FOF ¶ 19.

Gary Goodale sold the Peloquin Property to Steve Pearson and Marcia Cook (formerly Marcia Pearson) on February 14, 1994. FOF ¶ 20. The Pearsons sold the Peloquin Property to Michael Gross and Magdalena Rangel Gross on February 8, 1999. FOF ¶ 21. The Grosses sold the Peloquin Property to the Peloquins on December 11, 2008. FOF ¶ 22.

The prior owners of the Peloquin Property who testified at trial included Gary Goodale, Marcia Cook (formerly Marcia Pearson), Michael Gross, and Magdalena Rangel Gross. FOF ¶ 34. Importantly, the trial court found that all of the prior owners of the Peloquin property exaggerated the amount and extent to which they used the Disputed Area. FOF ¶ 40. The trial court found the credibility of all of the prior owners of the Peloquin Property troubling. FOF ¶ 39.

The trial court found the testimony of the prior owners of the Peloquin Property troubling for numerous separate, unchallenged reasons.

FOF ¶ 34. First, the trial court found that these witnesses were not dispassionate and objective. FOF ¶ 35. Not only did the prior owners of the Peloquin Property refuse to talk to the Sordenstones, but the Peloquins paid for David Cooper, co-counsel for the Peloquins, to represent the prior owners at their depositions and in this proceeding.⁵ Second, the trial court found the credibility of the prior owners of the Peloquin Property problematic because the Peloquins' co-counsel who represented the witnesses, David Cooper, had a "major conflict of interest." FOF ¶ 36. The trial court found that David Cooper likely committed a major breach of professional ethics by taking positions adverse to the Peloquins in the past, and by historically generating documents adverse to the Peloquins in this case.⁶ Third, the trial court found the credibility of Marcia Cook, Michael Gross and Magdalena Rangel Gross troubling based on their unsettling attitudes and demeanors during trial. FOF ¶ 38.

⁵ See FOF ¶ 35; see also Tr. Exs. 120, 122-125.

⁶ FOF ¶ 36. David Cooper was formerly Michael Sweeney's attorney. RP 355:5-356:3. In 1994, after meeting with Michael Sweeney and discussing the Pearsons' request that a driveway use agreement be documented in writing, David Cooper prepared a draft of a license agreement. RP 355:11-356:18; Tr. Ex. 104. In his cover memo to Michael Sweeney, David Cooper noted, "I had to make the license revokable [sic] in order to guard against its being considered an easement." Tr. Ex. 102. David Cooper represented the Peloquins, as well as Gary Goodale, Marcia Cook, Michael Gross and Magdalena Rangel Gross in this proceeding asserting a prescriptive easement over that same driveway, until an inquiry from the court about his conflict of interest led to his withdrawal. FOF 35; RP 476:1-6.

In another unchallenged finding of fact, the trial court found that although Marcia Cook testified that she used the Disputed Area daily, the court believed this was an exaggeration. FOF ¶ 43. The court found that Marcia Cook was the least credible of all the testifying witnesses. *Id.* Further relevant unchallenged findings of fact from the trial court are that Michael Gross and Magdalena Rangel Gross used the Disputed Area with their personal vehicle as needed, but not every day and regularly. FOF ¶ 41. The Grosses used the Disputed Area as an access point to the shop in the back, and not as the primary parking spot for a vehicle. *Id.*

4. The Trial Court's Unchallenged Findings Of Fact Regarding Historic Use Of The Disputed Area.

Sharon Munger, a former UPS driver, also testified at trial. FOF ¶ 64. The trial court found Sharon Munger's testimony credible. *Id.* Sharon Munger testified that she did not make deliveries to the shop on the Peloquin Property via the Disputed Area. *Id.* Sharon Munger testified that she delivered and picked up packages from the Pearsons at the Pearsons' own garage facing SW 116th Street, or at the Pearsons' house facing SW 116th Street. *Id.* In another unchallenged finding of fact, the trial court found there was no credible evidence to establish that any deliveries were made to the shop on the Peloquin Property via the Disputed Area. FOF ¶ 64.

The trial court also found that the prior owners of the Peloquin Property did not use the Disputed Area daily. FOF ¶ 60. The court further found that the credible testimony showed the garage and driveway on the Peloquins' own property off of SW 116th Street was always intended to be the primary parking spot for vehicles for the Peloquin residence. FOF ¶ 65. The court also found that the fence on the west side of the Peloquin Property was historically maintained. FOF ¶ 63. Finally, the court found that the back of the Peloquins' own Property was used for access to the shop. FOF ¶ 66. These findings are all unchallenged. FOF ¶ 60, 63, 65, 66.

B. The Trial Court Took Specific Note Of Jennifer Peloquin's Testimony About Potential Future Public Uses Of The Shop Requiring Access Over The Disputed Area.

The trial court found that while the credibility of the *prior* owners of the Peloquin and Sordenstone properties was relevant, based on the timeline of ownership of both properties, the credibility of the Peloquins and the Sordenstones was not essential to the resolution of the case. FOF ¶ 44. The court found, however, that Jennifer Peloquin's testimony was an exception. FOF ¶ 45. The trial court noted Jennifer Peloquin's testimony about the potential expansion of the shop into a yoga or pottery studio open to the public. *Id.* The court found that establishment of such

a commercial enterprise with sole access over the Sordenstones' driveway would cause significant conflict. *Id.* The court also took note of both: (1) the "significant amount of backpedaling" between Jennifer Peloquin's deposition and her testimony at trial; and (2) the long pause when she was asked at trial about her future plans for the shop. *Id.* The court found that the potential for a public commercial use of the Disputed Area would be the genesis for significant conflict. *Id.*

C. Scope Of The Easement Ordered By The Trial Court.

Following a three-day bench trial, the trial court concluded there was a limited prescriptive easement over the Disputed Area.⁷ Reasoning that the scope of the prescriptive easement is fixed and determined by the use in which it originated, the trial court held that, consistent with the historic use of the Disputed Area, the easement was for limited, occasional, irregular personal access by personal or family vehicles. COL ¶ 12, 14, 17.

⁷ COL ¶ 11. The Peloquins brought additional claims for: (1) easement by part performance; (2) easement by promissory estoppel; (3) easement by implication; and (4) a claim based on laches. COL ¶ 19. The laches claim was dismissed by the trial court at the conclusion of the Peloquins' case. COL ¶ 20. The trial court further concluded that the Peloquins did not meet their burden to establish an easement by part performance, promissory estoppel, or implication. COL ¶ 25, 26, 30. The Peloquins have not alleged that the trial court erred in reaching these conclusions. As such, the Peloquins' alternative claims are not at issue in this appeal.

The trial court ordered the scope of the prescriptive easement as follows: (1) the Sordenstones' gate at the entrance of their driveway needs to remain unlocked; (2) the Peloquins must close the Peloquins' own gate that opens onto the Disputed Area unless it is in use; (3) no blocking the Disputed Area; (4) no parking in the Disputed Area; (5) no commercial, retail, business or public use of the Disputed Area (the trial court clarified that driving a personal vehicle over the Disputed Area with products is not a business or commercial use); (6) no customers, visitors, members of the public or third-party vehicles may use the Disputed Area; (7) no delivery or pick up of products, materials or mail via the Disputed Area; (8) no foot traffic is permitted over the Disputed Area; and (9) there are no restrictions on emergency vehicle access over the Disputed Area. COL ¶ 15.

The trial court noted that on at least two occasions, construction vehicles were allowed to pass over the Disputed Area. COL ¶ 18. The court held that this use of the Disputed Area for construction access was an accommodation with express permission from Michael Sweeney, and that the construction use was outside the scope of the prescriptive easement. *Id.* The trial court also held, in a conclusion of law to which the Peloquins have not assigned error, that any commercial, retail, or

public use of the Disputed Area would be an unreasonable deviation from the scope of the original grant. COL ¶ 16.

V. ARGUMENT

A. Standard Of Review

1. Unchallenged Factual Findings: *Verities On Appeal*.

The Peloquins identify nine assignments of error relating to the trial court's findings of fact. Each of the trial court's unchallenged findings of fact stand as verities in this appeal.⁸

2. Challenged Factual Findings: Appellate Courts Do Not Second-Guess The Trial Court's Balancing Of The Testimony At Trial.

It is not the role of the appellate court to reweigh the evidence or reassess the relative credibility of witnesses.⁹ Therefore, even challenged findings of fact are binding on appeal if there is any substantial evidence in the record to support them.¹⁰ Substantial evidence requires simply a sufficient quantity of evidence to persuade a rational, fair-minded person

⁸ *In re Contested Election of Schoessler*, 140 Wn.2d at 385.

⁹ *Davis v. Dep't of Labor & Indus.*, 94 Wn.2d 119, 124, 615 P.2d 1279 (1980); *accord*, *State v. Hill*, 123 Wn.2d 641, 646, 870 P.2d 313 (1994); *Maehren v. Seattle*, 92 Wn.2d 480, 486, 501, 599 P.2d 1255 (1979) (when the trial judge was presented with conflicting evidence, appellate court will not disturb the judge's findings based on that evidence). This makes sense because the trial judge is in the best position to observe the witnesses' demeanor, verbal cues, and body language; assess their credibility (as well as weigh it against the relative credibility of other witnesses); and weigh the testimony.

¹⁰ *In re Contested Election of Schoessler*, 140 Wn.2d at 385; *Hollingbery v. Dunn*, 68 Wn.2d 75, 81-82, 411 P.2d 431 (1966).

of the truth of the factual finding.¹¹ Where the trial court has weighed the evidence, appellate review is limited to determining whether the findings are supported by substantial evidence and, if so, whether the findings in turn support the trial court's conclusions of law.¹²

B. Substantial Evidence Supports The Trial Court's Challenged Findings Of Fact.

1. The Credible Testimony At Trial Established That Use Of The Disputed Area Was Limited.¹³

In an unchallenged finding of fact, the trial court found it persuasive that Michael Sweeney could tell whether there was constant use being made of the Disputed Area. FOF ¶ 33. Michael Sweeney testified that use of the Disputed Area was limited.¹⁴

In another unchallenged finding of fact, the trial court found that the prior owners of the Peloquin Property exaggerated the amount and extent to which they used the Disputed Area. FOF ¶ 40. The trial court found that Gary Goodale's use of the Disputed Area was irregular. FOF ¶ 42. In another unchallenged finding of fact, the trial court found that while Marcia Cook testified that her use of the Disputed Area was regular, the trial court believed this was an exaggeration and found that

¹¹ *In re Contested Election of Schoessler*, 140 Wn.2d at 385.

¹² *Holland v. Boeing Co.*, 90 Wn.2d 384, 390, 583 P.2d 621 (1978).

¹³ This section addresses challenged FOF ¶ 29, 42, 56-59, 67, and challenged COL ¶ 14, 15, 17, 18.

¹⁴ See RP 351:4-7, 362:5-8, 374:10-12, 381:4-9.

Marcia Cook was the least credible witness at trial. FOF ¶ 43. The trial court also found, in an unchallenged finding of fact, that the Grosses' use of the driveway was not every day and regular. FOF ¶ 41. There was no credible testimony at trial to establish that use of the Disputed Area was frequent or regular.

2. The Credible Testimony At Trial Established That There Was No Commercial Or Third Party Use Of The Disputed Area.¹⁵

The credible testimony at trial, including testimony from Michael Sweeney and former UPS driver Sharon Munger, established that the prior owners of the Pelouquin Property used the Disputed Area for personal use, not commercial or third-party use.¹⁶ The trial court, in an unchallenged finding of fact, found Michael Sweeney's testimony reasonable and persuasive. FOF ¶ 27. In another unchallenged finding of fact, the trial court found it persuasive that Michael Sweeney knew the amount and extent to which the Disputed Area was being used for commercial purposes. FOF ¶ 33. Michael Sweeney testified that to his knowledge, none of the prior owners of the Pelouquin Property used the driveway for commercial purposes.¹⁷

¹⁵ This section addresses challenged FOF ¶ 29, 56, 58, 59, 67, and challenged COL ¶ 14, 15, 17, 18.

¹⁶ See RP 336:19-337:12, 338:21-24, 346:3-14, 350:23-25, 361:19-25, 362:9-11, 374:16-18, 375:3-7, 380:24-381:3.

¹⁷ See RP 346:3-14, 350:23-25, 361:19-25, 362:9-11, 374:16-18, 375:3-7, 380:24-381:3.

Substantial evidence supports the trial court's findings that: (1) Michael Sweeney did not observe trucks or other commercial or retail traffic; (2) Michael Sweeney would have known whether trucks or other commercial-type traffic was using the Disputed Area; and (3) historically there was no commercial use of the Disputed Area. FOF ¶ 29, 58.

Michael Sweeney testified at trial that due to the ground conditions of the driveway on the Sordenstone Property, he could tell when large, commercial vehicles like UPS used his driveway. RP 363:21-364:12. Michael Sweeney testified that the gravel driveway had two ruts from vehicle wheels, with grass growing between the two ruts and on both sides of the ruts. *Id.* at 364:1-4. Michael Sweeney further testified that trucks like the UPS delivery vehicle with dual wheels made tracks that were wider than the worn ruts in the driveway. *Id.* at 364:1-2. Michael Sweeney explained that he could tell by the disturbance of the grass and disturbance of the worn ruts when a truck had used the driveway. *Id.* at 364:1-12.

Michael Sweeney testified that he never saw evidence on the ground that UPS was using his driveway to deliver packages to the shop at the rear of the Peloquin Property. RP 365:2-4. Michael Sweeney's testimony is further supported by the testimony of the former UPS driver,

Sharon Munger. In an unchallenged finding of fact, the trial court found Sharon Munger's testimony credible. FOF ¶ 64. The Sordenstone and Peloquin Properties were on Sharon Munger's daily UPS route for twenty years.¹⁸ Sharon Munger testified that she did not use the Disputed Area to deliver packages to the shop at the back of the Peloquin Property, but instead delivered and picked up packages from the front of the Peloquin house or the front of the Peloquin Property's own driveway. RP 336:19-337:12. Sharon Munger also testified that during her twenty years as a UPS driver on Vashon Island, she never saw another parcel carrier (USPS, DHL, FedEx) using the Disputed Area to make deliveries to the shop behind the Peloquin Property.¹⁹ There was no credible evidence at trial to establish a historic commercial or third-party use of the Disputed Area.

3. There Was No Credible Evidence At Trial To Establish A Historic Pedestrian Use Of The Disputed Area.²⁰

The trial court found, in an unchallenged finding of fact, that the prior owners of the Peloquin Property exaggerated the amount and extent of their use of the Disputed Area. FOF ¶ 40. There was no credible evidence at trial to establish any historic pedestrian use of the Disputed

¹⁸ RP 332:1-333:15.

¹⁹ RP 331:20-332:12, 338:21-24.

²⁰ This section addresses challenged FOF ¶ 57, 67, and challenged COL ¶ 15.

Area. The unchallenged findings of fact and the testimony at trial established that owners and occupants of the Peloquin Property can walk directly back to the shop at the rear of the property without ever stepping foot on the Disputed Area.²¹ There are paths both from the front of the Peloquin home and from the back door of the Peloquin home to the shop through the Peloquins' own property. RP 260:22-261:13. There is no need to use the Disputed Area for pedestrian access to the shop. FOF ¶ 12.

4. There Was No Credible Evidence At Trial To Establish Historic Use Of The Disputed Area For Construction Or Maintenance.²²

The trial court found, in an unchallenged finding of fact, that the prior owners of the Peloquin Property exaggerated the amount and extent of their use of the Disputed Area. FOF ¶ 40. The Peloquins failed to meet their burden of proof to show that any historic, adverse use of the Disputed Area for construction or maintenance occurred. COL ¶ 18. Instead, the trial court concluded that the documented occasions when construction vehicles were allowed over the Disputed Area were accommodations with express permission from Michael Sweeney. *Id.* This conclusion is supported by Michael Sweeney's testimony.²³

²¹ FOF ¶ 12; RP 260:22-261:13.

²² This section addresses challenged COL ¶ 18.

²³ RP 344:24-346:14, 349:20-350:10, 381:15-20.

5. The Credible Testimony At Trial Established That The Gate On The Peloquin Property Was Kept Closed.²⁴

Michael Sweeney testified that it was important to him that the fence on the Peloquin Property line be maintained and that the gate be closed when not in use.²⁵ As Michael Sweeney explained, this was always important to him “[b]ecause this driveway was the only access to our property. It was the front door to our property, and I tried my very best to make it a pleasant approach to the house, and I didn’t want a broken down fence, or a broken down gate to mar that, to interfere with it.” RP 357:12-16. In an unchallenged finding of fact, the trial court found that the fence on the Peloquin Property was maintained. FOF ¶ 63. There was no credible testimony at trial to establish that the gate on the Peloquin Property was left open when the access point to the Disputed Area was not in use.

6. The Credible Testimony At Trial Established That Gary Goodale’s Use Of The Disputed Area Was Irregular.²⁶

Although Gary Goodale’s use of the Disputed Area is not relevant to a determination of the scope of the prescriptive easement, the credible evidence supports the trial court’s finding that Gary Goodale’s use of the

²⁴ This section addresses challenged FOF ¶ 62 and challenged COL ¶ 15.

²⁵ See RP 346:5-7, 357:7-16, 361:19-25, 375:3-7.

²⁶ This section addresses challenged FOF ¶ 42 and challenged COL ¶ 14, 15, 17.

of the Disputed Area was irregular.²⁷ Michael Sweeney, one of the credible witnesses at trial, testified that the Goodales used the Disputed Area on a limited basis.²⁸ In an unchallenged finding of fact, the trial court found that Michael Sweeney could tell whether constant use was being made of the Disputed Area. FOF ¶ 33. Further, the trial court discounted Gary Goodale's testimony regarding his use of the Disputed Area, as a result of the trial court's multiple unchallenged findings of fact related to Gary Goodale's credibility, including: (1) the trial court's finding that the prior owners of the Peloquin Property were not credible; and (2) the trial court's finding that the prior owners of the Peloquin Property exaggerated the amount and extent of their use of the Disputed Area. FOF ¶ 34-36, 40.

7. The Credible Evidence At Trial Established That Michael Sweeney Did Not Have A Stake In The Outcome.²⁹

Throughout the length of this lawsuit, the Peloquins have attacked Michael Sweeney's honesty and integrity by labeling him a "mischief

²⁷ In an unchallenged finding of fact, the trial court determined that adverse use of the Disputed Area commenced when the Pearsons gave Michael Sweeney notice of their claim. FOF ¶ 52. Gary Goodale's prior permissive use of the Disputed Area, therefore, is not relevant to a determination of the scope of the prescriptive easement. *Lee v. Lozier*, 88 Wn. App. 176, 182, 945 P.2d 214 (1997).

²⁸ RP 351:4-7.

²⁹ This section addresses challenged FOF ¶ 37.

maker,” and accusing him of forging documents.³⁰ The trial court specifically disagreed with the Peloquins’ characterizations of Michael Sweeney. The trial court ruled: “[t]he Court does not find that [Michael Sweeney] was a troublemaker. [...]. The Court finds that Michael Sweeney was reasonable and persuasive based on his demeanor and the consistency of his testimony.” FOF ¶ 26, 27.

The Peloquins’ have assigned error to the trial court’s finding that Michael Sweeney did not have a stake in the outcome of this proceeding, while the Grosses, who are potential defendants in a claim by the Peloquins, did have a stake in the outcome. Substantial evidence supports the trial court’s finding, including the trial court’s unchallenged findings of fact that Michael Sweeney was a credible witness, while the prior owners of the Peloquin Property were not credible.³¹

Further, Michael Sweeney’s own testimony supports the trial court’s finding:

Q: Part of the sale of your property to the Sordenstones is seller financed, right?

A: Yes.

Q: Have the Sordenstones made their payments on time?

A: Yes.

Q: Have they ever missed a payment?

A: No.

³⁰ Tr. Ex. 129 at 15-18; Tr. Ex. 130 at 15-17.

³¹ FOF ¶ 25-27, 34-36, 38-40.

- Q: Have the Sordenstones ever threatened to stop making payments if you didn't testify for them in this proceeding?
- A: No.
- Q: Do you have any stake in the outcome of this lawsuit?
- A: No, I have no dog in this hunt. I, to the extent that I have submitted affidavits to this court, I would have done exactly the same affidavits if Mr. Peloquin had approached me. RP 380:9-23.

The trial court had the benefit of viewing the demeanor of Michael Sweeney and evaluating his testimony and credibility firsthand. FOF ¶ 25. The trial court's unchallenged findings of fact and the credible testimony support the trial court's determination that Michael Sweeney was an unbiased witness.

C. The Scope Of The Prescriptive Easement Ordered By The Trial Court Is Consistent With The *Lee* Case And The Credible Evidence At Trial.

The scope of a prescriptive right is fixed and determined by the use in which the prescriptive right originated.³² The scope of a prescriptive easement is a question of fact.³³ The trial court noted that the law disfavors not only the existence of a prescriptive easement but also the scope of a prescriptive easement. COL ¶ 5. Further, the trial court noted

³² *Lee*, 88 Wn. App. at 187-88; *Northwest Cities Gas Co. v. Western Fuel Co.*, 17 Wn.2d 482, 486, 135 P.2d 867 (1943).

³³ *Broadacres, Inc. v. Nelsen*, 21 Wn. App. 11, 15, 583 P.2d 651 (1978).

that a prescriptive easement is not an all or nothing proposition, and the scope of an easement is informed by the historical practice. COL ¶ 12.

The trial court properly determined that the scope of the prescriptive easement in the present case includes only limited, occasional, irregular personal use by personal vehicles. COL ¶ 14-17. The Peloquins failed to meet their burden to prove the historic use of the Disputed Area was any broader than the scope awarded by the trial court.

1. The Scope Of The Prescriptive Easement Ordered By The Trial Court Is Consistent With The *Lee* Case.

The Peloquins try to frame the relevant inquiry as a question of whether the scope of the easement ordered by the trial court is wide enough to allow the Peloquins to achieve their purposes on the Disputed Area. *See* Appellants' Br. 27-29. The real inquiry, however, is whether the scope of the prescriptive easement the trial court ordered is consistent with the trial court's findings on historic use. The Peloquins are not entitled to a prescriptive easement that is broader than what the historic use was proved to be at trial.

In *Lee*, the court held that the scope of a prescriptive easement extends only to the uses necessary to accomplish the purpose for which the easement was claimed.³⁴ The *Lee* plaintiffs were several neighbors who

³⁴ *Lee*, 88 Wn. App. at 187.

filed suit claiming a narrow prescriptive easement for “recreational purposes” over a portion of a dock on the defendant’s property. *Id.* at 178, 186. The court found that the neighbors established a prescriptive right to use the dock for “recreational purposes.” *Id.* at 186-87. The court, however, declined to specify which recreational purposes were permitted, even though not all neighbors had engaged in all types of recreational activities in the past. *Id.* at 187. The court, for example, refused to say that swimming was allowed, while fishing was prohibited.

The trial court’s ruling in the present case is consistent with the *Lee* decision, because the trial court here provided a general outline for the scope of the prescriptive easement the Peloquins proved at trial. The Peloquins claimed a prescriptive easement for access over the Disputed Area. The trial court found that the evidence established a limited-access right, less than what the Peloquins requested, and ordered that the Peloquins could use the Disputed Area with their personal vehicles for personal use on a limited basis. COL ¶ 14-17. The court refused to specify a number of times they could use the Disputed Area. COL ¶ 17. Nor did the court specify or limit which activities the Peloquins must be engaging in to use the Disputed Area. RP 623:21-624:3. The trial court

ordered the general outlines of the limited prescriptive right the Peloquins proved they had a right to, and nothing more.

One of the critical distinctions between *Lee* and the present case is that the plaintiffs in *Lee* proved they were entitled to the full scope of the easement they claimed, whereas in the present case, the Peloquins proved only a limited prescriptive right.³⁵ Here, as in *Lee*, the extent of the easement ordered was consistent with the historic use that lead to creation of the prescriptive easement.

In the present case, as outlined in the unchallenged findings of fact, the trial court did not believe the testimony of the prior owners of the Peloquin Property who testified about commercial use, public use and pedestrian access over the Disputed Area. FOF ¶ 34-36, 38-40. As such, the trial court properly excluded these uses from the scope of the prescriptive easement. The trial court believed there was personal use on a limited basis, which is consistent with the scope of the prescriptive easement it ultimately ordered. As such, the trial court's ruling is entirely consistent with the *Lee* case.

An example of a ruling inconsistent with *Lee* would be if the trial court ruled that the Peloquins could only have vehicular access over the

³⁵ *Lee*, 88 Wn. App. at 187; COL ¶ 14-18.

Disputed Area to accomplish a specific purpose, like hauling firewood or unloading kayaks. The trial court made no such rulings. The trial court did not specify the reasons the Peloquins must have for ingress or egress access over the Disputed Area. In fact, the Court specifically stated that the ruling does not affect what the Peloquins do in their back shop. RP 623:23-24.

Another critical distinction between *Lee* and the present case is that the *Lee* plaintiffs asked for access for recreational purposes, not unfettered access as the Peloquins requested.³⁶ If the *Lee* plaintiffs had requested unfettered access over the dock, the court's ruling may have been different. The *Lee* plaintiffs asked for access for a specific purpose: recreational use. *Id.* The trial court refused to specify which individual recreational uses were permitted within that category. *Id.* In the present case, the Peloquins claimed very broad, completely unrestricted access rights. The trial court found, however, that the prior owners of the Peloquin Property exaggerated the amount and extent of their use of the Disputed Area, and the only historic use of the Disputed Area proved at trial was a limited, irregular, occasional personal use for ingress and egress. COL ¶ 14-18.

³⁶ *Lee*, 88 Wn. App. at 187.

If the Court were to accept the Peloquins' argument that the trial court was wrong to limit the prescriptive right to personal use with personal or family vehicles, this would in fact make a prescriptive easement an all or nothing proposition. The Peloquins are arguing that once they proved they had any prescriptive rights, the trial court could not limit how they use the Disputed Area in any way, since their claimed purpose was for unfettered access to the shop behind their house. This is simply not consistent with the case law on the scope of prescriptive easements. The Peloquins do not get unfettered access without proving they are entitled to unfettered access under the law, which they failed to do.

2. The Scope Of The Prescriptive Easement Is Consistent With The Credible Evidence At Trial.

The crux of the Peloquins' appeal is their complaint that the trial court's decision is not fair because it does not allow them to use the Sordenstones' driveway in every way the Peloquins would like.³⁷ The Peloquins fail to acknowledge, however, that they did not prove they were entitled to such broad access of the Disputed Area. The unchallenged

³⁷ It is important keep sight of the fact that the Disputed Area is the Sordenstones' Property. In an unchallenged finding of fact, the trial court specifically noted that the Sordenstones purchased this Disputed Area, they have title to the Disputed Area, they pay taxes on the Disputed Area, and they could be held liable if someone got injured on the Disputed Area. FOF ¶ 46.

findings of fact support the limited scope of the prescriptive easement ordered by the trial court.

a. The Trial Court Correctly Limited Access To Occasional, Irregular Use Over The Disputed Area.

The Peloquins did not meet their burden to prove that historic use of the Disputed Area included any regular use. In an unchallenged finding of fact, the trial court found it persuasive that Michael Sweeney would have known whether constant use was being made of the Disputed Area. FOF ¶ 33. Michael Sweeney testified that the prior owners of the Peloquin Property all used the Disputed Area on a limited basis.³⁸

The trial court also found, in another unchallenged finding of fact, that the prior owners of the Peloquin Property exaggerated the amount and extent to which they used the Disputed Area. FOF ¶ 40. In further unchallenged findings of fact, the trial court found the testimony of the prior owners of the Peloquin Property troubling for numerous reasons. FOF ¶ 34-36, 38-40.

There was no credible evidence at trial to establish that the historic use of the Disputed Area was anything beyond occasional, irregular use. The unchallenged findings of fact and substantial evidence support the

³⁸ See RP 351:4-7, 362:5-8, 374:10-12, 381:4-9.

trial court's conclusion that the prescriptive easement includes only occasional, irregular use.

b. The Trial Court Correctly Limited Access To Personal, Not Commercial Or Third Party, Use Of The Disputed Area.

The Peloquins did not meet their burden to prove any historic commercial or third-party use of the Disputed Area. In an unchallenged finding of fact, the trial court found it persuasive that Michael Sweeney would have known whether trucks or other commercial-type traffic were using the Disputed Area. FOF ¶ 33. The trial court found it persuasive that Michael Sweeney did not observe trucks or other commercial or retail traffic using the Disputed Area. *Id.*

The court also found the testimony of Sharon Munger, the former UPS driver who delivered to the Sordenstone and Peloquin Properties for twenty years, credible and persuasive.³⁹ Sharon Munger testified that she did not use the Disputed Area to deliver packages to the shop at the back of the Peloquin Property, but instead delivered and picked up packages from the front of the Peloquin house or the front of the Peloquin Property's own driveway. RP 336:19-337:12. Sharon Munger also testified that during her twenty years as a UPS driver on Vashon Island, she never saw another parcel carrier (USPS, DHL, FedEx) using the

³⁹ FOF ¶ 64; RP 332:1-333:15.

Disputed Area to make deliveries to the shop at the back of the Peloquin Property.⁴⁰

There was no credible evidence of historic commercial or third-party use of the Disputed Area before the trial court. The Peloquins try to obfuscate the issue by arguing that since their home is zoned residential, all uses of the Disputed Area are *per se* residential. This argument misses the real issue, which is whether the Peloquins met their burden to show that historically the Disputed Area was used by commercial or third-party vehicles. They did not. As such, the trial court specified that commercial use or third-party use of the Disputed Area was not permitted. However, the trial court also explained that the prohibition on commercial use did not extend to the Peloquins transporting their products for sale over the Disputed Area in their own vehicles. COL ¶ 15. The trial court's order does not restrict the Peloquins' own use of the Disputed Area for their own purposes, but restricts the use of the Disputed Area by third parties. The unchallenged findings of fact and substantial evidence support the trial court's conclusion that commercial and third-party access are not within the scope of the prescriptive easement. The credible evidence at trial established that use of the Disputed Area

⁴⁰ RP 331:20-332:12, 338:21-24.

was limited to access by owners of the Pelouin Property for personal use.
COL ¶ 14.

**c. The Trial Court Correctly Limited Use To
Vehicular, Not Pedestrian, Access Over The
Disputed Area.**

The Pelouins did not meet their burden to show there was a historic pedestrian use of the Disputed Area. Substantial evidence supports the trial court's finding that historically there was no foot traffic over the Disputed Area. The testimony at trial, as well as unchallenged findings of fact, establish that occupants of the Pelouin Property could walk directly back to the shop at the rear of the property without using the Disputed Area.⁴¹ There is a path both from the front of the Pelouin home and from the back door of the Pelouin home to the shop. RP 260:22-261:13. There is no need to use the Disputed Area for pedestrian access to the shop. FOF ¶ 12.

Further, there was no credible testimony at trial to establish historic pedestrian use. In an unchallenged finding of fact, the trial court concluded that the prior owners of the Pelouin Property exaggerated the amount and extent of their use of the Disputed Area. FOF ¶ 40. The unchallenged findings of fact and substantial evidence support the trial

⁴¹ FOF ¶ 12; RP 260:22-261:13.

court's conclusion that pedestrian access is not included in the scope of the prescriptive easement.

d. The Trial Court Correctly Determined That Access For Construction And Maintenance Is Not Part Of The Prescriptive Easement.

The Peloquins argue that the scope of the easement should include access for construction.⁴² The trial court found, however, that the Peloquins did not meet their burden to prove that historic use of the Disputed Area included access for construction. Instead, the trial court concluded that the documented occasions when construction vehicles were allowed over the Disputed Area were accommodations with express permission from Michael Sweeney. COL ¶ 18. This conclusion is supported by Michael Sweeney's testimony on construction access.⁴³

The Peloquins make the summary statement, without authority, that once the prescriptive easement was acquired, adverse use could not be punctuated by permissive accommodations from Michael Sweeney. This argument is not relevant. The credible testimony about construction access referred to access that occurred during Gary Goodale's

⁴² As outlined in the Sordenstones' Motion to Strike, all references to the feasibility of maintenance or construction without access over the Disputed Area, and all testimony regarding feasibility of relocating the Peloquins' septic drain field should be stricken. These issues were not raised during trial, and when the Peloquins tried to raise these issues in their Motion for Reconsideration, the trial court granted the Sordenstones' Motion to Strike. CP 998. As such, these issues are not properly considered on appeal.

⁴³ RP 344:24-346:14, 349:20-350:10, 381:15-20.

ownership.⁴⁴ The use that occurred during Gary Goodale's ownership was permissive, as the adverse use did not start until the Pearsons' ownership. FOF ¶ 52.

Even if Gary Goodale's use of the Disputed Area had been adverse, the trial court's conclusion that construction access was not within the scope of the easement is consistent with the evidence at trial and the law. One or two examples of construction access over the Disputed Area over an approximate thirty-year period is not the "continuous" use required to establish a prescriptive right.

Further, as discussed above, the scope of a prescriptive easement is not an all or nothing proposition. The scope is determined by the historic use of the property.⁴⁵ The prescriptive right over the Disputed Area did not include construction access. COL ¶ 18. As such, it is consistent that Michael Sweeney could have granted permission for a one-time construction access (a use outside the scope of the prescriptive right), without the prior owners of the Pelouin Property acquiring an expanded prescriptive right.

⁴⁴ *Id.*

⁴⁵ *Lee*, 88 Wn. App. at 187-88; *Northwest Cities Gas Co.*, 17 Wn.2d at 486.

e. In Unchallenged Findings Of Fact, The Trial Court Found That Prior Owners Of The Peloquin Property Exaggerated Their Use Of The Disputed Area And Were Not Credible Witnesses.

The Peloquins' appeal relies very heavily on testimony that the trial court did not believe, and the Peloquins improperly ask this Court to rely solely on the Report of Proceedings, without acknowledging the trial court's unchallenged findings and credibility determinations.

In multiple unchallenged findings of fact, the trial court found the credibility of Gary Goodale, Marcia Cook, Michael Gross and Magdalena Rangel Gross troubling. FOF ¶ 34-36, 38-39. The trial court also found, in an unchallenged finding of fact, that these prior owners of the Peloquin Property exaggerated the extent and scope of their use of the Disputed Area. FOF ¶ 40.

Marcia Cook's testimony that UPS drove up the Disputed Area to deliver packages to the shop on the Peloquin Property is one such example of the exaggerated testimony from the prior owners of the Peloquin Property. At trial, Marcia Cook testified about her previous sworn declaration, wherein she had stated:

We used the common driveway and had continuous access to the building [shop] during the entire time that we owned the [Peloquin] property. We had package carriers, such as UPS, come to the building [shop] for daily pickups of

products that we shipped from our home business.
RP 131:6-133:5.

During her cross examination, Marcia Cook admitted that her declaration was not accurate, and it should have said that UPS came to the “property” instead of “building.” *Id.* As Marcia Cook explained under cross examination:

Q: So there was a time that that – any activity like that stopped?

A: No. Driving down to the building [shop] by UPS only lasted a few weeks until we got a camera out front. The entire time UPS personnel and FedEx people would come to the front of the property, get out of their vehicles, walk around to the back of the shop.

Q: And is it —

A: They would come through the yard.

Q: Right, and —

A: We asked them to do that.

Q: Right.

A: Not to upset Mr. Sweeney.⁴⁶

On the other hand, the trial court found that Michael Sweeney was a reasonable and persuasive witness. FOF ¶ 27. These unchallenged credibility determinations drove the outcome of the trial court’s decision and likewise drive the outcome of this appeal.

⁴⁶ RP 134:1-13.

D. The Trial Court Was Not Troubled By The Prior Owners' Use Of The Disputed Area, But By Their Demeanors.

In an unchallenged finding of fact, the trial court found that one of the reasons the Marcia Cook's, Michael Gross' and Magdalena Rangel Gross' testimony was troubling was their demeanors during trial when testifying about their use of the Disputed Area. FOF ¶ 38. The Peloquins argue that the trial court was actually offended by these witnesses' adverse use, not their attitudes and demeanors while testifying. *See* Appellants' Br. 26-27. Although the Peloquins did not challenge this finding of fact, they argue it prejudiced them.

There are three problems with this argument. First, the Peloquins did not challenge the trial court's finding of fact on this issue (FOF ¶ 38). As such, the finding of fact is taken as a verity on appeal.⁴⁷ Second, the trial court was not offended by the actual testimony about the use of the Disputed Area, but by the witnesses' attitudes and demeanors while testifying at trial. FOF ¶ 38. Third, the trial court listed numerous other reasons why the testimony from these witnesses was not credible, so if there was any error in this finding, it did not affect the trial court's

⁴⁷ *In re Contested Election of Schoessler*, 140 Wn.2d at 385.

conclusions of law. Any error, therefore, was harmless and not grounds for reversal.⁴⁸

E. Gary Goodale's Use Of The Disputed Area Was Permissive, And Is Therefore Irrelevant To Determining The Scope Of The Prescriptive Easement

Permissive use is, by definition, not adverse, and it is not included in the running of the prescriptive period.⁴⁹ A permissive use of land cannot ripen into a prescriptive right, no matter how long it continues, “unless there has been a distinct and positive assertion by the dominant owner of a right hostile to the owner of the servient estate.”⁵⁰ According to the unchallenged findings of fact from the trial court, this distinct and positive assertion of hostile rights did not occur until the Pearsons declined to sign Michael Sweeney’s license agreement. FOF ¶ 52. Gary Goodale’s use of the Disputed Area, which occurred prior to the Pearsons’ ownership of the Pelouquin Property, was permissive. *Id.* at ¶ 20, 52. As such, Gary Goodale’s permissive use of the Disputed Area is not relevant to the determination of the scope of the prescriptive easement.

⁴⁸ *State v. Caldera*, 66 Wn. App. 548, 551, 832 P.2d 139 (1992) (an erroneous finding of fact not materially affecting the conclusions of law is not prejudicial and does not warrant a reversal) (internal citations omitted); *see also Northington v. Sivo*, 102 Wn. App. 545, 551, 8 P.3d 1067 (2000) (error without prejudice is not grounds for reversal and is not considered prejudicial unless it affects the outcome of the trial) (internal citations omitted).

⁴⁹ *Lee*, 88 Wn. App. at 182.

⁵⁰ *Northwest Cities Gas Co.*, 13 Wn.2d at 84.

F. The Trial Court Did Not Err In Requiring That The Peloquins Close Their Gate.

Trial courts have broad discretionary power and great flexibility in fashioning equitable remedies.⁵¹ An appellate court reviews the authority of a trial court to fashion equitable remedies for an abuse of discretion.⁵² The trial court did not abuse its discretion in requiring that the Peloquins close their gate after use of the Disputed Area. There was consistent testimony at trial that the gate was closed after use.⁵³ The trial court found that the gate “was always closed after it was used.” FOF ¶ 62. As Michael Sweeney explained, the Disputed Area is the front door to the Sordenstone Property. Further, it is the only access to the Sordenstones’ home.

It was within the trial court’s discretion to decide that a closed gate is the best way to ensure a peaceful relationship between both current and future owners of the Peloquin and Sordenstone Properties. In addition, there are sound policy reasons for keeping the gate closed when not in use. Leaving the gate open literally leaves a gate open to further disputes. An open gate also increases the Sordenstones’ potential liability for accidents

⁵¹ *Rabey v. Dep’t of Labor & Indus. of State of Wash.*, 101 Wn. App. 390, 396, 3 P.3d 217 (2000) (citing *Sac Downtown Ltd. P’ship v. Kahn*, 123 Wn.2d, 197, 204, 867 P.2d 605 (1994)); see also *Id.* at 396-97 (citing *Friend v. Friend*, 92 Wn. App. 799, 803, 964 P.2d 1219 (1998), review denied, 137 Wn.2d 1030 (1999)).

⁵² *Id.* at 397 (citing *Sac Downtown Ltd. Partnership*, 123 Wn.2d at 204).

⁵³ See RP 346:5-7, 357:7-16, 361:19-25, 375:3-7.

that occur on the Disputed Area. As the trial court noted, “[...] the Sordenstones are theoretically liable if someone gets injured on the Disputed Area.” FOF ¶ 46. If the Peloquins, or future owners of the Peloquin Property, have visitors, customers, third parties or children in the shop area, an open gate is an invitation for those persons to walk out onto the Disputed Area, thereby increasing the Sordenstones’ potential liability.

The layout of the Disputed Area is ripe for future disputes, and it was within the trial court’s discretion to fashion a remedy that attempts to limit future disagreements. There was no abuse of discretion, as the historic use of the property and sound policy reasons support the trial court’s equitable remedy.

G. The Trial Court Did Not Err In Denying The Peloquins’ Motion For Reconsideration

Motions for reconsideration are addressed to the sound discretion of the trial court, and a reviewing court will not reverse a trial court’s ruling absent a showing of manifest abuse of discretion.⁵⁴ The Peloquins assign error to the trial court’s denial of their motion for reconsideration. *See* Appellants’ Br. 15. However, the Peloquins did not provide any evidence, or even any argument, that the trial court somehow abused its discretion. As such, the Peloquins failed to meet their burden and the trial

⁵⁴ *Wilcox v. Lexington Eye Inst.*, 130 Wn. App. 234, 241, *review denied* 157 Wn.2d 1022, 142 P.3d 609 (2005).

court's denial of the Peloquins' motion for reconsideration should be affirmed.

H. Emergency Access Was Always Included Within The Scope Of The Prescriptive Easement

Almost immediately after the Peloquins filed their Motion for Reconsideration alleging that the trial court's ruling prevented emergency access over the Disputed Area, the trial court clarified that its ruling on the scope of the prescriptive easement did not prohibit emergency vehicle access. CP 885. The court was not, as the Peloquins allege, reversing itself or changing its ruling. The court was merely correcting the Peloquins' misconception that emergency vehicles were not permitted.

VI. CONCLUSION

The trial court listened carefully to testimony and observed the demeanor of several witness at trial in order to determine the proper scope of the prescriptive easement over the Sordenstones' Driveway. In a series of unchallenged findings of fact, the trial court found that the prior owner of the Sordenstone Property, Michael Sweeney, was a reasonable and persuasive witness, while the prior owners of the Peloquin Property were not credible.⁵⁵ The trial court found, in another unchallenged finding of

⁵⁵ FOF ¶ 27, 33-36, 38-40.

fact, that the prior owners of the Peloquin Property exaggerated the amount and extent of their use of the Disputed Area. FOF ¶ 40.

The unchallenged findings of fact, as well as the substantial credible evidence at trial support the trial court's conclusion that, consistent with the historic use, the scope of the prescriptive easement is very narrow. The trial court correctly determined that the scope of the prescriptive easement over the Sordenstones' Driveway includes only limited, irregular, occasional personal access by personal vehicles. The Peloquins did not meet their burden to prove the prescriptive easement includes access for commercial use, third-party access, pedestrian access or access for maintenance and construction. As such, the trial court's determination of the scope of the prescriptive easement was proper.

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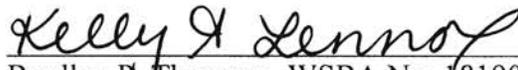
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Further, the Peloquins failed to meet their burden to show that the trial court abused its broad discretion in fashioning an equitable remedy when it ordered the Peloquins to close their gate after using the Sordenstones' Driveway. Accordingly, this Court should affirm the trial court's decision.

RESPECTFULLY SUBMITTED this 16th day of July, 2012.

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Reginald and Carol Sordenstone

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served in the manner noted copies of the following upon designated counsel:

1. Defendants/Respondents' Brief; and
2. Certificate of Service.

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Executed at Seattle, Washington, this 16th day of July, 2012.



Becky Rogers