

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

GERALD and SHIUE-HUEY CHANG,  
husband and wife,

Appellants,

v.

SUBIR and LILLIAN M. LAHIRI,  
husband and wife,

Respondents.

No. 80765-0-I

DIVISION ONE

UNPUBLISHED OPINION

SMITH, J. — This is a quiet title action involving adjacent neighbors. Gerald and Shiue-Huey Chang (collectively Changs) appeal the trial court’s order determining that Subir and Lillian Lahiri (collectively Lahiris) adversely possessed a disputed area of property between their residential lots. The Changs argue that the Lahiris failed to prove the necessary elements of adverse possession by a preponderance of the evidence and that the trial court erred in granting attorney fees to the Lahiris as the prevailing party. We affirm and also grant the Lahiris their attorney fees on appeal.

FACTS

The Changs and the Lahiris own adjacent residential properties in Kent. In 1989, the Changs purchased their home at 4511 Somerset Court. The Lahiris purchased their property at 26428 Carnaby Way in 1995. The Changs and Lahiris rarely interacted prior to the boundary dispute that led to this action in 2018.

The disputed area is a narrow wedge-shaped portion of property located between the Changs' rear yard and the Lahiris' side yard. A survey commissioned by the Lahiris in 2019 indicates that the disputed area encompasses approximately 439 square feet. A rock retaining wall and wood privacy fence are located on the Changs' side of the property line. The platted property line runs along the base of the rock retaining wall, and the fence runs along the top of the rockery. A small white drainage pipe is visible in the disputed area on the Lahiris' side of the fence. The rock retaining wall, fence, and drainage pipe were all present when the Changs purchased their property in 1989.

When the Lahiris bought their home in 1995, they believed the area between the Changs' fence and their home was part of their property, and they treated it accordingly. Over the years, the Lahiris and their landscape professionals performed regular maintenance and upkeep of the disputed area. They removed and added ferns, shrubs, and small trees, removed portions of a large juniper tree, installed weed barriers, spread beauty bark, trimmed trees and bushes, and managed irrigation. The Lahiris documented these changes with photographs and videos, comparing the appearance of the disputed area in 1996 through 1998 and 2006.

The Changs testified that they could easily access the disputed area two ways: through a gap in the fence and from Carnaby Way. However, the Lahiris' testimony and photographic evidence indicated that the rockery, fence, and mature landscaping made it difficult to access the disputed area from the Chang property. In addition, evidence introduced at trial indicated that the gap in the fence was actually located on the

property of the Changs' neighbors to the south and that it had been blocked by boulders until Gerald Chang removed them in 2019.

Gerald Chang and his daughter Angela Chang testified that they occasionally entered the disputed area to pull weeds, plant some vines, and maintain the fence. Landscaper Doug Doubleton, testified that he trimmed some vines on the Lahiris' side of the fence and trimmed some trees that were even with the fence at the Changs' request in 2013. Landscaper Joseph Garrido also testified that he did some work on the Lahiris' side of the fence at the Changs' request on one or two occasions since 2009. Gerald Chang and Angela Chang also claimed that they occasionally entered the disputed area to make sure the white drainage pipe was open. However, Lillian Lahiri testified that the white drainage pipe was clogged and that it never drained any water until shortly before this dispute arose. She noticed that the drain pipe began working because water running through it eroded some of the soil in the disputed area.

Muriel Drury, a neighbor who can see the disputed area from her property, testified that she thought it appeared to be part of the Lahiris' property. Photographs and videos introduced as exhibits at trial confirm Drury's observation. Drury never saw the Changs or the prior owners of their property doing any work in the disputed area. In contrast, she observed the Lahiris and the prior owners of their property regularly using and maintaining the disputed area. The Lahiris also stated that they never saw the Changs do any work or maintenance in the disputed area.

On one occasion in the late 1990s, while Lillian Lahiri was using a shovel to dig in the disputed area, Gerald Chang pointed to a "nail" in the street adjoining the Lahiri property and informed her that it was the property line and that she was working on his

land. However, Chang did not eject Lillian Lahiri from the disputed area or give her permission to use it. The Lahiris continued to use, maintain, and landscape the disputed area without the Changs' permission.

In 2015, the Lahiris commenced an extensive landscaping project on their property. Some of the work occurred within the disputed area. Although Gerald Chang acknowledged that he could easily see the disputed area from his window, he claimed that he never saw the Lahiris in the area and that he did not notice any changes to the landscaping until 2016.

In June 2018, the Changs commissioned a survey, which confirmed the location of the Changs' property line on the Lahiris' side of the fence. Prior to this survey, the Changs had never objected to the Lahiris' use, maintenance, and upkeep of the disputed area or attempted to eject them from it. The Lahiris removed the survey stakes, installed a "no trespassing" sign, and informed the Changs that they own the disputed area through adverse possession. The Changs instructed the Lahiris to put the stakes back up, but they refused to do so.

In September 2018, the Changs filed a complaint to quiet title. The Lahiris responded with a counterclaim for adverse possession. In October 2019, after a bench trial, the trial court entered detailed findings of fact and conclusions of law, determined that the Lahiris had established adverse possession of the disputed area, and granted the Lahiris' request for attorney fees. The court subsequently entered an order and final judgment quieting title in the Lahiris and a supplemental judgment for attorney fees and costs in the amount of \$40,886.98. The Changs appealed.

## ANALYSIS

### *Adverse Possession*

The Changs contend that the Lahiris failed to prove the elements of adverse possession by a preponderance of the evidence. They begin by assigning error to six of the trial court's 29 findings of fact.

We review the trial court's findings of fact for substantial evidence. Merriman v. Cokeley, 168 Wn.2d 627, 631, 230 P.3d 162 (2010). Substantial evidence is that which would persuade a fair-minded, rational person of the truth of the finding. In re Estate of Palmer, 145 Wn. App. 249, 265-66, 187 P.3d 758 (2008). A reviewing court will not disturb findings of fact that are supported by substantial evidence, even if there is conflicting evidence. Merriman, 168 Wn.2d at 631. Unchallenged findings of fact are verities on appeal. Merriman, 168 Wn.2d at 631.

The Changs first assign error to finding of fact 7, which states that “[t]he rockery, drainage pipe and fence were all present when the Changs purchased their property in 1989.” The basis of the Changs’ challenge to finding of fact 7 is their assertion that the Changs’ drainage system actually included two pipes, a black one and a white one. They point to a photograph depicting a black drain pipe adjacent to a utility box in a different area of the Changs’ property. But the Changs are not contesting the court’s finding that the rockery, drainage pipe, and fence were present when they purchased the property, and the existence of the black pipe does not change that fact. This evidence does not undermine or contradict finding of fact 7.

The Changs next argue that substantial evidence did not support the court’s findings that “[t]he Disputed Area lies between an old fence and rockery on the Chang

property's east-southeast border, and the Lahiri property's west-northwest border, according to Exhibit 44, which was a survey commissioned by plaintiffs before they filed suit" and that "[t]he Disputed Area encompasses approximately four-hundred and thirty-nine (439) square feet." They contend that the Lahiris' survey does not demarcate the precise boundaries of the disputed area and that the Lahiris failed to provide supporting testimony from the surveyor. However, the survey provided by the Lahiris articulates the disputed area's boundaries, both as a legal description and on the survey maps themselves. And the notes on the last page of the survey specify that the disputed area is 439.08 square feet. These findings are supported by substantial evidence.

The Changs next challenge the portion of finding of fact 9 which states "[t]here is no easy access to the Disputed Area from the Chang property." They assert that "[s]imply looking at the survey would show that a large portion of the disputed area is outside the portion of property bordered by the fence and rockery" and that it could be accessed from the southwest end of the fence or the street. However, this argument ignores testimony and evidence from the Lahiris demonstrating that the combination of the fence, rockery, and dense vegetation make it very difficult for the Changs to access the disputed area and that the gap in the fence is actually on another neighbor's property. The survey depicted in exhibit 44 does not contradict this substantial evidence.

The Changs next challenge the portion of finding of fact 12 that states the Lahiris "eventually installed curbing in the Disputed Area." The Lahiris' survey shows that the curbing does encroach on the disputed area. Although the Changs point out that much

of the curbing lay outside of the disputed area, this does not undermine or contradict the evidence in support of this finding.

The Changs next challenge finding of fact 15, which states that “[e]ven before the Lahiris bought their property in 1995, there was an irrigation system that served the Disputed Area. The water source for this irrigation system was located in the Lahiris’ basement; not on the Changs’ property.” They assert that its location in the Lahiris’ basement was not open and notorious. While this argument may be pertinent to the court’s legal conclusion regarding adverse possession, it does not undermine or contradict the evidence in support of this finding.

Lastly, the Changs challenge finding of fact 17, which states in pertinent part: “Ms. Lahiri testified credibly that the drain pipe was clogged, and never drained any water until shortly before this dispute arose.” The Changs contend that “[t]he fact is the white drainpipe is not perforated, and the pipe is sloped downwards so that the water flow from the pipe will expel any dirt or pine need[le]s.” Although Angela Chang testified that she checked the white drainage pipe to ensure it remained open, we defer to the trial court regarding witness credibility and conflicting testimony. Boeing Co. v. Heidy, 147 Wn.2d 78, 87, 51 P.3d 793 (2002).

We conclude that substantial evidence supports the challenged findings.

The Changs also assert that the court erred in determining that the Lahiris met their burden of proving by a preponderance of the evidence that they adversely possessed the disputed area. We disagree and conclude that the findings of fact amply supported the court’s conclusions of law.

The doctrine of adverse possession is based on an intent to “assure maximum utilization of the land, encourage the rejection of stale claims, and quiet titles.” Roy v. Cunningham, 46 Wn. App. 409, 412, 731 P.2d 526 (1986). A party claiming adverse possession must establish that possession is “(1) open and notorious, (2) actual and uninterrupted, (3) exclusive, and (4) hostile.” ITT Rayonier, Inc. v. Bell, 112 Wn.2d 754, 757, 774 P.2d 6 (1989) (citing Chaplin v. Sanders, 100 Wn.2d 853, 857, 676 P.2d 431 (1984)). Possession of the property with each of the necessary elements must exist for 10 years. RCW 4.16.020. “The party claiming adverse possession must establish each element by a preponderance of the evidence.” Teel v. Stading, 155 Wn. App. 390, 394, 228 P.3d 1293 (2010). “Whether adverse possession has been established by the facts as found by the trial court is a question of law, which we review de novo.” Happy Bunch, LLC v. Grandview North, LLC, 142 Wn. App. 81, 88, 173 P.3d 959 (2007) (citing Bryant v. Palmer Coking Coal Co., 86 Wn. App. 204, 210, 936 P.2d 1163 (1997)).

“Adverse use does not import ‘ill will’ but means ‘use of property as the owner himself would exercise, entirely disregarding the claims of others, asking permission from no one, and using the property under a claim of right.’” Lingvall v. Bartmess, 97 Wn. App. 245, 250, 982 P.2d 690 (1999) (quoting Malnati v. Ramstead, 50 Wn.2d 105, 108, 309 P.2d 754 (1957)). The ultimate test is whether the adverse possessor exercised such dominion over the land that the legal owner should have recognized that the adverse possessor was treating the land as would its true owner. ITT Rayonier, 112 Wn.2d at 759.

“A claimant can satisfy the open and notorious element by showing either (1) that the title owner had actual notice of the adverse use throughout the statutory period or



(2) that the claimant used the land such that any reasonable person would have thought he owned it.” Riley v. Andres, 107 Wn. App. 391, 396, 27 P.3d 618 (2001). “[T]o be open and notorious, the possession must be visible and known or discoverable to the true owner.” Lloyd v. Montecucco, 83 Wn. App. 846, 853, 924 P.2d 927 (1996).

An adverse possessor’s dominion over the land must be as exclusive as the community would expect of an ordinary title owner under the circumstances, including the land’s nature and location. Crites v. Koch, 49 Wn. App. 171, 174, 741 P.2d 1005 (1987). The exclusive possession element does not require the claimant to prove his or her possession was “*absolutely exclusive*.” Lilly v. Lynch, 88 Wn. App. 306, 313, 945 P.2d 727 (1997). An “occasional, transitory use by the true owner usually will not prevent adverse possession if the uses the adverse possessor permits are such as a true owner would permit a third person to do as a neighborly accommodation.” Lilly, 88 Wn. App. at 313 (internal quotation marks omitted) (quoting 17 WILLIAM B. STOEUBUCK, WASHINGTON PRACTICE REAL ESTATE: PROPERTY LAW § 8.19, at 516 (1995)).

“Hostility is not personal animosity or adversarial intent, but instead connotes that the claimant’s use has been hostile to the title owner’s, in that the claimant’s use has been akin to that of an owner.” Herrin v. O’Hern, 168 Wn. App. 305, 311, 275 P.3d 1231 (2012). “Permission, express or implied, from the true owner negates the hostility element because permissive use is inconsistent with making use of property as would a true owner.” Teel, 155 Wn. App. at 394.

The Changs argue that “[p]ossession, not use of property, is required to establish adverse possession.” They rely on ITT Rayonier for the proposition that the trial court failed to make the required factual finding that the Lahiris “possessed” the disputed

area. Instead, according to the Changs, the court relied on the legally irrelevant finding that the Lahiris believed the area was part of their property. The Changs' argument is misplaced. In ITT Rayonier, the Supreme Court stated:

“Evidence of *use* is admissible because it is ordinarily an indication of *possession*. *It is possession that is the ultimate fact to be ascertained*. Exclusive dominion over land is the essence of possession, and it can exist in unused land if others have been excluded therefrom.”

ITT Rayonier, 112 Wn.2d at 759 (some emphasis added) (quoting Wood v. Nelson, 57 Wn.2d 539, 540, 358 P.2d 312 (1961)). When read in context, it is apparent that “possession” refers to the court’s legal determination regarding whether a party has met its burden of proving the four requirements of adverse possession. ITT Rayonier does not compel the trial court to enter an express factual finding that the Lahiris “possessed” the disputed area. And the court’s conclusion that the Lahiris established adverse possession was not based solely on a finding that they subjectively believed they owned it, but rather on the actions they took in accordance with this belief.

The Changs also assert that the Lahiris’ alleged use and maintenance of the disputed area does not support their claim of adverse possession because (1) much of the work was done by landscape professionals who did not testify at trial, (2) the work did not result in the Changs being excluded from the disputed area, (3) certain activities, such as installation of a weed barrier and irrigation system, were not visible to the Changs, (4) certain activities, such as installation of the curbing and mowing the lawn, did not fully encroach on the disputed area, (5) the Lahiris did not prevent the Changs from accessing the disputed area, (6) the Changs’ use of the disputed area was substantially similar to that of the Lahiris, and (7) the Lahiris never did anything prior to

2016 that would have alerted the Changs that they were adversely possessing the property.

However, in unchallenged findings of fact, the court found that the Lahiris consistently maintained and openly used the disputed area as their own property since they purchased it in 1995; that the Changs were on notice that they were doing so; that the Lahiris never saw the Changs using the disputed area; and that the Changs' evidence regarding their use of the disputed area was sparse, vague, and conclusory. Also unchallenged were the court's findings that the Changs never sought to eject the Lahiris from the disputed area before 2018; that they never gave the Lahiris permission to use or alter the disputed area; and that they never expressly or impliedly allowed the Lahiris to use and maintain the disputed area as a neighborly accommodation.<sup>1</sup>

Although the Changs dispute the trial court's determinations regarding witness credibility, conflicting testimony, and persuasiveness of the evidence, we defer to the trial court in these matters. Harris v. Urell, 133 Wn. App. 130, 139, 135 P.3d 530 (2006). The trial court did not err in concluding that the Lahiris adversely possessed the disputed area.

#### *Attorney Fees*

The Changs assign error to the trial court's decision to award attorney fees and costs to the Lahiris.<sup>2</sup> "When reviewing an award of attorney fees, the relevant inquiry is

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<sup>1</sup> Notably, the Changs did not challenge the court's findings that in the late 1990s, Chang informed Lillian Lahiri that she was working on his land but did not eject her or give her permission to use it.

<sup>2</sup> The Changs did not discuss this issue in the argument section of their brief or support their assignment of error with citations to authority or to the record. We need not address an assignment of error that is unsupported by argument or citation to authority. RAP 10.3(a)(6); see Cowiche Canyon Conservatory v. Bosley, 118 Wn.2d

first, whether the prevailing party is entitled to attorney fees.” Unifund CCR Partners v. Sunde, 163 Wn. App. 473, 483-84, 260 P.3d 915 (2011). An award of attorney fees must be based in “contract, statute, or recognized ground of equity.” Durland v. San Juan County, 182 Wn.2d 55, 76, 340 P.3d 191 (2014). We review whether there is a legal basis to award attorney fees de novo. Gander v. Yeager, 167 Wn. App. 638, 647, 282 P.3d 1100 (2012). If there is a legal basis for awarding attorney fees, we review “a discretionary decision to award or deny attorney fees and the reasonableness of any attorney fee award for an abuse of discretion.” Gander, 167 Wn. App. at 647.

RCW 7.28.083(3) allows for an award of reasonable attorney fees and costs to “[t]he prevailing party in an action asserting title to real property by adverse possession” where the award “is equitable and just.” The Changs do not challenge the reasonableness of the award. Rather, they assigned error to the trial court’s conclusion that “an award of attorney fees to the Lahiris is just and equitable” because “it was the plaintiffs who chose to litigate” and “the defendants prevailed in their adverse possession claim.” Here, as discussed, the trial court properly concluded that the Lahiris adversely possessed the disputed area. And the findings of fact amply support the court’s conclusion that the parties were forced to incur fees because the Changs chose to litigate rather than continue to acquiesce to the Lahiris’ continued use and maintenance of the disputed area. The fee award was proper.

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801, 809, 828 P.2d 549 (1992). However, where the nature of the objection is apparent, we may nevertheless elect to address an issue that is inadequately briefed. See, e.g., State Farm Mut. Auto Ins. v. Avery, 114 Wn. App. 299, 310, 57 P.3d 300 (2002).

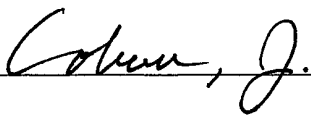
The Lahiris request an award of attorney fees on appeal based on RCW 7.28.083(3) and RAP 18.1. “A party may recover attorney fees and costs on appeal when granted by applicable law.” Oregon Mut. Ins. Co. v. Barton, 109 Wn. App. 405, 418, 36 P.3d 1065 (2001). RCW 7.28.083(3) provides a statutory basis for the award of attorney fees to the prevailing party of an adverse possession claim on appeal. Workman v. Klinkenberg, 6 Wn. App. 2d 291, 308-09, 430 P.3d 716 (2018). Because the Lahiris are the prevailing party on appeal, we award the Lahiris their reasonable attorney fees and costs incurred in this appeal subject to their compliance with RAP 18.1(d).

Affirmed.

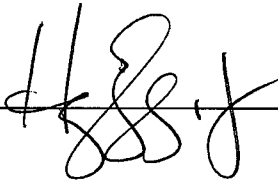


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WE CONCUR:



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