IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

TOLLEFSON FAMILY TRUST, by its co-trustees, MARC and NANCY TOLLEFSON,	)	DIVISION ONE
Respondent,	)	No. 65218-4-I
v.	)	UNPUBLISHED OPINION
GARY and SUE COHN, husband and wife, and the marital community composed thereof,	)	
Appellants.	)	FILED: July 11, 2011

Dwyer, C.J. — The Tollefson Family Trust and Gary and Sue Cohn own neighboring beachfront properties on Camano Island. The Tollefsons and their predecessors in interest have for decades used a driveway area between the homes for parking their vehicles. Upon obtaining a survey indicating that part of the driveway area was owned by the Cohns, the Tollefsons brought this action to quiet title and for ejectment. Because the Tollefsons proved the necessary elements to establish title by adverse possession, the trial court did not err by entering a judgment quieting title to the disputed area in the Tollefsons. Accordingly, we affirm.

This property dispute involves the boundary line between two Camano Island beachfront properties, both bordered to the north by Puget Sound and to the south by Maple Grove Lane. The easternmost property (Lot 16) was purchased by Gary and Sue Cohn in 1994. The westernmost property (Lot 17) was purchased by the Tollefson Family Trust through its co-trustees, Marc and Nancy Tollefson, in 2005. The Tollefsons purchased their property from three families—the Fields, the Danubios, and the Palos—who had jointly owned Lot 17. The Palos had previously purchased their share of Lot 17 from the Espidals, who had jointly owned the property with the Fields and the Danubios since 1961.

When the Tollefsons purchased Lot 17, the area between the Cohns' home and the Tollefsons' home was an undeveloped driveway area. At that time, neither the Cohns nor the Tollefsons had obtained a survey of the properties. Thus, neither knew exactly where the boundary line between the properties lay.

Shortly after purchasing Lot 17, the Tollefsons made plans to renovate their home. Specifically, the Tollefsons intended to install a septic system and protective paving bricks in the driveway area between the homes. Prior to making these renovations, the Tollefsons contacted the Cohns to discuss their plans. The parties communicated throughout the renovation process, discussing such issues as the drainage between the homes, sound absorption, and the integrity of the bulkhead along the waterfront.

In 2008, after the septic system and paving bricks had been installed, the Tollefsons obtained a survey, which indicated that the shared boundary line between Lot 16 and Lot 17 dissected the parking area diagonally. Thus, the survey indicated that the Cohns and the Tollefsons each owned a triangular portion of the property constituting approximately half of the driveway area where the Tollefsons had made their renovations. The boundary line, as indicated by the survey, dissected not only the parking area but also the septic system installed by the Tollefsons.

The Tollefsons informed the Cohns about the results of the survey. However, the neighbors were unable to negotiate a solution to the problems arising from this newfound awareness. The Tollefsons thereafter filed an action to quiet title and for ejectment, asserting that they and their predecessors in interest had obtained by adverse possession ownership of that triangular portion of the driveway area to which legal ownership was held by the Cohns (the disputed area).

During a two-day bench trial, numerous parties testified regarding the uses that had been made of the disputed area over the years. Ann Field, one of the Tollefsons' predecessors in interest, testified that she had always parked her vehicle in the driveway area between the houses when visiting the beach home. She further testified that no one had ever told her that it was not her parking space, that she had never asked permission of anyone to park there, and that

she understood that the area belonged to the owners of Lot 17. Field also testified that, in addition to parking vehicles in the disputed area, her family had pulled their boat over the bulkhead and parked it in the disputed area and had spread gravel in the area to protect the driveway. She further testified that Gary Cohn had asked her grandson to put some planks down along the drip line of the Cohns' home to protect the Cohns' rosebush. The planks were placed along what Field believed to be the property line between her property and that of the Cohns. Field additionally testified that she had never seen the Cohns or their predecessors in interest use the disputed area for any purpose.

Similarly, Dave Danubio, whose parents had co-owned Lot 17 prior to the Tollefsons' purchase of the property, testified that his parents would typically park their vehicles in the driveway area between the homes. He further testified that his family had spread gravel in the area a couple of times and that he had weeded the area to make it look neat. Danubio testified that no one other than the owners of Lot 17 parked in the disputed area and that his family had never asked permission to park there because "[i]t went with the cabin. It was part of our parking." Report of Proceedings (RP) (Sept. 9, 2009) at 48. He further testified that where his family would park "was just never a question"—they parked in the area between Lot 16 and Lot 17, and the owners of Lot 16 parked on the other side of the Lot 16 home. RP (Sept. 9, 2009) at 51.

Marc Tollefson testified at trial regarding the installation of the septic

system in the disputed area. He stated that he had a retaining wall built at the suggestion of the Cohns along the drip line of the Cohns' property, where the planks protecting the Cohns' rosebush had previously been placed. He further testified that Gary Cohn had stated in an e-mail that, when the Cohns began their own remodeling, Cohn anticipated that the Tollefsons would allow them to access "your [the Tollefsons'] driveway." RP (Sept. 9, 2009) at 74. Moreover, Marc Tollefson testified that the Cohns' concerns during the septic tank installation were solely about permeability, noise reduction, and runoff—not about the boundary between the parties' properties.

Nancy Tollefson testified that she had always parked her vehicle in the disputed area between the homes and that she had never asked permission of anyone to do so. She further testified that no one else parked in the disputed area and that she never saw the Cohns use the area for any purpose.

Gary Cohn testified at trial that, despite not having obtained a survey of his property, he had always understood the property line to be in the middle of the disputed area, such that a car parked in the area was parked partially on Lot 16 and partially on Lot 17. However, although Cohn had never expressed concern about encroachment onto his property by the Tollefsons' predecessors in interest, he testified that he had not raised the issue only because he was being a good neighbor. He testified that he had only occasionally observed anyone other than the Tollefsons or their predecessors in interest parked in the

disputed area. However, Cohn testified, he and his wife used the disputed area for other purposes, such as accessing the west side of their home and moving a dinghy to and from the water. Cohn further testified that he maintained the area by "weed whack[ing] it sometimes" and by "pick[ing] up a lot of dog poop there." RP (Sept. 9, 2009) at 145. He also testified that he used the area to access the garden under the drip line of his home and that his wife "spent extensive time" in the disputed area when painting their home. RP (Sept. 10, 2009) at 234. Cohn testified that, although he had objected to the Tollefsons' use of the disputed area only after learning about the survey, he objected only then because that was when he became aware of the extent of the septic system renovations. He explained that he had not previously learned of the extent of the renovations, despite earlier receiving an e-mail with photographs of those renovations, because he had not opened the pictures attached to that e-mail.

Marylee Brown, a neighbor of the Tollefsons and the Cohns, testified at trial that, because parking is sparse in their neighborhood, neighbors "just have always kind of shared each other's parking." RP (Sept. 9, 2009) at 171. She further testified that she had never seen anyone maintaining the area between Lot 16 and Lot 17 but that Ann Field often parked there during the summer. Brown further testified that she never saw anyone other than the owners of Lot 17 park in the disputed area.

Melinda Kelly, another neighbor on Maple Grove Lane, testified that

neighbors allow others to park on their lots due to the scarcity of parking in the area. She testified that her family had parked in the disputed area once but that they "were willing to move at the moment's notice if [the Fields, the Palos, or the Danubios] came." RP (Sept. 9, 2009) at 182. Kelly also testified that she had seen the Zuivichs—the Cohns' predecessors in interest—park their boat in the disputed area a couple of times during the winter; however, she admitted that, although she assumed it was their boat, she "couldn't swear to it." RP (Sept. 9, 2009) at 185.

After the bench trial, the trial court issued a decision letter in which it determined that the Tollefsons had proved all of the elements of adverse possession and, thus, were entitled to quiet title in the property and to ejectment of the Cohns from the disputed area. The Cohns thereafter filed a "motion for clarification," requesting that the trial court "address the extent of the adverse possession by the [Tollefsons] in the disputed area." Clerk's Papers (CP) at 50-52. In this motion, the Cohns for the first time asserted that the adversely possessed area should be no wider than a vehicle. The Cohns also requested, for the first time, an easement that would permit them to use the area. Because the Cohns did not note their motion for hearing, the motion was never before the trial court. The trial court thereafter issued its judgment and its findings of fact and conclusions of law.

On February 19, 2010, the Cohns filed a motion for reconsideration,

requesting that the trial court "reconsider the issues set forth in the previously filed Motion for Clarification," to which they attached a copy of their prior motion. CP at 12-15. The motion for reconsideration did not reference the trial court's judgment or its findings and conclusions. The trial court denied the motion.

The Cohns appeal.

II

The Cohns first contend that the actions of the Tollefsons and their predecessors in interest with regard to the disputed area did not constitute actual possession, as necessary to establish ownership by adverse possession. We disagree.

The possession required in order to establish a claim of adverse possession must be: (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). These necessary elements must exist concurrently for a period of 10 years. RCW 4.16.020(1). "[W]hat constitutes possession or occupancy of property for purposes of adverse possession necessarily depends to a great extent upon the nature, character, and locality of the property involved and the uses to which it is ordinarily adapted or applied." Frolund v. Frankland, 71 Wn.2d 812, 817, 431 P.2d 188 (1967), overruled on other grounds by Chaplin v. Sanders, 100 Wn.2d 853, 676 P.2d 431 (1984). "The ultimate test is the exercise of dominion over the land in a manner consistent with actions a true

owner would take." ITT Rayonier, 112 Wn.2d at 759.

The Tollefsons' complaint was filed on May 6, 2008. Thus, in order to establish ownership by adverse possession, the Tollefsons must show that each of the required elements of such a claim has existed since at least May 1998. See RCW 4.16.020(1). Because the Tollefsons have owned Lot 17 only since 2005, their adverse possession claim necessarily relies in part upon the actions of their predecessors in interest. See Roy v. Cunningham, 46 Wn. App. 409, 413, 731 P.2d 526 (1986) ("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.").

Based upon the testimony presented at trial, the trial court found that "[t]he owners of Lot 17 have always used the disputed area as their own since 1961 to the present." CP at 26 (Finding of Fact 8). Whether an adverse possessor has used disputed property as would a true owner, taking into consideration the character of the property and its ordinary uses, is a question of fact to be determined by the trial court. Thus, we must determine whether the evidence presented at trial supports the trial court's finding.

Here, the trial court's finding that the Tollefsons and their predecessors in interest acted as would a true owner of the disputed area, thus establishing actual possession as required to support a claim of adverse possession, is

supported by substantial evidence. As the trial court found, the Fields "used the property to haul their boat out of the water" and "maintained the area by weeding, spraying and putting gravel down to make it more suitable for parking and a driveway area."[1] CP at 26 (Finding of Fact 5). Moreover, Danubio, a son of one of the Tollefsons' predecessors in interest, also "parked in the disputed area, spread gravel over the area, [and] sprayed and cut down weeds." CP at 26 (Finding of Fact 6). Evidence of such activities by the Tollefsons' predecessors in interest is sufficient to support the trial court's finding that the owners of Lot 17 have used the disputed area as would a true owner from 1961 to the present.

That which constitutes possession depends significantly upon the character of the property and the manner in which it would typically be used. Frolund, 71 Wn.2d at 817. The character of the disputed area is such that it would typically be used for parking vehicles, which is precisely the use that the Tollefsons and their predecessors in interest made of the property. Thus, the actions of the Tollefsons and their predecessors in interest are sufficient to constitute possession for purposes of an adverse possession claim. Because the evidence presented at trial establishes that the Tollefsons and their predecessors in interest possessed the disputed area, the trial court did not err by so concluding.[2]

[1] Because these findings are unchallenged by the Cohns, they are treated as verities on appeal. Mills v. W. Wash. Univ., 170 Wn.2d 903, 906 n.1, 246 P.3d 1254 (2011).

[2] The Cohns further contend that the actions of the Tollefsons and their predecessors in

III

The Cohns next contend that the trial court erred by determining that possession of the disputed area by the Tollefsons' predecessors in interest was exclusive, as required to establish title by adverse possession. We disagree.

"Adverse possession must be as exclusive as one would expect of a titled property owner under the circumstances." Harris v. Urell, 133 Wn. App. 130, 138, 135 P.3d 530 (2006). Thus, possession need not be absolutely exclusive in order to establish ownership by adverse possession. Bryant v. Palmer Coking Coal Co., 86 Wn. App. 204, 217, 936 P.2d 1163 (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 v. Lynch, 88 Wn. App. 306, 313, 945 P.2d 727 (1997) (internal quotation marks omitted) (quoting 17 William B. Stoebuck, Washington Practice: Real Estate: Property Law § 8.19 at 516 (1995)). Indeed, "[t]rifling encroachments by an owner on land held adversely do not render the claimant's use nonexclusive." Crites v. Koch, 49 Wn. App. 171, 175, 741 P.2d 1005 (1987).

Our courts have held in many cases that the use of disputed property by the true owner or a third party does not prevent the claimant from establishing

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interest constitute a *use* of, rather than *possession* of, the disputed area and that the trial court erred by failing to recognize the distinction between an easement by prescription and title by adverse possession. However, because the owners of Lot 17 used the disputed area as would a true owner, the Tollefsons have proved actual possession as necessary to support their claim of adverse possession.

exclusive possession as necessary to obtain title by adverse possession. In Lilly, the Court of Appeals held that the claimant and her predecessors in interest exercised dominion and control over the disputed property, which included a boat ramp, in a manner consistent with the actions of a true owner, notwithstanding that the actual true owner regularly used the boat ramp. 88 Wn. App. at 315. The court determined that it was "likely a true owner would have allowed a friendly neighbor to use the ramp regularly without asking permission each and every time." Lilly, 88 Wn. App. at 315. Thus, the court held that the use by the true owner was a "neighborly accommodation" afforded by the adverse possessors that did not preclude the claimants from establishing exclusivity. Lilly, 88 Wn. App. at 315.

Similarly, in Crites, the Court of Appeals held that the claimant, a farmer who actively cultivated the disputed property, had established title by adverse possession despite the fact that the true owners used the property as a shortcut to neighboring fields and as an occasional parking strip. 49 Wn. App. at 174-76. The true owners asserted that, because their use of the disputed property was the only practical use possible, it amounted to shared possession and, thus, the claimant's use was not exclusive. Crites, 49 Wn. App. at 175. The court rejected this argument, noting that the claimant's use of the property "differed fundamentally in scope and substance" from that of the true owners. Crites, 49 Wn. App. at 175. Because allowing such use—shortcutting and parking—as a

"neighborly courtesy" would be expected of an owner, the court concluded, the claimant's possession of the disputed property was exclusive. Crites, 49 Wn. App. at 175-76; see also Frolund, 71 Wn.2d at 819 (holding that use by the true owner and third parties of disputed beach area "denote[d] neighborliness and friendship" and did not preclude the claimant's adverse possession claim); Harris, 133 Wn. App. at 138-39 (concluding that felling of tree by third party did not preclude adverse possession claim); Bryant, 86 Wn. App. at 216-18 (holding that, despite the fact that third parties may have used the disputed airstrip, claimant used the airstrip as would a true owner and, thus, established the element of exclusivity).

The Cohns testified that they used the disputed area to access the west side of their home, to tend their herb garden and rosebush, to move their dinghy to and from the beach, and to paint their home. Gary Cohn also testified that he would maintain the area by "weed whack[ing] it sometimes" and by "pick[ing] up a lot of dog poop there." RP (Sept. 9, 2009) at 145. The Cohns' testimony did not indicate how frequently they used the disputed area. The testimony at trial did indicate, however, that the Tollefsons and their predecessors in interest consistently used the disputed area for parking their vehicles throughout their ownership of Lot 17. Nevertheless, the Cohns contend that, collectively, their activities are sufficient to defeat exclusivity by the Tollefsons and their predecessors in interest.

In determining whether the Tollefsons have proved exclusivity, the primary question is whether their possession and that of their predecessors in interest was as exclusive as would be expected of a true owner in these circumstances. See Harris, 133 Wn. App. at 138. Because the Cohns' uses of the disputed area—to access the west side of their home, to tend their garden, and to paint their home—were transitory and occasional during the statutory period, such uses do not render nonexclusive the possession of the Tollefsons and their predecessors in interest, as these are the types of uses that would likely be permitted by a true owner as a "neighborly accommodation." See Lilly, 88 Wn. App. at 313. Moreover, as in Crites, the Tollefsons and their predecessors in interest used the disputed area to a significantly greater extent than did the Cohns. See Crites, 49 Wn. App. at 175. Thus, the trial court did not err by determining that the Tollefsons had proved exclusivity as required to obtain title by adverse possession.[3]

IV

Lastly, the Cohns contend that the trial court erred both by determining that the entire area between the homes was adversely possessed by the Tollefsons and their predecessors in interest and by declining to fashion an

[3] In addition to asserting that their own use of the disputed area precludes the Tollefsons from obtaining title by adverse possession, the Cohns also appear to be arguing that the actions of the Tollefsons' predecessors in interest were too limited—as they used the property only as a summer beach home—to establish exclusivity. However, a claim of adverse possession is not defeated because a summer beach home is used only during the summer months. Howard v. Kunto, 3 Wn. App. 393, 397, 477 P.2d 210 (1970), overruled on other grounds by Chaplin, 100 Wn.2d 853.

equitable remedy to allow the Cohns to continue to use a portion of the disputed area. However, the Cohns raised these issues in the trial court only on reconsideration. "CR 59 does not permit a plaintiff to propose new theories of the case that could have been raised before entry of an adverse decision." Wilcox v. Lexington Eye Inst., 130 Wn. App. 234, 241, 122 P.3d 729 (2005). Thus, the trial court erred neither in its determination of the extent of the area adversely possessed nor by declining to fashion an equitable remedy that the Cohns, prior to moving for reconsideration, had not requested.

Affirmed.

Dwyer, C.J.

We concur:

Leach, A.C.J.

Becker, J.