Filed 9/22/16 Arnold v. Padrah CA1/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

JEFF ARNOLD et al., Plaintiffs and Respondents, v. SHORE PADRAH et al., Defendants and Appellants.	A144347 (Contra Costa County Super. Ct. No. C12-02895) **ORDER MODIFYING OPINION AND DENYING REHEARING [NO CHANGE IN JUDGMENT]**

BY THE COURT:

It is ordered that the opinion filed herein on August 26, 2016, be modified as follows:

1. On page 9, replace the last paragraph (which carries on to page 10) with the following paragraph (and retain the footnote to the original paragraph):

"As to respondents' claim for intentional infliction of emotional distress, while the appellants' conduct underlying the claim may have included acts in the easement area as well as acts on respondents' property, appellants' right to use the area covered by the easement obviously did not include any use inconsistent with respondents' prescriptive rights—and the fact that appellants could enter the easement area did not mean that they could destroy what respondents had constructed there. Appellants fail to establish error."

The modification effects no change to the judgment.

The petition for rehearing is denied. We need not consider arguments raised for the first time in the petition. (*Akins v. State of California* (1998) 61 Cal.App.4th 1, 38–39 fn. 34.) No purported error affected the judgment.

Date: _____ _____, P.J.

Filed 8/26/16 Arnold v. Padrah CA1/5 (unmodified version)

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

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JEFF ARNOLD ET. AL., Plaintiffs and Respondents, v. SHORE PADRAH ET AL., Defendants and Appellants.	A144347 (Contra Costa County Super. Ct. No. C12-02895)

A jury found that respondents Jeff Arnold and Lisa Noble established a prescriptive easement on the land of appellants, Shore Padrah and Michael Vajdy. It further found that appellants committed trespass, invasion of privacy, and intentional infliction of emotional distress in the course of destroying respondents' improvements in the easement area, and awarded respondents general and punitive damages. In addition, the jury found that appellants should take nothing on their claims against respondents. The trial court accepted the jury's findings, imposed equitable relief in the form of quiet title to the prescriptive easement, and entered judgment.

Appellants contend (1) the jury's factual findings conflicted with the court's findings concerning the equitable issues; (2) the special jury instructions and verdict form regarding the prescriptive easement were erroneous; and (3) the court should have decided the equitable issues before the jury trial, and respondents were not entitled to a jury trial on their prescriptive easement claim. They also insist that the jury verdicts were improper on other grounds and the court committed additional errors. We will affirm.

I. FACTS AND PROCEDURAL HISTORY

A. Arnold's Complaint

Respondent Arnold commenced this action against appellants on December 12, 2012. His first amended complaint, filed on December 19, 2012, asserted causes of action for quiet title as to a prescriptive easement, trespass, invasion of privacy, and intentional infliction of emotional distress. The pleading sought damages and injunctive relief and alleged the events at the heart of this litigation.

According to the first amended complaint, Arnold and his wife (Noble) purchased the real property at 56 Tappan Lane in Orinda in 1987. At the time, there was a well-established patio area extending approximately 30 feet from the back kitchen area of the house, complete with a fire pit, benches, landscaping, and other improvements. There was also a footpath leading from the patio along a ridgeline to the corner of the property. The previous owners had developed this improved area and used it for many years. Since long before 1987, approximately 250 square feet of the improved area extended onto an adjoining property at 48 Tappan Lane. As to this part of the improved area, Arnold claimed to hold a prescriptive easement.

Padrah and Vajdy purchased 48 Tappan Lane in 2005. By then, the prescriptive easement had existed continuously for over 20 years; Arnold and his family continued to openly use and enjoy the area from 2005 through 2012.

In October 2012, Arnold offered to buy the easement area from defendants and pay for a lot line adjustment. Negotiations did not go well. On December 10, 2012, appellants threatened to destroy respondents' improvements unless respondents paid them $300,000 by the next day. On December 11, 2012, defendants carried out their threat and uprooted a picket fence, dug up rose bushes, tore out respondents' irrigation system, took a chainsaw to respondents' decking and arbor, trespassed onto respondents' property, and vandalized it with fluorescent pink spray paint.

B. Appellants' Cross-Complaint

Appellants filed a cross-complaint against Arnold and Noble in April 2013, asserting claims for trespass and invasion of privacy. Appellants alleged that in

September 2009, respondents began encroaching on their property in the course of grading, pouring concrete, and building a deck, an arbor, and a staircase. It was further alleged that respondents intentionally cut down at least three oak trees on appellants' property and damaged others. The cross-complaint requested declaratory relief and sought damages for diminution of property value, treble damages for trespass to trees, punitive damages, injunctive relief, and damages for emotional distress.

C. Noble's Cross-Complaint Against Appellants

In May 2013, Noble filed a cross-complaint against appellants, seeking the relief that was sought in Arnold's complaint.

D. Respondents' Second Amended Complaint

In February 2014, respondents collectively filed a second amended complaint with leave of court. The second amended complaint clarified that, after respondents purchased the 56 Tappan Lane property in 1987, they conveyed it to themselves as trustees of "The Noble-Arnold Family Trust" in 1989. The pleading realleged the facts set forth in the first amended complaint, except it asserted that the area claimed for the prescriptive easement was approximately 675 feet rather than 250 feet, and that respondents obtained the easement as trustees of their family trust.

E. Jury Trial

In March 2014, a jury trial began with respect to respondents' claims for quiet title as to the prescriptive easement, trespass, invasion of privacy, and intentional infliction of emotional distress, as well as appellants' cross-complaint for trespass and invasion of privacy. As to the quiet title cause of action, the jury was to decide the factual issues relevant to the elements of a prescriptive easement, with the court to decide the legal issues germane to the equitable relief of quiet title and injunctive relief, as well as appellants' cause of action for declaratory relief.[1]

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[1] Appellants appeared in pro per initially but were later represented by counsel. At the outset of the trial, they filed a motion to disqualify Judge Steven K. Austin pursuant to Code of Civil Procedure section 170.1. The trial proceeded pending the court's response and the outcome of the motion, over appellants' objection. The motion was

1. Evidence

Although this appeal is from a judgment after a jury trial, none of the briefs summarize the evidence that was admitted at the trial, leaving us to comb through more than 30 volumes of reporters' transcripts that amass over 3,000 pages. For appellants, this constitutes a violation of the Rules of Court. (Cal. Rules of Court, rule 8.204(a)(2)(C).) We summarize the evidence supporting the judgment briefly.

In support of respondents' claims, a surveyor testified at trial to the boundary lines for 56 Tappan Lane and 48 Tappan Lane, as well as the physical location and legal description of the easement area. Respondents testified as to the improvements and use of the area in the rear of 56 Tappan Lane, both on respondents' property and in the area of the proposed prescriptive easement on appellants' property, and the manner in which the area had been further improved and used by respondents and their family from the time of their purchase of 56 Tappan Lane in 1987 to the time of appellants' destructive acts in December 2012. Several photographs were admitted as well, along with a timeline setting forth the historical use of the area. Sheri Unitan, a babysitter for respondents' children, and Margaret Barron, a family friend, also testified to respondents' use of the property. David Hayden, whose family owned 56 Tappan Lane before respondents, testified about the property and its use before respondents' purchase.

Appellants' destructive acts in December 2012 were captured on respondents' home video security system, and a condensed version of the video was admitted into evidence and played for the jury. The video depicts appellants kicking, pulling, pushing, hammering, toppling over, slicing with a chainsaw, and casting aside the improvements that respondents had made to the easement area, even after law enforcement appeared on the scene.

Respondents also produced evidence of their damages. Contractor Donald Seppa testified it would cost $13,270.40 to repair the damage appellants caused to the backyard improvements located on respondents' property, and approximately $8,000 more for

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denied on April 30, 2014.

repairs in the easement area on appellants' property. Dr. Bricker testified that he treated Arnold for anxiety, stress, and insomnia related to the incident. Noble testified that she could not go into her backyard, or have family gatherings in the backyard, due to the debris appellants had left.

2. Jury Verdict

The jury reached a verdict in April 2014. With respect to respondents' claims, the jury found that respondents had established a prescriptive easement on appellants' property: the use of the area on appellants' property by respondents (or their predecessors) had been open and notorious, continuous for at least five years, without the permission of appellants (or their predecessors) during the earliest five year period, and adverse to appellants.

The jury also found in favor of respondents on their tort claims. With respect to the claim for intentional infliction of emotional distress, the jury determined that appellants' conduct was outrageous, they intended to cause Arnold emotional distress (or recklessly disregarded the probability), Arnold suffered severe emotional distress, and appellants' conduct was a substantial causative factor. As to respondents' claims for invasion of privacy, the jury found that Padrah or Vajdy intentionally intruded upon respondents' privacy at their home and property at 56 Tappan Lane, and the intrusion would be highly offensive to a reasonable person. On respondents' trespass claims, the jury found that respondents owned the property at 56 Tappan Lane, Vajdy or Padrah intentionally entered the property without respondents' permission, and their entry or conduct was a substantial factor in harming respondents.

As to general damages, the jury determined that Vajdy and Padrah each owed respondents $34,135, for the total sum of $68,270. For purposes of punitive damages, the jury found that Padrah and Vajdy engaged in their conduct with malice, oppression, and fraud.

On appellants' cross-complaint, the jury returned a defense verdict on all non-equitable causes of action for respondents and awarded appellants no recovery.

F. Punitive Damages Trial

The bifurcated jury trial as to punitive damages took place on May 22, 2014. The jury awarded respondents $10,000 in punitive damages against Vajdy and $10,000 in punitive damages against Padrah. The jurors were polled to clarify that they intended to impose a total of $20,000 in punitive damages against appellants.

G. Equitable Relief Hearing

A hearing for the equitable relief portion of the trial occurred on June 24, 2014, with respect to respondents' request in their first cause of action for quiet title (based on the prescriptive easement), their request for injunctive relief, and appellants' claim for declaratory relief. On September 8, 2014, the trial court issued its tentative decision on equitable relief.

The court issued its final statement of decision concerning the equitable issues on November 26, 2014. The court explained: "Most of the issues involved in this difficult, high-conflict, neighbor dispute have already been decided by the jury at the conclusion of a lengthy, contentious trial. All that remains is for this Court to determine what, if any, equitable relief is warranted based on the jury's findings and the facts presented. Such equitable determinations involve [respondents'] First Cause of Action for Quiet Title and Fifth Cause of Action for Injunctive Relief, as well as [appellants]' Third Cause of Action for Declaratory Relief."

As to respondents' quiet title claim, the court noted that the jury had found the elements of a prescriptive easement by clear and convincing evidence, and the findings were "clearly supported by the evidence at trial." The jury had decided the issue of exclusivity (that is, the use of the property as established by the prescriptive easement was not exclusive to respondents), and the jury's factual finding was "abundantly support[ed]" by the evidence and binding on the court. The jury's verdict had found a legally viable, nonexclusive prescriptive easement in favor of respondents. Accordingly, the court granted respondents' request to quiet title through the imposition of an easement "for ingress and egress, and for casual transient occupancy for recreational purpose, to be preserved in a natural condition without structures or improvements."

The court denied respondents' request for injunctive relief, finding there was very little chance of additional harassment by defendants because they had moved to the East Coast.

As to the appellants' cross-complaint, the court found in favor of respondents, on the ground that the establishment of a prescriptive easement rendered the appellants' declaratory relief action moot.

H. Final Judgment

Judgment was also entered on November 26, 2014. In the judgment, the court recounted the jury's findings with respect to respondents' prescriptive easement and tort claims, as well as the award of general damages and punitive damages; it also recounted the jury's finding with respect to appellants' cross-complaint.

The judgment reiterated the court's view that the jury's factual findings concerning the prescriptive easement were "clearly supported by the evidence presented at trial." The judgment continued: "The scope of the easement requested by the Plaintiffs is consistent with the jury's findings. Such an easement would place only a minimal burden on Defendants' property interests and does not constitute a grant of exclusive use to the Plaintiffs of any portion of Defendants' property. . . . The Court therefore grants the request of Plaintiffs to quiet title through the imposition of an easement for ingress and egress, and for casual transient occupancy for recreational purpose, to be preserved in a natural condition without structures or improvements . . . ."

The judgment denied respondents' request for injunctive relief, and found in favor of respondents on appellants' cross-complaint, for the reasons set forth in the statement of decision on equitable issues.

This appeal followed.

II. DISCUSSION

Appellants divide their arguments into three sections, asserting that (1) the jury findings on factual issues conflicted with the court's findings with respect to the equitable issues; (2) the special jury instructions and verdict forms regarding the prescriptive easement were erroneous; and (3) the court should have decided the equitable issues

before the jury trial, and respondents were not entitled to a jury trial on their prescriptive easement claim. They also launch many attacks on the court and respondents' counsel, and interject many other arguments, which we address in a fourth section.

A. Jury Findings and Court Findings

1. Irreconcilable Jury and Court Findings re Respondents' Tort Claims

Substantial evidence supported the jury's findings with respect to respondents' tort claims. An actionable trespass arises if an intentional entry onto the property of another, without permission, was a substantial factor in causing harm to the owner. (See CACI No. 2000.) Here, ample evidence indicated that appellants intentionally and without permission entered onto respondents' property, and the trespass harmed respondents: Seppa testified it would cost $13,270.40 to repair the damage appellants caused on respondents' property, and Dr. Bricker testified that he treated Arnold for anxiety, stress, and insomnia related to the incident. The tort of invasion of privacy arises upon an intrusion into a private place, in a manner highly offensive to a reasonable person. (*Sanders v. American Broadcasting Companies*, (1999) 20 Cal.4th 907, 914.) As demonstrated in the video shown to the jury, appellants entered into an enclosed space in respondents' backyard, and it was not unreasonable for the jury to conclude that respondents' intrusion, for the purpose of destroying the improvements respondents had made, would be highly offensive to a reasonable person. As to the tort of intentional infliction of emotional distress, the video evinces appellants' extreme and outrageous conduct, their intent to cause distress is reasonably inferred, and the video and Dr. Bricker's testimony indicated that Arnold sustained severe emotional distress as a proximate result of their conduct. (See *Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050.)

Appellants contend, however, that there is an irreconcilable conflict between the jury's findings regarding respondents' tort causes of action and the court's finding that the prescriptive easement was non-exclusive. Specifically, they argue that the evidence is insufficient to justify the jury's verdict with respect to trespass and invasion of privacy, because the court's ruling that respondents' easement is non-exclusive means that appellants had an equal right to access the encumbered land. (Similarly, they argue

respondents cannot establish the "exclusive possession" element for trespass, since appellants cannot trespass by entering land they have the right to enter.) Appellants further argue that, since they had a right to enter the encumbered area, respondents' claims for emotional distress and punitive damages cannot stand.

Appellants arguments are meritless. The jury found that appellants committed the torts of trespass and invasion of privacy based on their acts *on the property of respondents* at 56 Tappan Lane, not in the easement area on the property of appellants at 48 Tappan Lane. For respondents' trespass claims, the verdict forms specifically asked the jury whether Arnold and Noble "own the property at 56 Tappan Lane" and whether appellants intentionally entered "Jeff Arnold's property" and "Lisa Noble's property." The jury answered "Yes." For respondents' invasion of privacy claims, the verdict form asked the jury whether respondents had a reasonable expectation of privacy in their home and property at 56 Tappan Lane and whether appellants intentionally intruded on their privacy "at" their home and property at 56 Tappan Lane. The jury answered "Yes." As the trial court explained to appellants: "[Respondents are] saying you went onto their property. It wasn't that you went into the easement area that was on your property, it's because you went onto their property when you moved the gas canisters and some other things… So there can't be trespass as long as you stay on your side of the [property lot] line. The trespass claim is about you going over the [property lot] line."[2]

As to respondents' claim for intentional infliction of emotional distress, while the appellants' conduct underlying the claim may have included acts in the easement area as well as acts on respondents' property, appellants' right to use the area covered by the easement obviously did not include any use inconsistent with respondents' prescriptive rights—in other words, the fact that appellants could enter the easement area did not

[2] The jury's award for property damages corresponded to the testimony of expert witness Seppa, who calculated the damages appellants caused on respondents' property to be $13,270.40.

mean that they could destroy what respondents had constructed there. Appellants fail to establish error.[3]

2. Irreconcilable Jury Findings Regarding Appellants' Cross-Complaint

In their cross-complaint, appellants had asserted claims for trespass (including trespass to timber) and invasion of privacy. The jury returned a verdict in favor of respondents on the trespass claims, because although it found that respondents had intentionally entered appellants' property and cut down trees without permission, it also found that respondents' actions were not a substantial factor in causing harm to appellants. Similarly, the jury found that although respondents had intentionally intruded in appellants' property, the intrusion would not be highly offensive to a reasonable person.

Appellants contend the jury's finding that respondents were not liable for trespass onto appellants' property is inconsistent with the jury's finding that appellants were liable for trespass onto respondents' property. According to appellants, it is impossible to reconcile the jury's finding that respondents' entry onto the land and cutting down trees did not cause appellants harm, while the appellants' trespass "for seconds to place the respondents' items such as gas cylinders and garden items back in their land" caused respondents harm.

Appellants are incorrect. John Lichter, a certified arborist, testified that respondents did not excessively thin the trees on appellants' property. From this evidence, the jury could reasonably conclude that respondents' acts did not harm appellants, and appellants should not recover on their trespass claims. By contrast, as explained *ante*, there was substantial evidence to support respondents' trespass claims.

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[3] Appellants also argue in this section that, due to the jury instructions, it was "virtually impossible for the jurors to understand that what the appellants removed was not to be built to begin with by the respondents." Appellants provide no citation to the record or relevant legal authority to support their claim. They fail to establish that the evidence produced at trial and the closing arguments were insufficient to bring the issue to the jury's attention.

Appellants further contend the jury's ruling on their claim for invasion of privacy is "self-contradictory" for "precisely the same reason that the jury's ruling on Appellants' trespass claim is self-contradictory as described above." Just as appellants are incorrect as to their trespass claim, they are incorrect as to their privacy claim.

3. Jury Findings on Respondents' Prescriptive Easement Claim

As mentioned, the jury found that the use of the portion of land by respondents (or their predecessors) had been open and notorious, continuous for at least five years, without the permission of appellants or their predecessors during the earliest five year period, and adverse to appellants. The court concluded that these findings were supported by the evidence and the scope of the requested easement would place only a minimal burden on appellants' property, and granted "an easement for ingress and egress, and for casual transient occupancy for recreational purpose, to be preserved in a natural condition without structures or improvements."

Substantial evidence supported the jury's findings with respect to a prescriptive easement, including, as summarized *ante*, the evidence provided by respondents and others concerning the historic use of the property. Appellants nonetheless contend the evidence was legally inadequate to establish a prescriptive easement.

a. Court's Deference to the Jury

Appellants argue that the court's ruling on equitable issues (granting quiet title to the prescriptive easement area) was erroneous because the court improperly adhered to the jury's findings. Appellants acknowledge that the court must follow the jury's factual determinations, but they contend the court can make independent legal determinations germane to the request for equitable relief. (Citing *Hoopes v. Dolan* (2008) 168 Cal.App.4th 146.) Appellants urge that the court should not have deferred to the jury because whether a prescriptive easement is exclusive is a question of law.

There is some irony to appellants' argument, of course, since it was appellants who insisted that the jury should be instructed on the exclusivity issue. (See discussion *post*.) But be that as it may, the court did not merely defer to the jury with respect to whether the easement provided for exclusive use. Rather, the court, in granting quiet title

to the prescriptive easement, ruled that the easement *was* non-exclusive. The court's judgment specifically states that the easement, as found by the jury, "does not constitute a grant of exclusive use to the Plaintiffs of any portion of Defendants' property." Obviously, the easement the court recognized for "ingress and egress, and for casual transient occupancy for recreational purpose, to be preserved in a natural condition without structures or improvements," does not grant respondents exclusive use of the easement area. Appellants fail to establish error.

b. Ingress and Egress

Appellants argue that the jury erred in finding that respondents used the parcel to permit ingress and egress to other parts of their property, or property accessible to the public, because respondents "never needed to enter onto the property of the Appellants as they can access any part of their land through their own land." They do not, however, provide a citation to the record for this assertion. (Cal. Rules of Court, rule 8.204(a)(1)(C).) Nor do they provide a summary in their opening brief of the evidence submitted on both sides of the issue. They therefore fail to adequately present a challenge to the sufficiency of the evidence in regard to this finding.

In sum, appellants fail to establish that any findings were improper with respect to respondents' prescriptive easement and quiet title claim, respondents' tort claims, or appellants' cross-complaint. We turn next to their claims of instructional error.

B. Special Jury Instructions and Verdict Form as to Prescriptive Easement

In their "Part Two Argument," appellants contend the special jury instructions and verdict form, which were presented in connection with respondents' claim for a prescriptive easement, were improper. We begin with some background.

1. Background

In regard to respondents' prescriptive easement claim, the jury was instructed with Special Instructions 1, 2, 3, 4, 5, and 5.5. Special Instruction 1 explained that respondents claimed "that a prescriptive easement has been created in the form of a non-exclusive right by them to use an approximately 659 square foot portion of land located on [appellants'] property" for "paths of travel, and as open space areas, for relaxation and

recreational use by their families." It further advised that an easement "is merely a privilege to use another's land in a particular manner," and "[a]n exclusive prescriptive easement which completely prohibits the property owner from using his land is not legally permitted in a case such as this."

Special Instruction 2 defined an easement by prescription and informed the jury that, in order for respondents to prove they acquired a prescriptive easement, the jury would have to be satisfied from the evidence that respondents (or their predecessors) used the land in a way that was open and notorious, continued without interruption for five years, and adverse to appellants and/or their predecessors. Special Instructions 3, 4 and 5 explained further what respondents would have to prove in order to establish the elements of open and notorious use, continuous use, and adverse use.

Special Instruction 5.5 addressed the concept of "Exclusive Use," and specifically advised that any period in which respondents excluded appellants from the easement area could not be considered in deciding whether respondents used the area continuously for five years. [4]

The jury entered its findings on the Prescriptive Easement Verdict Form as follows: "1. Was the Arnolds' and/or the Haydens' [the Arnolds' predecessor in interest] use of the portion of land at issue open and notorious such that the Vadjys or their predecessors in interest, the Markeys, had actual or constructive [could have known/should have known] notice of Arnolds' use of the portion of land at issue? [¶] Yes [¶] . . . 2. Was the Arnolds' and/or the Haydens' use of the portion of land at issue continuous for a period of five (5) years at any point in the time between 1978 and

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[4] The instruction read: "If you determine that [appellants] and/or their predecessors in interest, the Markeys, were excluded from a part of the portion of land at issue for a specific period of time, then do not include that 'excluded' time period in determining whether there were five (5) continuous years of use of that part of the portion of the land at issue by [respondents] and/or their predecessors in interest, the Haydens. The servient estate would be excluded from a specific portion of property if you determine that []the specific portion of property was fenced off and no access was provided, or the soil of the specific portion of property was made inaccessible by the construction of a substantial structure."

2012? [¶] Yes [¶] . . . 3. Did the Vajdys[] or their predecessors in interest, the Markeys, grant the Arnolds and/or the Haydens permission to use the portion of land at issue before the earliest five year period determined in response to the question above was completed? [¶] No [¶] . . . 4. Was the Arnolds' and/or the Haydens' use of the portion of land at issue without recognition of the rights of the Vajdys, or their predecessors in interest, the Markeys, such that it may be deemed adverse? [¶] Yes [¶] . . . 5. During the time period when the Arnolds and/or the Haydens used the portion of land at issue, did they use the parcel to permit ingress and egress to other parts of 56 Tappan Lane or property accessible to the public? [¶] Yes [¶] . . . 6. During the time period when the Arnolds and/or the Haydens used the portion of land at issue, did they use the parcel for recreational purposes [socializing, cooking, conversations, play area]? [¶] Yes." (Brackets in original.)

2. Analysis

Appellants urge that the Special Instructions and verdict form were "completely biased and one-sided against the Appellants." In particular, they contend the instructions were erroneous because they did not state that a prescriptive easement: (1) must be based on a defined, limited, and specific use; (2) must have a specific, well-defined area; (3) must be non-exclusive, in that it cannot preclude appellants from continuing to use the easement area in a meaningful way; (4) must not adversely affect the value of appellants' property; and (5) must not adversely affect the privacy of appellants. They argue that respondents changed their use of the easement area by adding an arbor and stairs in 2009, and excluded appellants by the use of a fence; further, they claim, the addition and removal of a gate in the fence re-set the five-year period. Their arguments are meritless for several reasons.

a. Waiver

In large part, appellants waived any right to challenge the instructions on appeal. Appellants contend they objected to the instructions. But the record shows that appellants agreed to the *final* wording of Special Instruction 2 and voiced no specific objection to the content of the final versions of Special Instructions 3, 4 and 5.

As to Special Instruction 5.5, the wording of the final version was the result of extensive briefing by the parties and discussions with the court. Appellants argued that if respondents excluded appellants from the use of the prescriptive easement, that period of exclusion could not be included in deciding whether respondents met the five-year use requirement. This concept was addressed in Special Instruction 5.5, although appellants believed that the language should be in Special Instruction 4 rather than a separate instruction. Ultimately, Padrah agreed to the final version of Special Instruction 5.5 and commented, "Thank you. That's perfect, Your Honor."

Contrary to respondents' suggestion, however, appellants do seem to have persisted in their objection as to another aspect of the special instructions. Appellants argued that the respondents' use of the easement area had to be limited (because otherwise there would be exclusive use) and therefore had to be adequately defined in a "specific use element." Indeed, appellants argued that the elements for a prescriptive easement included not just the three elements set forth in the special instructions, but also "specific use" and "specific area." Appellants further urged that the specific use element was not satisfied in this case, because the prior owners of 56 Tappan Lane used the area differently than did respondents. The court rejoined that the use had to be open and notorious and continuous, but appellants were free to argue that those elements were not established because the prior owners used the easement area differently than respondents. Appellants in turn insisted that the "issue of use" had to be included in the instructions. Although closely related to the concepts of "exclusion" (of appellants by respondents from the area, during which time the five-year period does not run) and "exclusive use" (of the area by respondents, which cannot form a prescriptive easement), the concept of "specific use" (the same use of the area for the entirety of the five year period) is potentially distinct. We therefore proceed to the merits.

b. Adequacy of the Instructions

The jury instructions, taken as a whole, adequately addressed the issues of defined and specific use, a well-defined area, and non-exclusive use. Special Instruction 1 informed the jury that respondents sought "a non-exclusive right" to use approximately

659 square feet of appellants' property as they claim they and their predecessors had, "for paths of travel, and as open space areas, for relaxation and recreational use by their families." It explained that an easement "is merely a privilege to use another's land in a particular manner" and "[a]n exclusive prescriptive easement which completely prohibits the property owner from using his land" was not allowed. Special Instruction 5.5 informed the jury that respondents' exclusive use of the property could not be counted towards the calculation of five years of continuous use.

As to the purported requirement that the easement not adversely affect the appellants' property or privacy, appellants provide no authority that the jury must decide this issue. Nor do they persuade us that, under the evidence in this case, a non-exclusive easement for ingress, egress, and recreational use, without structures or improvements, would adversely affect the appellants' use of their property or privacy to such a degree as to preclude the imposition of the prescriptive easement. Indeed, the court expressly found that the easement, as found by the jury, "would place only a *minimal* burden on Defendants' property interests and does *not* constitute a grant of exclusive use to the Plaintiffs or any portion of Defendants' property." (Italics added.) While appellants debate this conclusion, they have not shown that the conclusion was unsupported by substantial evidence.

c. Appellants' Cases

Appellants rely on several cases for the proposition that a prescriptive easement cannot be obtained where the claimed easement area was used in an exclusive manner by the dominant estate. (*Kapner v. Meadowlark Ranch Assn.* (2004) 116 Cal.App.4th 1182, 1186–1187 (*Kapner*) [enclosure of land by a fence and gate was not a use sufficient to give rise to a prescriptive easement]; *Harrison v. Welch* (2004) 116 Cal.App.4th 1084, 1092 (*Harrison*) [trial court properly refused to order a prescriptive easement with respect to landowner's property, on which claimant had built a woodshed and placed trees, planter boxes and an irrigation system, because it completely prohibited the owner from using the land]; *Mehdizadeh v. Mincer* (1996) 46 Cal.App.4th 1296, 1306 (*Mehdizadeh*) [judgment reversed as to a prescriptive easement because a fence around

the easement property would bar the landowners access and preclude their use of the property]; *Silacci v. Abramson* (1996) 45 Cal.App.4th 558, 564 (*Silacci*) [no prescriptive easement where party enclosed portion of neighbor's property with a three-foot high picket fence and used it as a backyard garden area].)

Respondents do not address appellants' interpretation of these cases, but we nonetheless find the cases unhelpful to appellants.

First, none of these cases held that the *jury* must decide whether the party claiming the prescriptive easement used the easement area in a manner that would be sufficiently specific, defined, or non-exclusive. Nor do they hold that the jury must be *instructed* with respect to specificity of the use and area or non-exclusivity. Instead, the cases struck down prescriptive easements imposed by the *court* or affirmed the court's refusal to impose an easement. As such, the cases do not establish that the jury instructions and verdict forms in this case were erroneous.

Second, none of the cases hold that the concepts such as "specific use," "specific area," or "non-exclusive use" are independent elements of a prescriptive easement claim. To the contrary, they identify the elements to consist of a "use" that is open and notorious, adverse, and continuous, without any additional element such as "specific use," "specific area," or "non-exclusive use." (*Kapner, supra*, 116 Cal.App.4th at p. 1186 [elements are open and notorious use, hostile use, and continuous use], citing *Warsaw v. Chicago Metallic Ceilings, Inc*. (1984) 35 Cal.3d 564, 570.)[5]

Third, the verdict form shows that the jury *did* make findings that respondents had used the easement area for a specific, defined, non-exclusive use. The jury found that, during the time respondents or their predecessors used the "portion of land at issue," they used the parcel for "recreational purposes" and to "permit ingress and egress" to other

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[5] Some cases add a fourth element, that the claimant's use be under "claim of right." (E.g., *Harrison, supra*, 116 Cal.App.4th at p. 1090; *Mehdizadeh, supra*, 46 Cal.App.4th at p. 1305.) Appellants do not show that they objected on that ground in the trial court. Nor do they point to anything in the record that would demonstrate prejudice—indeed, it is plain from the record that respondents *did* use the property under a claim of right to use it. Appellants do not demonstrate cause for a reversal on this ground.

parts of 56 Tappan Lane or property accessible to the public. Further, the jury found that the requisite open and adverse use was made continuously for five years, notwithstanding the instruction that any period of exclusive use by respondents could not be considered. In other words, respondents' use (or their predecessors' use) was nonexclusive for the requisite period.

Fourth, unlike the proposed easements in the cases on which appellants rely, the prescriptive easement to which the trial court ultimately quieted title in this case has a specific, limited, defined, and non-exclusive use. The court granted the request to quiet title with respect to an easement only for "ingress and egress" and "casual *transient* occupancy for recreational purpose," to be preserved "*without* structures and improvements." (Italics added.) By no means is that exclusive use.[6] Furthermore, the court limited the easement to a specific, defined area, by including in the judgment the precise physical boundary of the easement location.

Fifth, another case on which appellants rely teaches that the use that the jury found respondents had made of the property, and the use that the court authorized respondents to make in its order quieting title, was sufficiently specific, defined, and non-exclusive. The court in *Mesnick v. Caton* (1986) 183 Cal.App.3d 1248 (*Mesnick*) observed that a prescriptive easement provides the right to "make a specific use of someone else's property" (as opposed to title to the property). (*Id*. at p. 1261; *Mehdizadeh, supra*, 46 Cal.App.4th at p. 1305.) It also stated that an easement is a restrictive right to "specific, limited, definable use or activity." (*Mesnick, supra*, 183 Cal.App.3d at p. 1261.) But it did not hold that the use must be more precisely described than the uses identified by respondents (and the court) here—ingress, egress, and recreation. To the contrary, the problem in *Mesnick* was that the party claiming the easement had not shown *any* use he

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[6] A grant of unconditional "occupancy" may connote a claim of possession and title, as opposed to the type of limited use appropriate for an easement. (*Mehdizadeh, supra*, 46 Cal.App.4th at p. 1306.) Here, however, the court's use of the phrase, "transient occupancy for recreational purpose," indicates that the right conveyed is nothing more than a right to a defined use.

made of the area, such as—in the court's words—"drainage, crops, *recreation*, transportation, *ingress and egress*, or other activity *which has been found to be a basis for a prescriptive easement*." (*Ibid*. Italics added.) *Mesnick* confirms that an easement for "ingress and egress" and "recreational purpose" is proper.

d. Lack of Prejudice

Finally, even if appellants were correct that the instructions were deficient, they do not establish the prejudice necessary for a reversal. Factors commonly used in civil cases to determine prejudice from instructional error include the degree of conflict in the evidence, whether the jury requested a rereading of the instruction or related evidence, the closeness of the verdict, whether counsel's closing arguments were misleading, and the effect of other instructions given. (*Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, 1054–1056.) Appellants do not substantially address any of these. Moreover, while they make various conclusory statements in their briefs, they do not *cite* to any *evidence* that the use by respondents' predecessor was, in fact, different than the use by respondents, or that respondents' use changed in such a legally meaningful manner as to preclude (or restart) the running of the five-year term. They therefore fail to show from *the record* that, if the instruction had been given as appellants urge, they would have obtained a better outcome in the trial.

Moreover, appellants overlook the scope of the court's equitable powers. As confirmed by a case on which appellants themselves rely, even where a prescriptive easement cannot be found as a matter of law, a court may nonetheless " 'exercise [its] equity powers to affirmatively fashion an interest in the owner's land which will protect the encroacher's use.' " (*Harrison, supra,* 116 Cal.App.4th at p. 1093 fn. 5.) Appellants fail to show that the easement to which the court quieted title exceeded the bounds of the court's equitable powers.

C. <u>Order of Trial and Jury's Role</u>

Included in appellants' "Part Three Argument" are two contentions: (1) the trial court should have decided the equitable issues before the jury trial; and (2) respondents

were not entitled to have a jury hear the evidence and decide their prescriptive easement claim. Both of these contentions are unavailing.[7]

In California, the constitutional right to a jury trial in civil cases generally applies to claims that are legal in nature, not to claims that are equitable. (*Arciero Ranches v. Meza* (1993) 17 Cal.App.4th 114, 124.) Where, as here, a civil case includes claims that are legal (such as respondents' and appellants' tort claims), claims that are equitable (such as respondents' claims for quiet title), and factual issues that must be resolved for the adjudication of respondents' quiet title claim, the court must decide what issues are to be decided by the jury, what issues are to be decided by the court, and the order in which the issues should be decided.

Appellants note that a court has *discretion* to decide equitable issues first, and such a course may be best if it promotes judicial economy. (*Hoopes v. Dolan*, 168 Cal.App.4th 146, 156–157.) "It is well established that, in a case involving both legal and equitable issues, the trial court *may* proceed to try the equitable issues first, without a jury . . . and that if the court's determination of those issues is also dispositive of the legal issues, nothing further remains to be tried by a jury." (*Raedeke v. Gibraltar Sav. & Loan Assn.* (1974) 10 Cal.3d 665, 671. Italics added.)

From this premise, appellants argue that the trial court erred when it tried the legal claims first in this case. As a result, they maintain, the court "erroneously bounded jurors to rule on legal issues," allowing jurors to "award Arnolds an exclusive prescriptive easement based on biased special jury instructions and verdict forms and evidence that was too complicated for jurors to decipher" and instructions that were "designed to give the impression the appellants had interfered with Arnold's prescriptive easement when they removed the illegal improvements from their land."

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[7] In this section of their opening brief, appellants also contend that the evidence was insufficient to support the prescriptive easement, the court admitted improper evidence, the court did not evaluate the evidence, and the court abused its discretion in a variety of other ways. We address these arguments elsewhere in the opinion.

Appellants' arguments are meritless. That a court has discretion to decide equitable issues first does not mean that it *must* do so, and appellants fail to establish an abuse of that discretion in the court's decision not to. Judge Austin recognized that if the jury found the elements of a prescriptive easement had been proven, it would be his responsibility to determine the terms of the equitable relief of quiet title or injunction. But if the jury found no prescriptive easement existed, there would be no need for the court to make these determinations. Furthermore, a jury was going to be impaneled anyway to hear the parties' related tort claims. Appellants do not show how the court's decision to try the legal issues first was unreasonable: contrary to their assertions, the court's approach did not require the jury to rule on legal issues, the special jury instructions and verdict forms were not biased, and the evidence was not too complicated for the jury to decipher.

D. Appellants' Other Arguments of Judicial Error and Misconduct

Appellants include in their opening brief a host of other complaints of error and repeatedly contend the court committed misconduct and was biased in respondents' favor. While we discuss only some of the arguments here, we have examined *each one* and conclude they are all devoid of merit, even if we do not explicitly discuss them.

1. Display of the Home Security Video Excerpts to the Jury

Appellants contend the trial court erred by allowing the jury to view the video depicting their destruction of respondents' property, claiming that the video "portrayed them like criminals" and was "heavily edited."

A failure to object to evidence at trial waives any appellate claim that the evidence was inadmissible. (*Doers v. Golden Gate Bridge etc. Dist.*, (1979) 23 Cal.3d 180, 184–185 fn. 1; Evid. Code, § 353.) Here, as respondents point out, appellants did not object when the video was shown to the jury at trial. Nor did they object when the video was admitted into evidence. Appellants contend in their reply brief that they "object[ed] profusely to using the videos in the opening statements or during trial via submitting motion in limine." The motion in limine is not included in the appellate record, but a reference in the reporter's transcript does suggest that appellants objected by motion in

limine. However, because the record does not show that appellants made clear the *grounds* for the objection, and they did not *renew* the objection at trial, appellants failed to preserve the matter for appeal. (Evid. Code, § 353, subd. (a) [no reversal for admission of erroneous evidence unless the appellate record shows a timely objection or motion to exclude upon a specific ground]; *People v. Morris* (1991) 53 Cal.3d 152, 189–190, disapproved on another ground in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1 [even where inadmissibility was urged by motion in limine, the objecting party must object again at trial when the evidence is presented, unless the motion satisfied Evid. Code § 353 by specifying the ground and the relevant evidence at a time when the court could determine the evidentiary question in its appropriate context].)

At any rate, appellants have not demonstrated an abuse of discretion. The video was relevant, there is no showing it was not properly authenticated, and it was reasonable to conclude that its probative value was not substantially outweighed by the probability that it would create a substantial danger of undue prejudice. (Evid. Code, § 352.)

2. Court's "Chainsaw Massacre" Statement

Appellants contend they did not receive a fair trial because the court made a reference to a "chainsaw massacre" to describe their self-help actions. Judge Austin made the reference, however, when speaking *outside* the presence of the jury. Furthermore, he was referring to his concerns about Vajdy using the chainsaw in a manner that could have harmed him. Appellants were not prejudiced by the court's statement. Nor did the statement, in light of the entire record, suggest a bias against them.[8]

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[8] The relevant colloquy, which occurred during an in limine discussion, shows that the phrase was interjected initially by respondents' counsel, and appellants take the court's statements wildly out of context. "MR. DOOLEY: . . . Specifically, in discovery, as part of the 12.1 series of form interrogatories, they asked for documents and pictures related to the incident, which they defined as my clients' alleged encroachment. When I asked them—and they never asked any questions with regard to the incident that we defined as the *chainsaw massacre*. [¶] MS. PADRAH: Massacre? Excuse me, Your Honor, did we kill anybody? [¶] THE COURT: Let's just stop here. Stop please. I've been so patient. It's hard for me to even fathom how patient I've been with all of you.

3. Failure to Apply "Judicial Admission" Doctrine

Appellants complain that the "court failed to apply the doctrine of judicial admission where a party cannot contradict itself to create a triable issue of fact to avoid summary judg[]ment." They assert that respondents first advocated for an exclusive prescriptive easement, and then sought a non-exclusive prescriptive easement at trial.

In light of their citation to *Jogani v. Jogani* (2006) 141 Cal.App.4th 158, appellants mean to invoke the doctrine of "judicial estoppel," which may arise if a party has taken two entirely inconsistent positions in a judicial proceeding, the tribunal accepted the first position, and the first position was not taken as a result of ignorance, fraud or mistake. (*Id*. at p. 169.) However, they do not show that the court *accepted* any position previously taken by respondents that was inconsistent with their position at trial.

4. Coaching of Respondents

Appellants argue that the court was "helping and coaching" respondents' counsel by correcting the deficiencies in their complaint. Without citation to the record, they provide the following quotation: "THE COURT: All right. This is what I want you -- it's 4:30. I want you to write it out on a piece of paper what that easement is going to be

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[¶] MR. DOOLEY: Your Honor, I apologize. It[] was meant in jest." The court then urged the participants to proceed on a high note, and the phrase was revisited a few pages later in the transcript. "MR. VAJDY: The other problem we have is they are using this issue of the chainsaw as though we are chainsaw massacre people. First of all, we removed 95 percent of all the decking and everything. [¶] THE COURT: You almost chainsaw massacred yourself when I watched the thing. It was scary when you were on the steps and were cutting the Pergola down. That was a scary thing. My wife doesn't let me use chainsaws. [¶] MR. VAJDY: And as you can see, I'm not – I don't know how to use chainsaws. But, Your Honor – [¶] THE COURT: I could see you were not an experienced chainsaw handler. [¶] MR. VAJDY: Yeah. So what we don't want to happen is that the opposing counsel keep on referring to us as the chainsaw people and chainsaw incident, that's extremely prejudicial. [¶] THE COURT: Well, during the course of the trial, what's said before the jury is different. There aren't going to be opportunities to say those kind of things. If he says that during opening statement would be the only time to do it or voir dire. I would say *if he called you a name of some sort, that would be inappropriate and disrespectful, and no one can disrespect other people in my court that way*." (Italics added.). The passage shows no bias.

that's going to get recorded, if that's what you want, and I want to see what it is because I have to cross-examine you to figure out what it is, and that shouldn't be right. I shouldn't have to do that. I want it on a piece of paper. It's not in your complaint what you want. And I want to know what it is that you want so I know what I'm ruling on, okay? So you got until tomorrow to do that, and we'll meet again at 1:15." Appellants complain that the court was coaching respondents that they could not obtain an exclusive prescriptive easement and needed to limit the scope of the easement.

Appellants' argument is untenable. The cited passage reflects the court's demand that respondents' counsel provide a specific description of the proposed easement. The court did not advise respondents' counsel that the easement could not be exclusive, and if it had, the statement would have been no more than what appellants advocated as well.[9]

5. "Behind the Door" Negotiations

Appellants contend they were excluded "from what appeared to be 'behind the door negotiations' between the court and the Respondents' counsels, regarding crafting the scope of an easement." They provide no citation to the record indicating an improper ex parte communication.

6. Crafting a Punitive Damages Strategy

Appellants argue that the court "crafted a strategy" for respondents in relation to their punitive damages claim. They cite to a motion in limine discussion regarding hearsay statements made to appellants by governmental agencies. In actuality, the court was explaining to respondents' counsel why the statements appellants wanted to use would be admissible to show that appellants had *not* acted with malice when they destroyed respondents' deck with a chainsaw. Far from crafting a strategy for

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[9] Appellants continue in their reply brief to berate the trial court's integrity and charge the judge with bias and disrespect. To the extent not raised in the opening brief, the arguments shall not be considered in the absence of a showing of good cause. (*REO Broadcasting Consultants v. Martin* (1999) 69 Cal.App.4th 489, 500.) At any rate, none of appellants' aspersions comes remotely close to establishing any prejudicial misconduct, let alone reversible error. In our view, the trial court displayed appropriate judicial decorum and laudable patience under the circumstances.

respondents to obtain punitive damages, the court was recognizing the admissibility of evidence that would *refute* such a claim.

7. Exclusion of Evidence

Appellants attempted to introduce a Home Depot receipt to prove the truth of matters asserted regarding respondents' purchase of a gate they purportedly installed. As the court explained, however, the document was being offered for a hearsay purpose and appellants had not established any applicable exception to the hearsay rule. (See Evid. Code, § 1200.)

Appellants also contend they were denied a fair trial because the court did not allow their contractor expert witness, Terry Murphy, to testify about appellants' loss of privacy as a result of respondents' allegedly illegal additions to their house and use of their land, particularly by the removal of vegetation through grading. The court permitted Murphy to testify as to the grading work done in relation to his experience as a contractor, but precluded testimony concerning privacy: "He's not an expert in privacy. I'm not going to let him testify to that." Appellants fail to establish that Murphy was an expert in privacy, or that Murphy could competently testify to the privacy issues as a lay witness. They fail to demonstrate an abuse of discretion.[10]

8. Allowing Arnold's Emotional Distress Claim

Appellants contend the court improperly allowed Arnold's claim for intentional infliction of emotional distress because the court had "stated earlier it was not appropriate." Regardless of what the trial court previously stated, however, appellants fail to establish that the emotional distress claim was, in fact, inappropriate. They therefore fail to show error in allowing the claim to proceed.

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[10] As another evidentiary matter, appellants argue that the trial court improperly admitted evidence "which was invented, created and presented by Respondent, Jeff Arnold as an expert witness to the jurors." They provide no citation to the record nor any relevant legal authority to support their position.

9. Respondents' Unclean Hands

Appellants contend that respondents had unclean hands, because respondents allegedly claimed falsely that they did not know where the boundary line was until an encroachment survey was conducted, respondents excluded appellants from entering and enjoying their own property and intended to force appellants to give up their land, they repeatedly changed the way they used the disputed parcel, they claimed they needed the disputed parcel for ingress, egress and personal enjoyment, Arnold denied grading or changing the terrain, respondents gave contradictory dates as to when the encroachment was built, respondents pointed telescopes and video surveillance cameras onto their neighbor's living quarters, respondents denied that East Bay Municipal Utilities District had ordered all the encroachments from their easement removed, and respondents are "serial encroachers."

Appellants' argument has no merit. They provide no legal authority that any of these actions would constitute unclean hands so as to preclude the equitable relief awarded by the court.

10. Reweighing the Evidence

Appellants urge us to reweigh the evidence presented in the trial court. They state: "Appellants believe it will take very little effort to weigh the evidence and determine that the findings of the trial court were so against the weight of the evidence as to require a reversal and a retrial. The evidence show[s] the judgment is so unfair and unreasonable so it must be unfair."

Appellants misunderstand the role of this court. We do not reweigh the evidence. To the extent a challenge to the evidence has been properly asserted, we review factual findings for substantial evidence. (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 631.) Here, appellants have not adequately asserted a challenge to the evidence and, at any rate, substantial evidence supports the factual findings underlying the judgment.

Appellants fail to demonstrate error.[11]

III. DISPOSITION

The judgment is affirmed.

NEEDHAM, J.

We concur.

JONES, P.J.

SIMONS, J.

[11] On August 9, 2016, appellants filed a request for judicial notice of parts of the reporter's transcript and the alleged stalking of their daughter. The request is denied.