

No. 40500-8-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

ANTHONY G. MALELLA, Respondent

v.

LONA KEIST, individually and as Trustee of the
LONA POULSEN REVOCABLE LIVING TRUST,
STEVEN D. KOCH and JANE DOE KOCH, husband and wife,
VINCE F. BROWN and JANE DOE BROWN, husband and wife,
JOHN E. THOMAS and JANE DOE THOMAS, husband and wife,
GEORGE R. ELKINS and JANE DOE ELKINS, husband and wife,
MARC ELKINS, SR., and JANE DOE ELKINS, husband and wife,
MARC ELKINS, JR. and JANE DOE ELKINS, husband and wife, and
MEREDITH ELKINS, and JOHN DOE ELKINS, husband and wife,
Appellants

APPEAL FROM SUPERIOR COURT OF SKAMANIA COUNTY
HONORABLE EDWIN L. POYFAIR, JUDGE
SKAMANIA COUNTY CAUSE NO. 01-2-00122-3

BRIEF OF RESPONDENT

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01/29/01 X3-D31

10/29/01
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DIVISION II
JANUARY 29 2001

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I. ASSIGNMENT OF ERRORS

Defendants, Lona Keist *et. al.*, assigns error to numerous Findings of Fact and Conclusions of law entered by the trial court in its findings that Plaintiff, Anthony Malella, was entitled to the disputed property.

II. ISSUES PERTAINING TO ASSIGNMENT OF ERRORS

A. Issues Related to Assignments of Error 1 – 11

Does substantial evidence support the trial court's findings that Mr. Malella and his predecessors used the property "to the exclusion of all others?"

Is the proper standard of review for mixed questions of law and fact legal error?

As the trier of fact, does the trial court determine the credibility of witness testimony?

B. Issues Related to Assignment of Error 12 – 17

Did the trial court err in ruling Mr. Malella adversely possessed the disputed property when he possessed the land openly and notoriously, actually and uninterrupted, exclusively and hostilely for ten years?

Does the lack of permission given by Mr. Malella reinforce his claim for adverse possession for the property in the disputed area on which his garage sits?

Do the facts as found by the trial court support its ruling that Mr. Malella was entitled to the disputed area by adverse possession?

III. STATEMENT OF THE CASE

A. Procedural History of the Case

Mr. Malella agrees with Mrs. Keist's statement regarding the procedural history of this matter.

B. Statement of facts

This lawsuit involves properties lying on the east and west sides of the Salmon Falls Bridge on the Washougal River between Washougal River Road and the Washougal River in Skamania County, Washington. (CP 60) Anthony Malella owns a parcel of real property on the west side of Salmon Falls Bridge (the Malella property). (CP 60) Mr. Malella took possession of the property in 1990. (CP 26) Prior to Mr. Malella's purchase of the property, Roger Dean and Maynette Manwaring owned the property. (CP 26). The Manwarings had purchased the property from William G Crisman and Kimberly Bryant in 1981. (CP 26) Mr. Crisman and Ms. Bryant purchased the property from Jack and Johanna Phillips in 1980. The Phillips had purchased the property from Mrs. Phillips parents in 1963. (CP 26)

Lona Keist and her former husband, Harold Elkins, acquired the Keist property on the east side of the Salmon Falls Bridge from Fred and

Beulah Hornush in 1952. (CP 27) In 1976, Mrs. Keist transferred the property to Steve Elkins, George Elkins, Meredith Elkins and MD Elkins, as tenants in common. (CP 27) The property was then transferred to Edwin T. Hoffman in 1978. (CP 27) The property was then transferred by Edwin T. Hoffman a day later in 1978 to Mrs. Keist. (CP 28) Finally in 1996, Mrs. Keist transferred the property to The Lona Poulson Revocable Living Trust where it has remained ever since. (CP 28)

When Mr. Phillips purchased the Malella property in 1963, he and his wife believed that they owned the property in question just about to the edge of the bridge. (CP 28) To the exclusion of all others, Mr. Phillips and his wife exercised domain and control of the disputed property to the western edge of the bridge except for any such property lying to the south of the middle of the Washougal River during their ownership of the property. (CP 28) The Phillips exercised this domain and control over the disputed property by maintaining a water source close to the bridge, applying for water rights in 1973, attempting to keep the public off the property, posting no trespass signs and building a garage on the premises. (CP 29) The project to build to the garage began in 1964 and they were never informed that the garage was on the Keist's property. (CP 29) During their ownership, no one other than Mr. Phillips did anything to maintain or use the path from the garage to the water source on the

disputed property. (CP 29) Further, Mr. Phillips understood the water source near the property line was part of his property. (CP 29)

During the ownership of the Malella property by the Manwarings, to the exclusion of all others, Mr. and Mrs. Manwaring maintained the property up to the bridge by clearing blackberry bushes, removing pieces of trees and shrubs, cutting back the path across the tip of the island and picking up trash quite often during the summer months, and plastic and junk in the winter months when debris would get stuck in the trees due to high water. (CP 30) They also maintained the water source close to the bridge, constructed the path between the garage and the house to the river, kept the public off their property by telling people they could not go on the property and only gave permission to people they wanted to allow onto the property. (CP 30) They would call the police when individuals would not leave after being told to leave, they posted no trespassing signs at the top of the path between the garage and the house and at the edge of the bridge. (CP 30) They posted signs offering a reward for anyone caught snagging fish and fished both sides of the river. (CP 30) They enlisted the help of their neighbors, Howell and Stauffer, to help keep people off their property and hired another neighbor, Lee Walker to do the same in their absence. (CP 31-32)

While owners of the property, the Manwarings understood and believed that they owned the property in question all the way to the bridge, with the exception of maybe a small sliver of property near the bridge. (CP 31) Marc Elkins, a friend of the Manwarings son, was allowed to use the property without asking permission. (CP 31) The Manwarings were the only ones who maintained or used the disputed property during their ownership. (CP 31) No one ever advised them that the disputed property was not theirs. (CP 31)

During Mr. Malella's ownership of the Malella property, his renters, agents or himself maintained the disputed property, kept the public off the disputed property on both sides of the river and posted no trespassing signs on the disputed property. (CP 33) It was always Mr. Malella's understanding and belief that the water source to the property, which is located on the disputed property and has been continuously used by him, was on his property. (CP 34) During his ownership, no one else, without Mr. Malella's permission, maintained, used or exercised dominion and control over the disputed property other than his agents, renters or himself. (CP 34) Mr. Malella exercised dominion and control of the disputed property to the western edge of the bridge except for any such property lying to the south of the middle of the Washougal River during his ownership. (CP 34)

During the latter part of Mr. Malella's ownership of the property (in April 2001), Mrs. Keist attempted to allow recreational use of the disputed property, but these attempts were challenged by Mr. Malella (CP 34) Anyone who wanted to go the on the disputed property intending to fish or swim had to first obtain permission of Mr. Malella or his agents. (CP 34) Mr. Malella confronted both Kris Leonard and John Thomas, who had received permission from Mrs. Keist to enter the property, and told them to leave when they attempted to do so. (CP 34-35) At the request of Mr. Malella, Don Bryden built the parking lot on the disputed property in 1991 and he spread an additional 30 yards of gravel in the parking area in 1996. (CP 35)

IV. ARGUMENT

A. Standard of Review

This matter was tried to the court thus making the court the trier of fact. On appeal from a bench trial, conclusions of law are reviewed de novo. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wash.2d 873, 880, 73 P.3d 369 (2003). Findings of fact are reviewed to determine whether they are supported by substantial evidence and, if so, whether the findings support the conclusions of law. *Hegwine v. Longview Fibre Co.*, 132 Wash.App. 546, 555, 132 P.3d 789 (2006). "Substantial evidence is evidence 'in sufficient quantum to persuade a fair-minded person of the

truth of the declared premise.” *J.E. Dunn Nw. Inc. v. Dep't of Labor & Indus.*, 139 Wash.App. 35, 43, 156 P.3d 250 (2007) (quoting *Holland v. Boeing Co.*, 90 Wash.2d 384, 390-91, 583 P.2d 621 (1978)). If the evidence satisfies this standard, the appellate court will not substitute its judgment for that of the trial court, even though it might have resolved the factual dispute differently. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wash.2d 873, 879-80, 73 P.3d 369 (2003). Findings of fact erroneously labeled “conclusions of law” are reviewed as findings of fact, and conclusions of law labeled findings of fact as conclusions of law. *Willener v. Sweeting*, 107 Wn.2d 388, 394, 730 P.2d 45 (1986). Unchallenged findings of fact are verities on appeal, and the appellate court’s review is limited to whether the findings support the conclusions of law. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 808, 828 P.2d 549 (1992).

Washington Courts have previously stated that adverse possession is an issue of fact. See, e.g., *Jacobsen v. State*, 89 Wash.2d 104, 111, 569 P.2d 1152 (1977); *Hill v. L. W. Weidert Farms, Inc.*, 75 Wash.2d 871, 874, 454 P.2d 220 (1969). “It is more accurate, however, to say that adverse possession is a mixed question on law and fact. Whether the essential facts exist is for the trier of fact; but whether the facts, as found, constitute adverse possession is for the court to determine as a matter of law.”

Peeples v. Port of Bellingham, 93 Wn.2d 766, 771, 613 P.2d 1128; *see*, e.g., *Robin v. Brown*, 308z Pa. 123, 126, 162 A. 161 (1932); *Smith v. Vermont Marble Co.*, 99 Vt. 384, 395-96, 133 A. 355 (1926); 2A C.J.S. Adverse Possession § 301 (1972). Therefore, it is within the province of the trier of fact to determine from conflicting evidence the existence of facts necessary to constitute adverse possession, and such factual findings will not be disturbed on appeal when they are sustained by the record. *Peeples*, 93 Wn.2d at 771.

The proper standard of review for mixed questions of law and fact is not de novo, but rather legal error. *Franklin County Sheriff's Office v. Sellers*, 97 Wn.2d 317, 330, 646 P.2d 113 (1982); *Eagle Point Condo. Owners Ass'n v. Coy*, 102 Wash.App. 697, 706, 9 P.3d 898 (2000) (citing *Sardam v. Morford*, 51 Wash.App. 908, 911, 756 P.2d 174 (1988)). “[I]t is not the province of the reviewing court to try the facts de novo when presented with mixed questions of law and fact, whether on appeal from a judgment of the superior court, administrative tribunal or administrative judge.” *Franklin County*, 97 Wn.2d at 330; *see Bennett Veneer Factors, Inc. v. Brewer*, 79 Wn.2d 849, 441 P.2d 128 (1968).

B. ASSIGNMENT OF ERROR 1 – 11

1. Substantial evidence does support the trial court’s findings that Mr. Malella and his predecessors used the property “to the exclusion of all others.”

The findings of fact challenged by Mrs. Keist, 10.1, 10.2, 11.2, 11.3, and 12.5 are supported by substantial evidence that Mr. Malella and his predecessors used the property to the exclusion of all others and therefore should be upheld. These findings are not contradicted by other findings. For simplicity, Mr. Malella will respond to the assertions of Mrs. Keist in the order she presented them in her appellate brief.

2. Substantial evidence supports the trial court's finding of fact that Jack Phillips and his wife exercised dominion and control of the disputed property to the exclusion of all others.

In Finding of Fact 10.1, the trial court held, in part, that “[t]hat to the exclusion of all others, Jack Phillips and his wife exercised dominion and control of the disputed property to the western edge of the bridge except for any such property lying to the south of the middle of the Washougal river during their ownership of the property.” (CP 28) In Finding of Fact 10.2, the trial court found that “[d]uring the ownerships of the real property, to the exclusion of all others, Jack Phillips, maintained a water source close to the bridge, applied for water rights in 1973, attempted to keep the public off the property, posted no trespassing signs and built a garage on the premises.” (CP 29) In her brief, Mrs. Keist argues that Findings of Fact 10.1 and 10.2 conflict with Finding of Fact 10.6 and Finding of Fact 24.6, however, this is incorrect.

In Finding of Fact 10.6, contrary to Mrs. Keist's assertions, the trial court found more than the fact that Mr. Stetler also tried to control usage below the bridge. Finding of Fact 10.6 also states that "Jack Phillips tried to prevent persons, mainly swimmers, from coming onto the property. He put up "No Trespassing – Keep Out" signs. . . If any person were causing trouble, he or his wife would run them off or call the sheriff." (CP 29-30) This finding only further supports the trial court's determination that Mr. Malella and his predecessors used the property to the exclusion of all others. Further, Finding of Fact 24.6 does not conflict with Finding of Fact 10.1 and 10.2. Finding of Fact 24.6, states that Mrs. Keist's son, not "sons" as asserted by Mrs. Keist, George Elkins, began posting "No Trespassing" in 1963 above and below the bridge; he does not know how many; they were torn down. (CP 43) This finding does not in any way conflict with the trial court's finding that Mr. Malella and his predecessors used the property to the exclusion of all others. Rather, this finding merely demonstrates further that the disputed property was not open to the public.

Findings of Fact 10.1 and 10.2 are supported by substantial evidence and therefore should be upheld. Mr. Phillips purchased the property from his in-laws. (RP 47) Mr. Phillips and his wife exercised dominion and control of the disputed property to the western edge of the

bridge except for any such property lying to the south of the middle of the Washougal River during their ownership of the property. (RP 50 – 52, 67). While they owned the property, Mr. Phillips and his wife built a garage on the premises, maintained a water source close to the bridge, applied for water rights in 1973, attempted to keep the public off the property, and posted no trespassing signs. (RP 52-56, RP 58, RP 60, RP 61-62, Ex. 4) The deference accorded under the substantial evidence standard recognizes that the trier of fact, in our case the trial court, is in a better position than the reviewing court to evaluate the credibility and demeanor of witnesses. *State v. Hill*, 123 Wn.2d 641, 646, 870 P.2d 313 (1994). In our case, the trial court determined, as the trier of fact, that the testimony of Mr. Phillips was sufficient to meet the element of adverse possession that he and his wife exercised dominion and control of the disputed property to the exclusion of all others. Therefore, the reviewing court should defer to the findings of the trial court and not substitute its judgment in regards to Findings of Fact 10.1 and 10.2.

3. Substantial evidence supports the trial court’s finding of fact that Mr. and Mrs. Manwaring exercised dominion and control of the disputed property to the exclusion of all others.

The trial court found in Finding of Fact 11.2 far more than set forth in Mrs. Keist’s brief. The trial court found that Roger Dean and Maynette Manwaring “maintained the property up to the bridge by clearing

blackberries, picking up pieces of trees and shrubs, cutting the path across the tip of the island and picking up trash quite often on the summer months, and plastic and junk in the winter months when debris would get stuck in the trees due to high water, maintained a water source close to the bridge, constructed the path between the garage and the house to the river, kept the public off their property by telling people they could not go on the property and only giving permission to people they wanted to allow access to the property, and calling police if the trespassers would not leave, posted no trespassing signs at the top of the path between the garage and the house and at the edge of the bridge, as well as paying to have reward signs put up for anyone caught snagging fish, fished both sides of the river and engaged the assistance of neighbors, Howell and Stauffer, to keep people off the property and hired neighbors, Lee Walker to police the area in the Manwaring's absence. (CP 31)

Finding of Fact 11.3 also states more than noted in Mrs. Keist's brief. In Finding of Fact 11.3, the trial court found that "Roger Dean Manwaring understood and believed that he owned the property in question all the way to bridge. . . To the exclusion of all others, Roger Dean Manwaring and Maynette Manwaring exercised dominion and control of the disputed property to the western edge of the bridge except for any such property lying to the south of the middle of the Washougal

river during their ownership. (CP 31) Marc Elkins, a family friend of the Manwarings, was allowed to use the property. (CP 31, FF 11.4)

Contrary to Mrs. Keist's brief, other Findings of Fact, specifically 23.4, 24.3, 24.5, 25.2, and 26.1 do not "believe" Findings of Fact 11.2, 11.3, and 11.4. Findings of Fact 24.3, 23.4 and 24.5 state that relatives of Mrs. Keist swam in the disputed area and worked on clearing a trail in the disputed area. (CP 42) Finding of Fact 23.4 states that "Marc Elkins, *when allowed on the disputed property*, would help to clear blackberries and tree branches from the trails (emphasis added). (CP 42) Further, Mrs. Keist has misstated Finding of Fact 26.1. This finding states that "*[N]o credible evidence* accepted by the court was produced that the Defendant did anything tangible to keep the disputed property open to the public. In fact, Defendant testified that she posted "No Trespassing" signs (emphasis added). (CP 43)

Findings of Fact 11.2, 11.3, and 11.4 are supported by substantial evidence and therefore should be upheld. Roger Dean and Maynette Manwaring maintained the disputed property up to the bridge, maintained the water source close to the bridge, kept the public off their property on both sides of the river, posted no trespassing signs, fished both sides of the river and engaged the assistance of neighbors to keep people off the property. (RP 247-250, 254, 257-258, 276-277, 279-280 and 289;

Deposition of R. Manwaring at pgs. 25, 50, 53-56, 58, 60, and 86-88)

Further, no one else maintained or used the disputed property during the Manwaring's ownership and no one ever advised them that the disputed property was not theirs. (RP 247, 251, 278, Deposition of R. Manwaring at pgs. 50-51, 57-58, and 74) Marc Elkins did use the disputed property but only after permission was given by the Manwarings. (RP 252, 288, and 267)

The deference accorded under the substantial evidence standard recognizes that the trier of fact, in the present case the trial court, is in a better position than the reviewing court to evaluate the credibility and demeanor of witnesses. *State v. Hill*, 123 Wn.2d 641, 646, 870 P.2d 313 (1994). In the present case, the trial court determined, as the trier of fact, that the testimony of Mr. Manwaring was sufficient to meet the element of adverse possession that he and Mrs. Manwaring exercised dominion and control of the disputed property to the exclusion of all others. Therefore, the reviewing court should defer to the findings of the trial court and not substitute its judgment in regards to Findings of Fact 11.2, 11.3, and 11.4.

4. Substantial evidence supports the trial court's finding of fact that Mr. Malella exercised dominion and control of the disputed property to the exclusion of all others.

Finding of Fact 12.5 states that "[N]o other person without the owner's permission maintained, used or exercised dominion and control

over the disputed property other than Plaintiff, his renters or agents. To the exclusion of all others, Anthony G. Malella exercised dominion and control of the disputed property to the western edge of the bridge except for any such property lying to the south of the middle of the Washougal river during his ownership of the property.” (CP 34) Contrary to Mrs. Keist’s brief, Findings of Fact 12.7 and 21.1 do not contradict Finding of Fact 12.5. Although Findings of Fact 12.7 and 21.1 do state that John Thomas and Kris Leonard were allowed by Mrs. Keist to fish on the property, the trial court found that all individuals found on the disputed property “were confronted by Plaintiff or his agents and directed to leave the property” or obtained permission from Mr. Malella or other previous owners to be on the property. (CP 34, 43, FF 12.7, 25.2, 25.3)

Contrary to Mrs. Keist’s assertion that the “one constant in this case. . . is the continuing and unabated presence of trespassers coming” to the disputed property, the one constant throughout the trial court’s findings is that Mr. Malella, his agents, or other neighbors did everything in their power to confront all trespassers on the property and assert dominion and control exclusive to all others. Further, Mrs. Keist cites no authority that just because a trespasser is occasionally successful of illegally entering an individual’s property that this negates the elements of exclusive control. Surely Mr. Malella and his predecessors could not have

been expected to keep all trespassers off of their property every minute of every day.

Finding of Fact 12.5 is supported by substantial evidence and therefore should be upheld. During Mr. Malella's ownership of the property, no other persons maintained, controlled or used the disputed property other than Mr. Malella, his renters or agents. (RP 164, 166) Anyone who wanted to go on the disputed property intending to fish or swim had to first obtain permission from Mr. Malella, his renters or his agents. (RP 156-157; Deposition of A. Malella at pgs. 39-40) In fact, the trial court determined that "Mrs. Keist's act of placing her property, including the disputed property in a timber bank, did not establish her maintenance, usage or dominion and control over the disputed property. (CP 34) The deference accorded under the substantial evidence standard recognizes that the trier of fact, in our case the trial court, is in a better position than the reviewing court to evaluate the credibility and demeanor of witnesses. *State v. Hill*, 123 Wn.2d 641, 646, 870 P.2d 313 (1994). In the present case, the trial court determined, as the trier of fact, that the testimony of Mr. Malella was sufficient to meet the element of adverse possession that he, his renters and his agents exercised dominion and control of the disputed property to the exclusion of all others. Therefore,

the reviewing court should defer to the findings of the trial court and not substitute its judgment in regards to Finding of Fact 12.5

C. The proper standard of review for mixed questions of law and fact is not de novo, but rather legal error.

A reviewing court is not able to review facts de novo on mixed questions of law and fact, though language in previous opinions has led reviewing courts to mistakenly do so. *Franklin County*, 97 Wn.2d at 329. “[I]t is not the province of the reviewing court to try the facts de novo when presented with mixed questions of law and fact, whether on appeal from a judgment of the superior court, administrative tribunal, or administrative judge.” *Id*; see *Bennett Veneer Factors, Inc., v. Brewer*, 73 Wn.2d 849, 441 P.2d 128 (1968).

In Findings of Fact 10.1, 11.3, 12.5, and 12.6 the trial court found that Mr. and Mrs. Phillips, Mr. and Mrs. Manwaring, and Mr. Malella had exerted dominion and control exclusively. Mrs. Keist argues that these findings are mixed questions of law and fact and therefore subject to de novo review; however, these Findings of Fact are just that, Findings of Fact and therefore are not subject to de novo review but rather subject to review only to determine if they are supported by substantial evidence. As noted above, each of these Findings of Fact are supported by substantial evidence and therefore should be upheld upon review.

Mrs. Keist offers no argument as to what factors the court should consider in their de novo review in order to reverse these findings in favor of Mrs. Keist. Therefore, Mr. Malella requests that the court deny Mrs. Keist's request for de novo review.

If, however, the Court should determine that these Findings of Fact are mixed questions of law and fact, Mr. Malella submits that the proper standard of review is one of legal error. *Franklin County*, 97 Wn.2d at 330; see *Bennett Veneer Factors, Inc. v. Brewer*, 79 Wn.2d 849, 441 P.2d 128 (1968). Because Mrs. Keist has failed to argue in any form that the trial court applied the wrong legal standard in determining Findings of Fact 10.1, 11.3, 12.5, and 12.6, Mr. Malella requests that the appellate court rule in his favor that the trial court applied to appropriate legal standard in making its findings.

Next, Mrs. Keist argues that Finding of Fact 12.7 is a conclusion of law and therefore subject to de novo review. While Mrs. Keist is correct that conclusions of law are subject to de novo review, Finding of Fact 12.7 is not a conclusion of law, it is a Finding of Fact and therefore subject to the substantial evidence standard. Mrs. Keist argues 12.7 is a conclusion of law because in order for the court to find that individuals had to first obtain permission from Mr. Malella or his agents to fish or swim it must have determined he was the owner of the property, which is a conclusion

of law. However, in 12.7, the trial court merely found that due to the way Mr. Malella and his agents treated the disputed property exclusively as their property, other individuals had to get his permission to enter. This is not a conclusion of law. This was a necessary fact for the trial court to find in order for it to conclude that Mr. Malella's adverse possession claim was valid.

Finding of Fact 12.7 is supported by substantial evidence. Mr. Malella always instructed his renters and agents to keep people off the disputed property. (RP 156-160) The deference accorded under the substantial evidence standard recognizes that the trier of fact, in this case the trial court, is in a better position than the reviewing court to evaluate the credibility and demeanor of witnesses. *State v. Hill*, 123 Wn.2d 641, 646, 870 P.2d 313 (1994). Therefore, Mr. Malella requests that the court deny Mrs. Keist's request to have Finding of Fact 12.7 reviewed de novo.

Mrs. Keist makes a similar argument in regards to Finding of Fact 12.8 and that the trial court's finding that Kris Leanord was a trespasser was a conclusion of law and should be reviewed de novo. This also, is not a conclusion of law but rather a factual finding that was necessary for the court to determine and conclude as a matter of law that Mr. Malella and his predecessors held the property in exclusive control.

Lastly, in this portion of her brief, Mrs. Keist argues that Finding of Fact 28.2 is also a conclusion of law and therefore subject to de novo review. As with the other three portions of this brief, Mrs. Keist has offered nothing in the way of argument as to what the trial court should have found. Rather she merely states that 28.2 is subject to de novo review. Mrs. Keist offers no argument as to what factors the court should consider in their de novo review in order to reverse these findings in favor of Mrs. Keist. Therefore, Mr. Malella requests that the court deny Mrs. Keist's request for de novo review.

D. The trial court, as the trier of fact, determines the credibility of witness testimony and determined that Mrs. Keist's testimony was not credible.

The deference accorded under the substantial evidence standard recognizes that the trier of fact, in this case the trial court, is in a better position than the reviewing court to evaluate the credibility and demeanor of witnesses. *State v. Hill*, 123 Wn.2d 641, 646, 870 P.2d 313 (1994). Mrs. Keist next argues that substantial evidence does not exist for the trial court's Finding of Fact 10.2, specifically the portion where the trial court found that no one ever told Mr. Phillips that the garage he built was on Mrs. Keist's property. This is incorrect. Substantial evidence does exist for this finding. On direct examination of Mr. Phillips he was asked:

Q: Did anyone ever tell you that you're building - - that when you built the garage it wasn't on your property?

A: No. (RP 53-54)

While Mrs. Keist cites her testimony that she in fact did tell Mr. Phillips that the garage was being built on her property, the trial court, as the trier of fact, found her testimony not to be credible. (CP 44, 46) Specifically, the trial court found in Finding of Fact 29.1 that “[t]his court has major concerns with regards to the memory of Defendant Lona Keist and therefore, finds that her testimony is not credible. (RP 46) This was not the only testimony of Mrs. Keist that the trial court found to not be credible. The trial court also found that “Defendant Keist’s testimony regarding keeping the property open to the public was not credible and her testimony regarding putting up no trespassing signs on the property . . .” (RP 44) The trial court also found, after viewing all the testimony, that Mr. Malella’s witness were more credible. (RP 46)

Mrs. Keist attempts to argue that because the trial court previously entered Finding of Fact 18.6 which stated that Mrs. Keist had told Mr. Phillips that the garage was on her property that this becomes the “law of the case” and therefore Finding of Fact 10.2 is invalid. What Mrs. Keist fails to point out is that this instruction was initially requested by Mrs. Keist in the initial findings of fact and Mr. Malella objected to its entry.

Further, the Court of Appeals, in its first review of this case, essentially determined all of the findings of fact and conclusions to be an inadequate basis for the trial court's initial ruling. (Slip Op, pg. 1 -2) Upon remand, the trial court reviewed all of the evidence again, listened to argument by counsel for both Mr. Malella and Mrs. Keist, and entered its new findings of fact and conclusions of law, as ordered by the Court of Appeals. Thus, this initial finding was found to be invalid and does not become the law of the case. Therefore, the trial court did not err in making Finding of Fact 10.2 in finding that Mrs. Keist did not advise Mr. Phillips of any encroachment.

The deference accorded under the substantial evidence standard recognizes that the trier of fact, in this case the trial court, is in a better position than the reviewing court to evaluate the credibility and demeanor of witnesses. *State v. Hill*, 123 Wn.2d 641, 646, 870 P.2d 313 (1994). Because the trial court found Mr. Malella's witness to be more credible than Mrs. Keist testimony, the appellate court should defer to the trial court's judgment and uphold this finding.

E. Assignment of Error 12 – 17

The trial court did not err in ruling that Mr. Malella adversely possessed the disputed property because he possessed the land openly and

notoriously, actually and uninterrupted, exclusively, and hostilely for ten years.

To prove adverse possession, one must prove that they possessed the disputed land in a manner that was (1) exclusive, (2) open and notorious, (3) hostile, and (4) actual and uninterrupted for the statutory period of 10 years. *Teel v. Stading*, 155 Wn. App. 390, 393-94, 228 P.3d 1293 (2010); RCW 4.16.020(1); *Chaplin v. Sanders*, 100 Wn.2d 853, 857-65, 676 P.2d 431 (1984). “The party claiming adverse possession must establish each element by a preponderance of the evidence. *Id.*, citing *Varrelman v. Blount*, 56 Wn.2d 211, 211-12, 351 P.2d 1039 (1960).

In her brief, Mrs. Keist cites *Slater v. Murphy*, 55 Wn.2d 892, 339 P.2d 457 (1959) for the proposition that “erecting sign boards and mailbox and plowing up weeds” is not sufficient to demonstrate possession. As done throughout her appellate brief, Mrs. Keist has once again cited only a portion that she considers helpful to her. In *Slater*, the State Supreme Court provides more complete details as to why these items were not sufficient. The Court in *Slater* found these items to be deficient because no one knew whether one of the signs placed on the property was on the disputed property or not and the party claiming adverse possession did not place any of the signs or the mailbox on the property themselves. *Id.* at 900. This is a far cry from the facts in this case which clearly demonstrate

that Mr. Malella, his agents, renters and predecessors clearly maintained the property by maintaining a water source close to the bridge, applying for water rights, attempting to keep public off the property and calling the police when they refused to leave, posting no trespassing signs, building a garage of the disputed property, clearing blackberries, picking up pieces of shrubs, cutting back the path across the tip of the island, picking up trash, and paying to have reward signs put up for anyone caught snagging fish, fishing both sides of the river and engaging the assistance of neighbors to help police the property for trespasser. (CP 29, 30, 33, 34) Therefore, *Slater* is inapplicable to our case.

Next, Mrs. Keist cites the case of *Petersen v. Port of Seattle*, 94 Wn.2d 479, 486, 618 P.2d 67 (1980) for the proposition that the use of the property is presumed permissive at its inception. What Mrs. Keist fails to point out is that *Petersen* does not involve a claim for adverse possession but rather is a case involving inverse condemnation by the Petersens against the port of Seattle. *Id.* at 481. The Petersens owned and resided upon property located about 2 miles south of Sea-Tac Airport and brought suit to recover the diminished value of their property resulting from the operation of the airport. *Id.* This case does not in any way involve adverse possession and is therefore inapplicable.

In claims of adverse possession, “hostile” does not mean animosity; “rather it is a term of art which means that the claimant possesses property in a manner not subordinate to the title of the true owner.” *Teel*, 155 Wn. App. at 395-96, citing *El Cerrito, Inc., v. Ryndak*, 60 Wn.2d 847, 854, 376 P.2d 258 (1962). To prove hostility, the claimant must demonstrate that he treated the property as would a true owner throughout the statutory period. *Teel*, 155 Wn. App. at 396, citing *Chaplin*, 100 Wn.2d at 860-61. The adverse possessor must show that permission terminated either because (1) the claimant asserted a hostile right or (2) the servient estate changed hands through death or alienation. *Teel*, 155 Wn. App. at 396, citing *Miller v. Anderson*, 91 Wn. App. 822, 829, 964 P.2d 1281 (1999).

For simplicity’s sake, Mr. Malella will respond to the issues raised in Mrs. Keist brief in the order she presented. Contrary to her assertion, the trial court’s findings of fact do support its conclusion to quiet title of the disputed property to Mr. Malella.

1. The facts as found by the trial court support its ruling that Mr. Malella was entitled to the disputed area by adverse possession.

a. The Encroaching Garage

The facts as determined by the trial court support its conclusion that Mr. Malella’s claim for adverse possession regarding the portion of

the property encroached by the garage is valid. First, Mrs. Keist concedes that the garage was present for more than 10 years, the statutorily required time period, and that all elements of adverse possession are present. (See Appellant's Brief, pg. 26). Mrs. Keist only contests the element of hostility. Once again, Mrs. Keist argues that there is substantial evidence in the case that Mrs. Keist permitted the encroaching garage. As noted above, this argument fails.

While Mrs. Keist again cites her testimony that she in fact did tell Mr. Phillips that the garage was being built on her property, the trial court, as the trier of fact, found her testimony not to be credible. (CP 44, 46) Specifically, the trial court found in Finding of Fact 29.1 that "[t]his court has major concerns with regards to the memory of Defendant Lona Keist and therefore, finds that her testimony is not credible. (RP 46) This was not the only testimony of Mrs. Keist that the trial court found to not be credible. The trial court also found that "Defendant Keist's testimony regarding keeping the property open to the public was not credible and her testimony regarding putting up no trespassing signs on the property . . ." (RP 44) The trial court also found, after viewing all the testimony, that Mr. Malella's witness were more credible. (RP 46) The deference accorded under the substantial evidence standard recognizes that the trier of fact, in this case the trial court, is in a better position than the reviewing

court to evaluate the credibility and demeanor of witnesses. *State v. Hill*, 123 Wn.2d 641, 646, 870 P.2d 313 (1994). Because the trial court found Mr. Malella's witness to be more credible than Mrs. Keist testimony, the appellate court should defer to the trial court's judgment and uphold this finding.

Lastly, Mrs. Keist suggests that the appropriate remedy is for Mr. Malella to purchase the property from her. This suggestion is irrelevant given that all elements of adverse possession are met and Mr. Malella is now the true owner of the disputed property.

b. The area adjacent to the garage

The facts as determined by the trial court support its conclusion that Mr. Malella's claim for adverse possession regarding the portion of the property adjacent to the garage is valid. Mrs. Keist addresses three areas that she alleges are missing thus making Mr. Malella's adverse possession claim to this area invalid. Each will be addresses in the order presented by Mrs. Keist.

First, Mrs. Keist argues that the trial court did not determine when Mr. Bryden placed the fill onto the disputed property. This argument is irrelevant because Finding of Fact 13.1 was not entered by the trial court to set the time frame for when the statutory period for adverse possession started for Mr. Malella's claim. Rather, Finding of Fact 13.1 was entered

to demonstrate Mr. Malella's continued exclusive, open, hostile, and continuous use of the disputed property area. Mrs. Keist is attempting to mislead the court by dividing the property into small "individual" sections and manipulate the facts in her favor.

Mr. Malella's predecessors in ownership, namely Jack Phillips, Roger Dean Manwaring and Maynette Manwaring all testified that they believed they owned the property from their westerly property line over to the bridge, which includes the disputed area, and that they maintained this area in one way or another. RP 50-69, RP 243-250, RP 272-278, and Deposition of R. Manwaring, P. 20, 40, 53-57, 82-83.

The required time period for adverse possession does not reset each time a different owner makes additional usage of the disputed property. If anything, the additional usage only strengthens Mr. Malella's claim to the disputed property. Therefore, the time period actually began when Mr. Phillips first purchased his property based upon his belief that he owned the entire area of the disputed property and began making improvements and building the garage.

In addition, courts will project boundary lines between objects when reasonable. *Lloyd v. Montecucco*, 83 Wn. Ap. 846, 854, 924 P.2d 927 (1996). "Courts are not required to find a blazed or manicured trail along the path of the disputed boundary; it is reasonable and logical to

project a line between objects when the extent of the adverse possessor's claim is open and notorious as the character of the land and its use requires and permits. *Id.* Mrs. Keist's suggestion that the court should carve out pieces of property and award small portions to either her or Mr. Malella is not practical. Substantial evidence exists to support the trial court's findings that Mr. Malella's claim for adverse possession is valid. The deference accorded under the substantial evidence standard recognizes that the trier of fact, in this case the trial court, is in a better position than the reviewing court to evaluate the credibility and demeanor of witnesses. *State v. Hill*, 123 Wn.2d 641, 646, 870 P.2d 313 (1994). Therefore, the appellate court should not disturb the trial court's findings.

c. The Water Source

The facts as determined by the trial court support its conclusion that Mr. Malella's claim for adverse possession regarding the portion of the property referred to by Mrs. Keist as the "water source" is valid.

Mrs. Keist cites the case of *Malnati v. Ramstead*, 50 Wn.2d 105, 309 P.2d 754, for the proposition that when one is claiming ownership to a water source they are not entitled to the land on which the source, conveyance facilities and trail are located but merely to a prescriptive easement. What Mrs. Keist fails to point out about *Malnati*, is that the plaintiff in the matter, Mr. Malnati was not seeking adverse possession of

the land on which the source, conveyance facilities and trail are located. They were simply seeking a prescriptive easement for the water source. *Id.* at 108. In fact, the State Supreme Court specifically notes in its opinion that Mr. Malnati was not making a claim to the land the source, conveyance facilities and trail were located upon. *Id.* Therefore, *Malnati*, is irrelevant to the matter before us. Mr. Malella submits that because Mrs. Keist has made no other argument regarding this portion of the disputed property the trial court's ruling quieting title to this area of the disputed property to Mr. Malella should be upheld.

d. Remainder of Disputed Property

The facts as determined by the trial court support its conclusion that Mr. Malella's claim for adverse possession regarding the entirety of the disputed area is valid. Mrs. Keist takes the testimony of Mr. Phillips in regards to his maintenance of the trail leading to the river and twists Mr. Phillips' words to make her argument that there was no reasonable use to be made of the area. This is incorrect. The disputed area at issue is absolutely usable. Mrs. Keist is once again attempting to mislead the court by examining the property in small pieces instead of as a whole. The disputed property is usable as demonstrated by the portion of the garage in the disputed area, the parking lot to the east of the garage, the path to the river, the river bank and the water source are all usable sources

contained within the area of the disputed property. While it may be true that there are very small specific portions of the property that contain blackberry bushes, the disputed area must be viewed as a whole.

Mrs. Keist begins her argument by citing to two cases from outside the State of Washington, Alaska and Illinois. These cases are neither controlling nor authoritative to matters within the jurisdiction of the State of Washington. Mrs. Keist has failed to cite any authority from the State of Washington for her assertion that Mr. Malella did not meet the required elements of adverse possession for this portion of the disputed property.

In addition, the out-of-state cases cited by Mrs. Keist are factually different from the present case and therefore inapplicable. In *Nome 2000 v. Fagerstrom*, 799 P.2d 304 (Alaska, 1990) the court found that the Fagerstroms' use of trails and picking up litter did not provide the reasonably diligent owner with visible evidence of another's exercise of dominion and control. 799 P.2d 304. In *Estate of Welliver v. Alberts*, 278 Ill.App.3d 1028, the claimant's use of the disputed property was similar to that in *Nome 2000*. In our case, Mr. Malella and his predecessors did more than just use trails and pick up litter. As noted above Mr. Malella, his renters, agents and predecessors clearly maintained the property by maintaining a water source close to the bridge, applying for water rights, attempting to keep the public off the property and calling the police when

they refused to leave, posting no trespassing signs, building a garage of the disputed property, clearing blackberries and brush to maintain the path to the river, picking up pieces of shrubs, cutting back the path across the tip of the island, picking up trash, and paying to have reward signs put up for anyone caught snagging fish, fishing both sides of the river and engaging the assistance of neighbors to help police the property for trespasser. (CP 29, 30, 33, 34) This extended use and control of the property is clearly far more than just picking up trash and using trails as was the case in *Nome 2000* and *Estate of Welliver* and establishes the requirements of open and notorious use.

Next, Mrs. Keist once again attempts to divert the attention of the Court by discussing prescriptive easements. Whether or not a prescriptive easement is appropriate in this case or not is not before the Court for review. The issues before the Court deal solely with adverse possession. Therefore, Mr. Malella requests that the Court disregard the portions of Mrs. Keist's brief discussing prescriptive easements.

Mrs. Keist argues that the trial court's Findings of Fact show that the use of the disputed property by Mr. Malella and his predecessors was not exclusive. This is incorrect. Substantial evidence exists demonstrating that Mr. Malella and his predecessors' use of the disputed property was exclusive. To begin with, Mrs. Keist argues that because

Mr. Malella and his predecessors enlisted the help of neighbors and other individuals to keep trespassers off of the property and thus negating the elements of exclusive use. This argument is made without Mrs. Keist citing any authority that enlisting the use of other individuals to police your property negates exclusive use in regards to a claim for adverse possession. In fact, enlisting the use of others to help control access to the disputed seems to only strengthen the evidence that Mr. Malella and his predecessor maintained exclusive control over the disputed property.

Lastly, Mrs. Keist also argues that she and her family posted “no trespassing” signs and performed other minor activities on the property therefore negating the element of exclusivity. What Mrs. Keist fails to point out to the Court is that the trial court found Mr. Malella’s witnesses credible and her witnesses not credible. As noted above, specifically, the trial court found in Finding of Fact 29.1 that “[t]his court has major concerns with regards to the memory of Defendant Lona Keist and therefore, finds that her testimony is not credible.” (RP 46) This was not the only testimony of Mrs. Keist that the trial court found to not be credible. The trial court also found that “Defendant Keist’s testimony regarding keeping the property open to the public was not credible and her testimony regarding putting up no trespassing signs on the property . . .”

(RP 44) The trial court also found, after viewing all the testimony, that Mr. Malella's witness were more credible. (RP 46)

Substantial evidence exists to support the trial court's findings that Mr. Malella and his predecessors maintained exclusive control over the disputed property. Therefore, Mrs. Keist's request to set aside these findings should be denied.

e. The trial court's findings regarding adverse actions by Mr. Malella involve more than the posting of no trespassing signs.

In this portion of her brief, Mrs. Keist attempts to argue that the posting of "no trespassing" signs and the eviction of trespassers cannot be considered adverse to Mrs. Keist's interest in the property. What Mrs. Keist fails to point out is that the trial court made other findings of fact that were directly adverse to Mrs. Keist interests in the property. The trial court determined that, Mr. Phillips, who purchased the property from his in-laws in 1963, maintained a water source close to the bridge, applied for water rights in 1973, attempted to keep the public off the property, posted no trespassing signs and built a garage on the premises. (CP 29, FF 10.2) Further, the trial court determined that Mr. Phillips maintained a trail down from behind the garage to his water source, he would call police or "run-off" trespassers and enlisted Mr. Stetler to control the usage of the bridge. (CP 29-30, FF 10.4, 10.6) All of these acts occurred well before

Mr. Malella purchased the property and are all adverse to Mrs. Keist's interest in the property.

Also, the trial court found that Mr. and Mrs. Manwaring did substantial maintenance to the disputed property and regularly kept people off the property along with fishing both sides of the river. (CP 30, FF 11.2) All of these adverse actions occurred before Mr. Malella purchased the property in 1990 and all are adverse to Mrs. Keist's interest in the property.

Mrs. Keist's argument that the only adverse actions against her interest in the disputed property are limited to the posting of no trespassing signs and the eviction of trespassers is simply not true. This is evidenced by the trial court's Findings of Fact in relation to the continued use, maintenance and control of the disputed property by Mr. Phillips and the Manwarings since at least 1963. Therefore, substantial evidence exists to support the trial court's findings of fact and conclusion that Mr. Malella's claim for adverse possession is valid.

f. Substantial evidence exists to support the trial court's findings of fact and conclusion of law that the actions of Mrs. Keist and her relatives amounted only to neighborly accommodation.

"A claimant's possession need not be absolutely exclusive in order to satisfy the exclusivity condition of adverse possession. *Lilly v. Lynch*,

88 Wn. App. 306, 313, 945 P.2d 727 (1997), citing *Crites v. Koch*, 49 Wn. App. 171, 174, 741 P.2d 1005 (1987). The “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, citing 17 WILLIAM B. STOEBUCK, *Washington Practice Real Estate: Property Law* § 8.19 at 516 (1995).

The test in determining whether a claimant has exercised dominion over the disputed land is whether he or she has done so in a manner consistent with actions a true owner would take. *Lilly*, 88 Wn. App. at 313, citing *ITT Rayonier, Inc. v. Bell*, 112 Wn.2d 754, 759, 774 P.2d 6 (1989); *Bryant v. Palmer Coking Coal Co.*, 86 Wn.App. 204, 217, 936 P.2d 1163 (1997). The court must look at two things: (1) whether the non-claiming party’s use of the disputed property was more than “occasional” or “transitory,” and (2) whether the claimant and his predecessors acted as true owners would. *Lilly*, 88 Wn.App. at 313. The necessary occupancy and use of the property, for the purposes of establishing adverse possession, need only be of the character that a true owner would assert, “considering the nature and location of the land.” *Frolund v. Franklin*, 71 Wn.2d 812, 817, 431 P.2d 188 (1967), overruled on other grounds by *Chaplin*, 100 Wn.2d at 861, n. 2.

For example, in *Frolund*, the State Supreme Court held:

[T]he evidence reveals that the children of the parties, as well as those of other neighbors, played about over the various neighborhood beach areas with not more than the usual parental approval and restraint, and that the parties themselves occasionally, socially, and casually visited back and forth, and sometimes assisted one another in the performance of various work projects, e.g., beaching the swimming raft for winter storage. Such conduct, under the circumstances, denotes neighborliness and friendship. It does not amount to a subordination of defendants' adverse claim to the disputed wedge. . .

Frolund, 71 Wn.2d at 818-19.

In the present case, the trial court's Conclusion of Law 34.1 that any use by Mrs. Keist was incidental and of a nature a true owner would have permitted as a neighborly accommodation is supported by substantial evidence. The trial court's findings of Mrs. Keist's attempts to allow occasional use by her friends and family was so inconsequential that even if it was determined that her testimony was credible, it would still amount to nothing more than the actions of neighborly accommodation. In addition, most of Mrs. Keist's attempts at use were made subsequent to the adverse possession claim. (CP 34 – 42, FF 12.6, 12.7, 18.4, 20.1, 22.2, 23.3) Mrs. Keist's actions are even smaller in significance than the ones the court determined to be neighborly accommodation in *Frolund*.

In applying the two part test set forth on *Lilly*, it is evident that the actions of Mrs. Keist and her relatives and friends amounted to nothing

more than neighborly accommodation. First, their use of the property was occasional at best. Mrs. Keist had not even been on the property since 1983 (CP 39, FF 18.4, RP 34, RP 455-457) Second, these actions are nothing more than a true owner of the property would allow. In fact, Mr. Malella and his predecessors tried to discourage such acts. (CP 34, FF 12.7, 12.8, 12.9, RP 156-60)

In her brief, Mrs. Keist cites *Roediger v. Cullen*, 26 Wn.2d 690, 175 P.2d 669, for the proposition that if a person's use of property is deemed a "neighborly accommodation" then it cannot be hostile. *Roediger* is inapplicable to our case for two reasons. First, it involves a prescriptive easement, not adverse possession. Second, the holding in *Roediger* has been modified since 1946 when it was decided by numerous cases, including the ones set forth above by Mr. Malella. As noted above, in cases involving adverse possession, the test for neighborly accommodation is not hostility but rather whether the non-claiming party's use of the disputed property was more than "occasional" or "transitory," and whether the claimant and his predecessors acted as true owners would. Mr. Malella submits that is what occurred in this case as found by the trial court.

Mrs. Keist admits her brief, citing *Crites v. Koch, supra*, that "occasional parking of farm equipment and crossing the land to get to

other fields – will not eliminate a plaintiff’s adverse possession claim.” (Appellant’s Brief, pg. 40). This is almost identical to the type of action Mrs. Keist argues in our case does not amount to neighborly accommodation. Substantial evidence exists to support the trial court’s findings of fact and conclusion of law that the actions of Mrs. Keist and her relatives amounted only to neighborly accommodation.

F. The trial court’s Findings of Fact support its Conclusion of Law that Mr. Malella is entitled to the entirety of the disputed property.

Substantial evidence exists to support the trial court’s Findings of Fact and Conclusion of law as set forth in Conclusion of Law 33.1 and the trial court’s reliance upon *Lloyd v. Montecucco*, 83 Wn.App. 846, in making this conclusion was correct. Mrs. Keist argues *Lloyd* is a “far cry” from the present case; this is incorrect. Mrs. Keist seems to base this argument on the alleged fact that Mr. Malella and his predecessors do not use a large portion of the disputed area. As noted above, and as determined by the trial court, this could not be further from the truth. Mr. Malella, his renters, agents and predecessors clearly maintained the property by maintaining a water source close to the bridge, applying for water rights, attempting to keep public off the property and calling the police when they refused to leave, posting no trespassing signs, building a garage of the disputed property, clearing blackberries and brush to

maintain the path to the river, picking up pieces of shrubs, cutting back the path across the tip of the island, picking up trash, and paying to have reward signs put up for anyone caught snagging fish, fishing both sides of the river and engaging the assistance of neighbors to help police the property for trespasser. (CP 29, 30, 33, 34) This extended use of the property is similar to the use of the property in *Lloyd*.

Substantial evidence supports the trial courts Findings of Fact and Conclusions of law that awarded Mr. Malella the entire disputed area as outlined in Exhibit "E" attached to the Findings of Fact and Conclusions of Law (CP 55, 56) Therefore, the Court should deny Mrs. Keist's request to reverse the trial court's decision.

V. REQUEST FOR ATTORNEY'S FEES

Lastly, Mr. Malella asks the appellate court to award him attorney fees and costs incurred while defending against this lawsuit at the appellate level pursuant to RAP 18.1.

VI. CONCLUSION

In conclusion, the trial court's Findings of Fact are supported by substantial evidence. The Findings of Fact the trial court made support its Conclusions of Law and Order Quieting Title in Real Property on Remand. Therefore, the Court should uphold the trial court's findings,

judgment and order. Further, the Court should award Mr. Malella attorney fees and costs pursuant to RAP 18.1.

RESPECTFULLY SUBMITTED this 29th day of October, 2010.



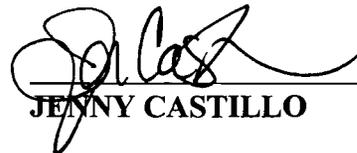
RONALD W. GREENEN, WSB #6334
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of Attorneys for Appellant

CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on the 29th day of October 2010, I served a copy of Respondent Brief to the following person(s):

Ben Shafton
Caron, Colven, Robison & Shafton
900 Washington Street, Suite 1000
Vancouver, WA 98660

By Hand Delivery



JENNY CASTILLO

10 NOV -1 AM 9:53
STATE OF WASHINGTON
BY _____
DEPUTY