

NO. 49308-0-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

ZONNEBLOEM, LLC, a Washington Limited liability company,
MANDL HOLDINGS, LLC, a Washington limited liability company,

Respondents,

vs.

BLUE BAY HOLDINGS, LLC, a Washington limited liability company,

Appellant.

APPELLANT/CROSS RESPONDENT BLUE BAY HOLDINGS, LLC'S
REPLY AND CROSS RESPONDENT'S BRIEF

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I. INTRODUCTION

The Sluyses pursue a two-pronged response to Blue Bay's appeal of the summary judgment prematurely dismissing Blue Bay's damages claim for interference with a prescriptive easement for electrical connection. The Sluyses first assign error to the grant of the easement after a trial, complaining that the element of adversity was not found. They do not assign error to any finding, but instead rely on an insubstantial technical objection. The objection fails because the Findings and Conclusions establish adversity. The applicable presumption of adversity alternatively establishes this element. And, the Sluyses do not benefit from a presumption of permissive use. This Court should reject the Sluyses' challenge to the award of the easement.

The Sluyses next argue that the undisputed facts show that no fact-finder could find unreasonable interference with Blue Bay's prescriptive rights because the Sluyses reasonably rejected the easement requested by Puget Sound Energy ("PSE") to re-install the electrical service. The reasonableness of the Sluyses' refusal to execute the PSE easement, however, is a question of fact meriting trial. Reversal of the dismissal and remand of the claim is appropriate.

Mandl also unpersuasively attempts to defend its award of Area 3, arguing that the evidence was sufficient to meet its burden of clear and

convincing evidence of the elements of adverse possession. The evidence was not sufficient and its award should be reversed and remanded.

II. REPLY IN SUPPORT OF BLUE BAY’S APPEAL

A. The Law and the Undisputed Facts Support Reversal and Remand of Blue Bay’s Damages Claim

Blue Bay has demonstrated that the Superior Court prematurely dismissed its claim for damages arising from the Sluyses’ refusal to allow PSE to re-connect the electrical lines. *See Op. Br.* 13-21. The Sluyses respond with the following three arguments: 1) the Sluyses met their burden on summary judgment, 2) Blue Bay failed to preserve the issue, and 3) on the merits no claim existed because Blue Bay “cannot require the Sluys to grant a third party an[] ex[t]ended easement in a different location.” *Resp. Br.* at V.B.5. Blue Bay addresses why these arguments fail to support the summary judgment of dismissal.¹

1. The Sluyses did not meet their burden as the moving party.

Blue Bay argued that the Sluyses failed to offer authority and argument in their global summary judgment motion on the issue of the damages claim sufficient to meet their burden as the moving party. *See*

¹ The Sluyses also argue the issue will be moot if the Court grants their appeal of the prescriptive easement for electrical power that the Superior Court awarded. Because the Court should deny the Sluyses’ appeal or at the very most remand for a finding on adversity, as argued later in this brief, the Court should reach this issue.

Op. Br. 14-15. By offering no authority, the Sluyses failed to shift the burden to Blue Bay to defend its right to proceed to trial on the claim. No relief was justified.

The Sluyses argue on appeal that they met their burden by presenting enough undisputed facts to show the absence of a genuine issue of material fact. *See Resp. Br.* 22-23 citing CP 208-10. This is incorrect for two reasons. First, the Sluyses' record citation is to their Reply Brief supporting summary judgment, but a reply comes too late to meet the moving party's burden. The initial burden concerns a party's opening motion for summary judgment. "In analyzing orders on summary judgment, this court has traditionally noted that a moving party under CR 56 bears the initial burden of demonstrating an absence of any genuine issue of material fact and an entitlement to judgment as a matter of law." *Schaaf v. Highfield*, 127 Wn.2d 17, 21 (1995) (emphasis added) (citing *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225 (1989)). Only if the moving party meets in its opening motion its burden as to both, i.e., no disputed, material facts and a legal right to judgment, does the burden shift. *Schaaf*, 127 Wn.2d at 21. To avoid reversal, the Sluyses should have demonstrated that their opening motion provided sufficient authority and argument to show an entitlement to judgment as a matter of law. They failed to do this.

Second, even in their Reply Brief (like in their motion), the Sluyses did not present a single authority to show that the claim could not survive based on the alleged facts. The Sluyses simply asserted without authority that the claim should be dismissed because “the law does not require the owner of a servient parcel burdened by prescriptive easement (plaintiffs) to grant an easement—with additional substantive terms—to a third party (PSE). . . .” CP 208-09. Assertions of law without authority fail. “Unsupported conclusional statements and legal opinions cannot be considered in a summary judgment motion.” *Marks v. Benson*, 62 Wn. App. 178, 182 (1991) (citations omitted). The Sluyses presented no authority and did not meet their burden to justify dismissal.

This Court should hold that the Sluyses’ motion was insufficient to shift the burden to Blue Bay, supporting reversal. After reaching this holding, the Court should also decide the legal issue whether the law allows the claim to avoid the necessity of a second appeal if Blue Bay were to prevail on the remanded damages claim.

2. The Sluyses fail to raise a legitimate preservation issue and this Court should fully consider all authorities.

The Sluyses incorrectly argue that Blue Bay cannot present new authorities to this Court to show that the law supports its claim. *See Resp. Br.* 24-25. The Sluyses conflate the rule that new *issues* cannot be raised

on appeal with the incorrect assertion that new *authorities* cannot be presented on appeal. Blue Bay does not insert a new issue, but simply offers additional legal authority to support its claim. If the Sluyses met their moving burden as they argue, the Superior Court properly had before it the issue whether the damages claim was insufficient for trial under the law, and that same issue is now before this Court.

New authorities *can* be presented. “Authorities not addressed below may be considered for the first time on appeal where they are pertinent to the substantive issues which were raised below.” *Miller v. United States Bank, N.A.*, 72 Wn. App. 416, n. 3 (1994) (citing *Bennett v. Hardy*, 113 Wn.2d 912, 918 (1990)). Washington courts consider new authority supporting the same legal theory presented to the Superior Court. *Greenfield v. W. Heritage Ins. Co.*, 154 Wn. App. 795, 801 (2010); *Postema v. Postema Enters., Inc.*, 118 Wn. App. 185, 195 (2003) (to determine legal issue, will consider authorities necessary “to making a proper decision”). This Court should fully resolve the legal issue in light of all authority presented.

In the alternative, RAP 2.5(a) “is written in discretionary, rather than mandatory, terms.” *Roberson v. Perez*, 156 Wn.2d 33, 39 (2005). Because a holding that considers all authorities advanced by Blue Bay will resolve this dispute and provide useful guidance, this Court should

consider them. The Sluyses assert no prejudice.

This Court should consider all authorities offered by Blue Bay to hold that a party pursuing a prescriptive easement can pursue a claim for damages for interference with that easement on the grounds alleged.

3. The law at a minimum supports trial of the claim on the undisputed facts.

Blue Bay presented sound authority in support of reversal. *Op. Br.* 15-22. In their response on the merits, the Sluyses barely address Blue Bay's authorities. This should be taken as a concession that Blue Bay's legal briefing, characterized by the Sluyses as "comprehensive and scholarly," *see Resp. Br.* 24, is correct. The Sluyses also abandon their argument made to the Superior Court that a party cannot in one action seek to establish both a prescriptive easement and damages for interference with it. The Sluyses depend solely on the argument that no fact-finder could find that their refusal to execute the PSE easement was an unreasonable interference with Blue Bay's rights. *See Resp. Br.* 25. Because this is incorrect, the claim should be remanded.

The Sluyses do not address any of the Washington law cited by Blue Bay, including *Bauman v. Turpen*, *Thompson v. Smith*, *Littlefair v. Schulze*, *Crisp v. VanLaeken*, *City of Edmonds v. Williams*, *Northwest Cities Gas Co. v. W. Fuel Co.*, and *Seattle v. Nazareus*, and the numerous Restatements. *See Op. Br.* 20. The Sluyses do not present counter-

argument to show that these authorities do not support reversal. The Sluyses do not argue that Washington would not or should not follow Restatement (Third) Property: Servitudes § § 4.9 and 4.10 (2000). In sum, the Sluyses concede the significant authorities that control and show that reversal is correct.

Although no published decision indicates that Washington courts have awarded damages for a servient owner's interference with an easement in this context, these authorities are more than sufficient. The case *Affiliated FM Ins. Co. v. LTK Consulting Services, Inc.*, 170 Wn.2d 442, 458 (2010) also illustrates in another context that easement owners whose rights are invaded or injured should have a right of action even though their interest is nonpossessory. Washington authorities permit Blue Bay's claim.

Rather than confront such authorities and address unreasonable interference with a dominant owner's rights, the Sluyses argue that Blue Bay "cannot require the Sluys to grant a third party an[] expanded easement in a different location." *Resp. Br.* 25. The Sluyses offer no authority to support this assertion. *See Resp. Br.* 26. This is not the issue anyway. Blue Bay has not sought to force the Sluyses to grant an easement, and whether it could receive that relief is not before this Court. Rather, Blue Bay has sought damages for their unreasonable refusal to do

so. The Sluyses offer no briefing, authority or argument that damages cannot be awarded if the refusal to grant the easement was an unreasonable interference with Blue Bay's rights.

Regarding the law, the Sluyses attempt to distinguish only the California case, *Dolnikov v. Ekisian*, 222 Cal. App. 4th 419 (2013), on the basis that it concerned an express, written easement whereas this case concerns a prescriptive easement. *See Resp. Br.* 27. The Sluyses fail to explain why that distinction alters the analysis in *Dolnikov* whether a servient owner's refusal to sign off on building permits sought by the dominant owner unreasonably interfered with the easement rights. The analysis should be the same regardless of the origin of the easement rights.

Dolnikov is useful guidance in this case primarily because it shows that a servient owner cannot escape its obligations simply by asserting that it has no duty to cooperate with third parties, grant permission or sign documents necessary to further a dominant owner's rights. *Dolnikov* demonstrates that whether the servient owner's actions were reasonable is a question of fact. *Dolnikov*, 222 Cal. App. 4th at 430. The Court should adopt this approach.

The Sluyses also overlook Blue Bay's citation at page 20 of its Opening Brief to *Fyfe v. Tabor*, 860 N.W.2d 415 (Neb. 2015), where the Nebraska appellate court similarly affirmed the trial court's judgment that

both granted the *prescriptive* easement and awarded damages for interference with it. 860 N.W.2d at 420, 429-30.

The Sluyses also attempt to distinguish *Dolnikov* by arguing that the servient owner's refusal to sign off on the building permits is not like their refusal to sign off on an easement to PSE because they were asked to take actions they consider more onerous: sign an *easement* not just a building permit, "expand the use of the easement," and "relocate" the easement. *See Resp. Br.* 27. Again, whether their refusal was reasonable is a question of fact. Further, their arguments are belied by the unchallenged findings since entered. After the summary judgment hearing and the trial, the Superior Court awarded the prescriptive easement along a slightly adjusted route (CP 473 at 4 (Judgment), 476-77) and entered findings to which the Sluyses did not assign error that the proposed route for re-connection of the power constituted "a very minor shift" and was "a reasonable use of the power easement area," and that "Mandl was unwilling to grant the easement unless it had a termination clause." CP 463 at FF 6.C and 6.D. These findings are binding on remand and support the ultimate conclusion that refusal to execute the PSE easement was unreasonable.

Even if the issue were not constrained by these binding findings, the Sluyses' new contentions on appeal are likely to be rejected by any

fact-finder. The summary judgment record showed that Mandl did not refuse to execute the PSE easement for the reasons argued now to this Court that PSE required a new easement for an “expanded,” “relocated” use. PSE had accepted Mandl’s counter-proposal for the easement wherein *Mandl consented to both the 4 foot width and the adjusted location.* CP 76 ¶ 3, 96 ¶ 3 (on this exhibit, the bolded language is PSE’s). The sole term desired by Mandl to which PSE could not agree, which resulted in Mandl’s refusal to execute the easement, was a termination clause. CP 96 ¶ 5. Mandl’s argument today contradicts those facts.

In addition, Mandl does not argue to this Court that its insistence on a termination clause could be judged reasonable or is supported by law. The Sluyses fail to rebut Blue Bay’s argument and authorities showing that the Sluyses’ insistence on a termination clause was not reasonable as a matter of law. *See Op. Br.* 18-19 (“But the Sluyses had no right to terminate Blue Bay’s prescriptive easement, and therefore, no right to require a termination clause with PSE.”) and cited authorities.

A court may grant summary judgment on a claim when no reasonable fact-finder could find from all the evidence for the plaintiff. *See Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982); *Morris v. McNicol*, 83 Wn.2d 491, 494-95 (1974). This rule does not support the dismissal. A reasonable person could conclude on numerous

grounds that the Sluyses unreasonably refused to execute the PSE easement and interfered with Blue Bay's rights. Insistence on a termination clause was not reasonable as a matter of law, and this Court should so instruct. Because this has already been determined to be the reason the Sluyses refused to grant the easement, this Court should direct a judgment of liability *to Blue Bay* and remand the issue for a damages trial. If not, this Court should reverse dismissal and remand the claim.

B. Reversal of the Award of All of Area 3 Is Justified Because, Contrary to the Sluyses' Argument, Witness Testimony Did Not Satisfy Their Burden

Blue Bay seeks reversal of the adverse possession award of Area 3 to Mandl. *See Op. Br. 2*, Assignment of Error 2. The Superior Court should have awarded only the physical encroachments (Mandl's building encroachment and the retaining wall) because Mandl failed to meet its burden of proof as to any other portion of Area 3. *Op. Br. 22-28*.

Mandl argues that the testimony of Marion Sluys and Ms. Mattson supported the findings that Area 3 was used and maintained as part of the Sluyses' property. *Resp. Br. 32*. To support that contention, Mandl refers to Finding 4C concerning a former footbridge and argues these findings are supported by Marion Sluys's testimony. But Mr. Sluys's testimony never established where the footbridge had been. No pictures of it exist. The testimony concerning the footbridge does not sufficiently establish its

location and cannot support award of any portion of Area 3. At most, the testimony could show (but not by substantial evidence) that the footbridge was along the eastern edge of Area 3. This is insufficient to support the award of all of Area 3.

Mandl next argues that Ms. Mattson's testimony about occasional blackberry removal, a vague observation that Marion's "contractors" were in the vicinity, and the removal of a plum tree at the tip of the triangle constitutes substantial evidence to support the award of all of Area 3. *See Resp. Br.* 34 citing VR 61, 82, 116 and 70. This testimony, however, does not establish exclusive use, uninterrupted use or hostile use. The testimony does not establish "use" like an owner and does not touch and concern the entire triangle.

Mandl argues that "witnesses" addressed the area where the new HVAC system was recently installed. *See Resp. Br.* 34 citing VRP 114-15. This testimony is insufficient not only because the location was extremely vague, but also because the testimony does not describe activity of the level of "use" of an owner, as opposed to a neighbor. The HVAC system itself was only recently installed, so such testimony cannot be considered.

Mandl argues, repeating a conclusion of the Superior Court, that Blue Bay presented no testimony "to counter" Mandl's testimony. Blue

Bay has sufficiently addressed the Superior Court's conclusion that Blue Bay did not "rebut" Mandl's evidence. *See Op. Br.* 26-27. Further, the Court should not shift the burden to Blue Bay. Blue Bay had no obligation to rebut Mandl's insufficient evidence. Blue Bay had no obligation to engage in such a back-and-forth (e.g., by asserting that if Mandl occasionally cut blackberry bushes in the vicinity of the Mandl building, Blue Bay's predecessors cut blackberry bushes a little more than Mandl). As the case *ITT Rayonier*² demonstrates, this type of use is not sufficiently exclusive. The evidence did not demonstrate that Mandl's alleged use excluded Blue Bay's predecessors from Area 3.

Unlike Mandl, Blue Bay as the record owner was not required to demonstrate *any* use at all of this very unusable area. For an adverse claimant, however, more is necessary than the vague and inadequate testimony presented by Mandl to divest Blue Bay of title. A successful adverse possession claim cannot easily be made for land that is not particularly useable and was, in fact, not used by the claimant to the extent necessary to prevail. This describes Area 3. As Daniel Sluys testified, he never gave Area 3 "a whole lot of notice."

Blue Bay concedes that in the appropriate adverse possession case,

² *ITT Rayonier, Inc. v. Bell*, 112 Wn.2d 754, 758 (1989), cited in *Op. Br.* 27.

the trial court may “create a penumbra of ground around areas actually possessed when reasonably necessary to carry out the objective of settling boundary disputes.” *See Resp. Br. 30*, citing *Lloyd v. Montecucco*, 83 Wn. App. 846, 853-54 (1996). In *Montecucco*, the trial court drew a straight line rather than have a jagged line demarcate what became two lots. *Id.* at 857. This practical approach was not needed here, however, and the Sluyses make no argument that it was. Nor did the trial judge find that it was reasonably necessary to award all of Area 3 together as one parcel. The rule described in *Montecucco* does not obviate a claimant’s burden to prove adverse possession of the property in question. A claimant cannot win an area greater than what the substantial evidence showed he possessed simply by over-describing it. That occurred here.

An issue of “access” to Area 3 is a red herring. Mandl offers no authority to demonstrate the legal relevance of access, which is not an issue relevant to adverse possession. *See Lee v. Lozier*, 88 Wn. App. 176, 184 (1997) (prescriptive rights do not involve elements of necessity or mutuality). Area 3 is contiguous to and part of Blue Bay’s parcel. As record holder, Blue Bay is entitled to keep it unless Mandl met its burden, which it did not.

Mandl argues that the award of Area 3 to Mandl meets the objectives of adverse possession to promote the maximum use of land.

Resp. Br. 36. This objective only arises when a claimant actually used the land. It is backward-looking, not forward-looking. Mandl would like to exclusively use Area 3 now that it has recently installed a new HVAC system there. But Mandl was not actually, continuously, adversely or exclusively using Area 3 previously, apart from the undisputed physical encroachments. On these facts, the law requires that Area 3 remain the property of the record holder.

III. RESPONSE OPPOSING THE SLUYSES' APPEAL AND SUPPORTING AFFIRMANCE OF THE AWARD TO BLUE BAY OF A PRESCRIPTIVE EASEMENT FOR ELECTRICAL AND CABLE TRANSMISSION LINES

Blue Bay opposes the Sluyses' assignment of error to the award of a prescriptive utility easement for electrical and cable transmission lines. *See Resp. Br.* 3. *See also* CP 467 ¶ 8 (award); CP 476-77 (new legal descriptions). The Court should affirm that award.

A. Issues Pertaining to Assignment of Error

1. Should this Court affirm the award of a prescriptive easement to Blue Bay because the element of adversity is supported by the findings and conclusions, or by a presumption of adversity?

2. If an express finding is necessary on the single element of adversity because it is not implied and this Court cannot infer it, should the Court remand the issue?

B. Factual Clarifications

The Sluyses do not challenge any findings.

The Court granted Blue Bay a utility easement for electrical and cable transmission lines from the existing utility pole to the Blue Bay Building, quieting title to the easement in Blue Bay against the Zonnebloem Parking Lot and the Mandl Building. CP 473 at 4 (Judgment), 476-77. Blue Bay's lot had obtained electrical power service over this route for more than forty years. CP 462 at FF 6.A.

C. Standard of Review

The parties agree that, as with an adverse possession award, an award of a prescriptive easement presents a mixed question of law and fact, with the factual findings reviewed for substantial evidence and the legal conclusions reviewed *de novo*. See *Resp. Br. 16*, citing *Petersen v. Port of Seattle*, 94 Wn.2d 479, 485 (1980). Here, however, the Sluyses do not assign error to any findings. Whether use is adverse is a question of fact. See *Northwest Cities Gas Co. v. W. Fuel Co.*, 13 Wn.2d 75, 84 (1942).

D. Argument Supporting Affirmance

The findings and conclusions support the award of the prescriptive utility easement. The Sluyses challenge only whether the Superior Court found adversity. See *Resp. Br. 16-21*. Because it did, this Court should

reject the Sluyses' appeal. This Court should also deny their appeal because the unchallenged findings demonstrate adversity and allow this Court to infer it. The unchallenged findings meet Blue Bay's burden. As a third basis to affirm, Blue Bay benefits from a presumption of adversity under *Cuillier v. Coffin*, 57 Wn.2d 624 (1961), while the Sluyses do not benefit from a presumption of neighborly accommodation under *Gamboa v. Clark*, 183 Wn.2d 38 (2015). If necessary, the Court should remand for an express finding regarding adversity, although this is not necessary because the findings and conclusions and the applicable presumption of adversity resolve the issue in Blue Bay's favor.

The principal purpose of prescriptive easements "is to protect long-established positions." *Kunkel v. Fisher*, 106 Wn. App. 599, 603 (2001). The award satisfies this purpose where the Blue Bay lot, situated on prime commercial property in downtown Poulsbo, has relied since "prior to 1971" on utility lines essential to its commercial purposes that cross the Sluyses' properties. CP 462 at FF 6.A.

1. The award of a prescriptive power easement to Blue Bay is amply supported by the findings.

The findings directly resolve adversity if reasonably construed, or at a minimum support an inference of adversity sufficient to meet Blue Bay's burden. This is true regardless of any potentially applicable

presumptions.

“Possession is adverse if a claimant uses property as if it were his own, entirely disregards the claims of others, asks permission from nobody, and uses the property under a claim of right.” *Lee v. Lozier*, 88 Wn. App. 176, 182 (1997). The law also holds that declarations of intent from users are not determinative, but evidence of their conduct is, stating,

It is not necessary to the establishment of a prescriptive right that the claimant make declarations of an adverse intent during the period upon to establish such right, or that he testify later that his intent was of that character; the intentions and attitudes of the parties may be shown by evidence as to their conduct relative to the use of the right of way in question.

Northwest Cities Gas Co. v. W. Fuel Co., 13 Wn.2d at 87-88. Even a declaration by a user that he had no adverse intent will not terminate a prescriptive right. *Id.* at 88 (“A prescriptive right, once acquired, cannot be terminated or abridged at the will of the owner of the servient estate, nor even by the oral admission of the easement claimant that his use was not, and is not, adverse.”). The Sluyses cannot avoid the award by asserting that Blue Bay failed to submit testimony of intent by Blue Bay’s successors, or by referencing statements of Jim Cecil during the 2012/2013 construction when he believed re-connecting power to his lot would not be an issue. The fact of adverse use *over the prescriptive period* demonstrates adversity, including evidence of “the nature and

location of the property involved,” which are “material considerations.” *Northwest Cities Gas Co.*, 13 Wn.2d at 88. “Failure on the part of the owner of the servient estate to interrupt the user of a right of way across his land by another is strong evidence that the parties thought that the way was used as a matter of right [meaning, adversely].” *Id.*

- a. This Court should reject the Sluyses’ formalistic argument because the finding is sufficiently stated or implied.

The Superior Court found adversity. To construe the Findings of Fact and Conclusions of Law (CP 456-467) any other way is not reasonable. The Superior Court correctly identified the elements of a prescriptive easement that a claimant must show including that “the use was adverse to the landowner,” CP 467 at CL 6 at (4), and concluded that Blue Bay had “established” its claim for a prescriptive utility easement. CP 467 at CL 8 (“Blue Bay’s claim for a declaratory judgment for a prescriptive easement for electrical and cable hookup from the PSE power pole to the Blue Bay building is granted.”), CP 463 at FF 6.G. (“Blue Bay has established that it is entitled to a prescriptive easement for power from the PSE power pole directly to a strike on the Blue Bay building.”), and CP 464 at FF 6.I (“Blue Bay has established that it is entitled to a

prescriptive easement for cable from the pole to the Blue Bay Building.”).³

This is a sufficient expression that Blue Bay established adversity.

The Sluyses have offered no authority to show that this is insufficient or that the Superior Court must express its finding differently. To the extent that the Superior Court did not state the finding as expressly as the Sluyses would wish, the Sluyses’ assignment of error is overly formalistic.

The Sluyses having failed to argue that substantial evidence does not support the finding of adversity, no additional analysis is necessary and this Court should deny their appeal.

- b. Explicit findings also demonstrate sufficient adversity to meet Blue Bay’s burden, and this Court should infer the finding of adversity.

If this Court is not satisfied that the Superior Court found adverse use, other explicit findings demonstrate adversity. On the basis of these express findings, this Court should hold the element of adversity is satisfied because it can be inferred. The Sluyses at most raise only

³ The Superior Court was aware that permissive use prevents prescriptive rights, rejecting Blue Bay’s claim for an access easement across Zonnebloem’s parking lot because the use was “permissive” and “consistent with neighborly accommodation or sufferance.” CP 464 FFCL 7.D. *See also* 7.F (Blue Bay’s access across parking lot was neighborly accommodation and not adverse). The Court tellingly did not make this same finding as to the prescriptive easement but instead concluded that all elements were met.

harmless error. See *State v. Banks*, 149 Wn.2d 38, 46, 65 P.3d 1198 (2003) (“The omission of an essential element [] from the findings and conclusions in a bench trial are errors that are subject to harmless error analysis.”); *Douglas Northwest v. O’Brien & Sons Constr.*, 64 Wn. App. 661, 682 (1992) (“[W]e decline to treat the absence of a finding on the reliance issues as the presumptive equivalent of a negative finding on those issues and hold that under the circumstances of this case, the absence of the findings is harmless error.”); *W.L. Reid Co. v. M-B Contractors Co.*, 46 Wn.2d 784, 791 (1955) (same). The Supreme Court in *Banks* concluded that an appellate court could infer a finding from the other findings and conclusions that were entered. *Id.* It reversed the Court of Appeals, which had remanded the case for absence of an express finding. *Id.* at 46-47. This Court should conclude that it can infer the finding of adversity, and any error is harmless.

The findings demonstrate adversity according to *Northwest Cities Gas Co.*, *supra*. They establish first the location of the properties, demonstrating that Mandl’s building is south of the Zonnebloem Parking Lot and the hiatus (Area #4). CP 457 at FF 1.A, 1.B, and 1.C., and 2.H. Blue Bay’s commercial building lies south of the Zonnebloem Building, north of the Mandl Building, and west of the Zonnebloem Parking Lot. CP 457 at FF 1.C. See Exhibits 2, 4 and 45. The Court further found that

“[f]rom prior to 1971, Puget Power (“PSE”) electric power reached the Mandl building and old Blue Bay building via a wire from a power pole located outside but within one foot of the Hiatus, as illustrated on Exhibit 2 and Exhibit 37—to a strike on the Mandl building.” CP 462 at FF 6.A. *See also* Ex. 2 (handwritten explanations show route of power connection), Ex. 37. The current power pole in the corner of the Zonnebloem Parking Lot was installed in 1975. CP 462 FF 6.A. “TV cable was strung along the same route.” CP 462 FF 6.A.

The Superior Court also found that “[a]ll witnesses testified that electrical power went from the PSE power pole to the Mandl building strikes and then to the old building on the Blue Bay parcel.” CP 463 at FFCL 6.B. Similarly, the Superior Court found that witnesses Eric Waltenburg and Roberto Soltero, predecessors to Blue Bay, established that cable similarly serviced the Blue Bay Building. CP 464-65 at H. Further, the Court did not find any permission from the Sluyses for this longstanding and invasive utility service but observed the opposite, noting that Marion Sluys testified he was unaware of the cable lines despite their uncontested open and notorious nature. *See* CP 463-64 at FF 6.H. The Sluyses do not challenge the element of continuous use, establishing lack of interruption during the prescriptive period.

Where the use shown over the prescriptive period was use like an

owner, i.e., inconsistent with an owner's rights, it supports an inference of adversity. *Lee v. Lozier*, 88 Wn. App. at 183-85, n. 2 (citing *Chaplin v. Sanders*, 100 Wn.2d 853, 860-61, 676 P.2d 431 (1984)). Here, adversity is shown by the nature of the use over the prescriptive period, the location of the properties and the actual physical invasions represented by the utility lines and the electricity and signals they carried to Blue Bay's lot.

The utility route was usurped and used like an owner. The usurped route included the lines across the Sluyses' properties and their extension to Blue Bay's property. The use was invasive. Electricity and cable signals ran constantly across the Sluyses' property and were delivered to the Blue Bay property. These facts demonstrate an appropriation of the neighboring properties to provide utility service to the Blue Bay parcel. These circumstances show adversity.

The unchallenged findings demonstrate a more compelling case of adverse use than many right of way cases where use of road built by the record owner was occasionally or temporarily shared by a neighbor. It is undisputed and unchallenged that for far longer than 10 years a physical use and invasion of the Sluyses' properties occurred to supply power and cable to the building now owned by Blue Bay. The use was not limited to a road built by the record owner, but involved use of equipment installed and used for the direct benefit of the Blue Bay commercial building.

Moreover, even as to road cases, the circumstances here are similar to those where a prescriptive easement has been found. For example, in *Northwest Cities Gas Co.*, the appellate court reasoned that the unchallenged facts supported the element of adversity where the use was not “mere” occasional travel but included the claimant’s installation of a “deliberately laid out” road used “regularly” and as if “the land had been its own,” and with an absence of objection. *Id.* at 90-91. The appellate court adjudged the entirety of the evidence in that case “strong” and “ample.” *Id.* at 91. Here, the evidence shares sufficient similarities to support the conclusion that the unchallenged appropriation demonstrates adversity, i.e., deliberately laid lines and cables installed for regular and constant use by Blue Bay’s predecessors, carrying and delivering essential services to Blue Bay as if the route were across its own land, and with an absence of objection. This was not “mere” occasional travel.

The United States Supreme Court in the context of takings law has recognized the significant, adverse character of a physical occupation of another’s property by utility lines and wires. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (cable connections represent a physical invasion that restricts the use of an owner’s domain). The U.S. Supreme Court characterized such a physical occupation as “perhaps the most serious form of invasion of an owner’s property interests.” 458 U.S.

at 435. Blue Bay does not argue that takings law controls the issue. This authority demonstrates that the physical use of the Sluyses' property to supply Blue Bay's lot with power and cable is significant and contrary to their interests as owners.

The findings and legitimate inferences therefrom support an ultimate finding of adversity. They show that Blue Bay met its burden. This Court should affirm.

2. Blue Bay benefits from a presumption of adversity.

Affirmance is also supported because these same facts establish that Blue Bay benefits from a presumption of adversity.

In *Northwest Cities Gas Co.*, the Supreme Court established that where all other elements of prescriptive right have been shown, a presumption exists that the use was adverse, as follows:

[P]roof that the use by one of another's land has been open, notorious, continuous, uninterrupted, and for the required time, creates a *presumption* that the use was *adverse*, unless otherwise explained, and, in that situation, in order to prevent another's acquisition of an easement by prescription, the burden is upon the owner of the servient estate to rebut the presumption by showing that the use was permissive.

Northwest Cities Gas Co. v. W. Fuel Co., *supra*, at 85 (emphasis original).

The Supreme Court in 2015 described this presumption of adverse use as one "created when a claimant meets all of the elements of a prescriptive easement other than adverse use 'unless otherwise explained.'" *Gamboia*,

183 Wn.2d at 46. The Supreme Court did not overrule this presumption. *Id.* *Gamboa* and *Northwest Cities* are consistent decisions. The Sluyses concede that all the other elements were met, so the presumption applies. And, the Sluyses argue neither that they “otherwise explained” the use, or that they rebutted the presumption.

The conclusion that a presumption of adversity applies is consistent with *Cuillier*, where the Supreme Court held that a fact-finder may draw an inference of adversity from evidence establishing a use without formal permission for the prescriptive period that goes unchallenged. 57 Wn.2d at 627. Therefore, *Cuillier* similarly supports the presumption (or inference) of adversity in Blue Bay’s favor.

3. The Sluyses do not benefit from a presumption of neighborly accommodation

The Sluyses do not benefit from a presumption of neighborly accommodation, contrary to their argument. *See Resp. Br.* 18-19. Precedent including *Gamboa, supra*, does not support it.

First, the Sluyses do not benefit from a presumption of permissive use generally applicable to unenclosed land as described in *Gamboa* at 44 with reference to *Roediger v. Cullen*, 26 Wn.2d 690, 707-11 (1946), because no path or road is at issue and the land is not unenclosed within the meaning of these cases. The presumption necessarily concerns a “path

or road” travelled *by the user* as a convenience and the use is necessarily abbreviated, temporary or minimal. The *Roediger* court explained the rationale that acquiescence to use of a road should not result in forfeiture of title to promote neighborhood generosity within reason:

“ . . . we see no more than the usual accommodation between neighbors that marked the settlement of the public domain. Until roads are lawfully established, as said by one of the witnesses, “they [meaning the public] must go somewhere,” and by common consent the pioneer settling in front of another has usually been willing that his neighbor should continue his way over the land occupied by him. To charge the owner with acquiescence, or to credit the user with an adverse intent, would put a penalty upon generosity, and consequently, . . . destroy all neighborhood accommodation.”

26 Wn.2d at 712, citing *Schulenbarger v. Johnstone*, 64 Wash. 202 (1911). Under this rationale, the owner should not have to adopt a “dog in the manger” attitude when he could extend a great convenience to his neighbor by allowing the neighbor to temporarily cross the owner’s undeveloped, unenclosed or uncultivated lot. 26 Wn.2d at 709-10.

This rationale and, therefore, the presumption, does not apply to the case at bar. The facts are materially dissimilar. The Sluyses concede that no road is at issue. *See Resp. Br.* 20 (“[T]his case does not deal with a road.”) As already discussed, the intrusions are not of a like nature. This case concerns the deliberate and permanent use of transmission lines installed across the Sluyses’ property that deliver a constant stream of necessary utilities to Blue Bay’s lot. It is unlike the permissive, temporary

use of an owner's path or road addressed in *Roediger*. It is also unlike *Kunkel v. Fisher*, 106 Wn. App. 599 (2001), which concerned the traditional concept of travel across the owner's land to reach the back of the user's property.

Additionally, the Sluyses' land did not have a fence around it, but it should not be considered "undeveloped, unenclosed or uncultivated" land as addressed in *Roediger*. The properties are developed lots in downtown Poulsbo in close proximity to other commercial lots,⁴ not the type of property amenable to the presumption described in *Roediger*. The character of the land and the use at issue do not fit the rationale of *Roediger* and do not support the presumption.

As to the second presumption noted in *Gamboa*, it can apply to enclosed or developed land (like this) when "it is reasonable to infer that the use was permitted by neighborly sufferance or acquiescence." *Gamboa*, 183 Wn.2d at 44, 50-51 ("We hold that an initial presumption of permissive use applies to enclosed or developed land cases in which there

⁴ A commercial building sat on the Mandl lot. CP 457 at FF 1.B. The Zonnebloem Parking Lot was a paved parking lot adjacent to commercial and residential buildings with a propane tank and utility installations. See CP 459 at FF 3.B., 3.C., 3.D. (citing Exhibits 4 and 45), 3.H. Blue Bay obtained title to the hiatus over which the power lines cross, but Mandl won it by adverse possession in the trial subject to the easement. CP 461-62 at FF 5.A.-E; CP 466 at CL 4. Mandl had improved the hiatus with concrete and an oil tank. CP 462 at FF 5.C., 5.D.

is a reasonable inference of neighborly sufferance or acquiescence.”). Here, it would not be reasonable to infer that the use at issue was permitted by neighborly sufferance or acquiescence. The use by Blue Bay’s predecessors is simply of a different, more invasive and permanent character. The Superior Court recognized this when it rejected Blue Bay’s traditional pedestrian access claim across the Zonnebloem Parking Lot, holding that the use was permissive (which Blue Bay did not appeal), but granted the utility easement claim because the circumstances strongly show adversity, i.e., the usurpation of the neighboring properties for utility lines and connection. The former falls readily into *Gamboa*, but the latter does not.

It is not reasonable to infer “the usual accommodation between neighbors” for such an invasive and vital use as the conveyance of electrical power and cable service across one owner’s property to the property of another. Neighbors do not usually allow a constant and physical invasion of their properties to suit the needs of neighbors, including the installation and maintenance of utility lines. The essential utility connections necessary to the commercial functions of the Blue Bay parcel are fundamentally unlike occasional travel by a people of a road or a footpath across a parcel. The outright, constant, and physical use of the neighbors’ properties for the delivery of utilities is not a neighborly

courtesy and, in the words of the *Gamboa* court, is “clearly adverse to the owner of the land[.]” *Gamboa*, 183 Wn.2d at 48. The type of use made by Blue Bay’s predecessors goes beyond neighborly courtesy and constitutes physical appropriation.

Finally, the third presumption of permissive use does not apply: “when the evidence demonstrates that the owner of the property created or maintained a road and his or her neighbor used the road in a noninterfering manner.” *Gamboa*, 183 Wn.2d at 44, citing *Cuillier*, 57 Wn.2d at 627. As already noted, the Sluyses conceded no road is at issue. *See Resp. Br.* 20. Blue Bay’s utility lines and their extension to the Blue Bay parcel represent a direct and permanent invasion of the Sluyses’ properties unlike mere and occasional use of a neighbor’s pre-existing road or path.

If the Sluyses are entitled to any presumption of permissive use, the evidence defeated it. The Sluyses concede a presumption of acquiescence can be overcome by evidence that “the user was adverse and hostile to the rights of the owner....” *Resp. Br.* 20-21. *See also Gamboa*, 183 Wn.2d at 51-52 (citing *Northwest Cities Gas Co.*, 13 Wn.2d at 87 (citing 2 THOMPSON, Real Property (Perm. Ed. 1939) 111, § 523). Based on the evidence already discussed, Blue Bay overcame any presumption.

The circumstances established by this record support the Superior Court’s conclusion that the use by Blue Bay’s successors was adverse to

the ownership interests of the Sluyses.

4. This Court alternatively should remand for a finding on the single element of adversity.

If the Court finds the record inadequate to determine whether the disputed element of adversity was met, it should remand the matter.

CR 52(a)(1) requires findings as a result of a bench trial. When the findings are inadequate, the matter should be remanded to the trial court for either (1) new argument, (2) new findings or (3) a new trial. *Wold v. Wold*, 7 Wn. App. 872, 877, 503 P.2d 118 (1972). “By remanding a cause to the trial court for elucidation, a missing material fact may be supplied and then reviewed on appeal.” *Id.* (citing *Mertens v. Mertens*, 38 Wn.2d 55 (1951)). The Court of Appeals concluded that findings on a material fact should be found by the trial court on remand where incomplete if they cannot be ascertained from the record, stating,

[W]here findings are incomplete or defective so that doubt exists as to the theory on which the case was decided, the doubt may be resolved by reference to the oral or memorandum decision of the trial court. If, however, the court’s actual findings on a material fact cannot be ascertained from the record, then the appellants are deprived of an opportunity to challenge those findings. This is the situation before us.

Wold, 7 Wn. App. at 877.

If the Court determines that the findings and conclusions lack material findings regarding the element of adversity that cannot be

ascertained from the record, this Court should remand.

IV. CONCLUSION

The Superior Court was correct to award Blue Bay a prescriptive utility easement. A fact-finder should determine whether the Sluyses unreasonably interfered with that easement, because the law strongly supports the damages claim, as do the facts. The Sluyses' physical encroachments into Area 3 are the only portions that they adversely possessed.

Dated: February 1, 2017.

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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on 1st day of February, 2017, I arranged for service the foregoing **APPELLANT/CROSS RESPONDENT BLUE BAY HOLDINGS, LLC'S REPLY AND CROSS-RESPONDENT'S BRIEF** on the following party via E-Mail by agreement:

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February 01, 2017 - 12:02 PM

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