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DIVISION II

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STATE OF WASHINGTON

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COURT OF APPEALS – DIVISION II
OF THE STATE OF WASHINGTON

ZONNEBLOEM, LLC and MANDL HOLDINGS, LLC,

Respondents and Cross-Appellants,

v.

BLUE BAY HOLDINGS, LLC,

Appellant and Cross-Respondent.

**OPENING BRIEF OF RESPONDENTS AND CROSS-
APPELLANTS**

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I. INTRODUCTION

Blue Bay Holdings, LLC (“Blue Bay”) bought an old commercial building in Poulsbo. On each side of that building were properties owned by Mandl Holdings, LLC (“Mandl”) and Zonnebloem LLC (“Zonnebloem”). Mandl and Zonnebloem are owned by members of the Sluys family.¹

When Blue Bay demolished its building to build a new one, the parties learned that the lines of occupation and use of their properties did not match their legal descriptions. Blue Bay also lacked recorded, express, easements for access and utilities over the Sluys’ properties.

The Sluys sued to quiet title to five small encroachments. Three they claimed as their own. Two they held record title to, but acknowledged Blue Bay’s historical use and occupation, and asked these areas be quieted in Blue Bay.

Blue Bay denied the Sluys’ claims to quiet title and counterclaimed. It did not acknowledge any of the Sluys’ claims, and sought title to all five

¹ Zonnebloem is also owned by Stephanie Richards. Zonnebloem and Mandl are referred to collectively as “Sluys.”

areas and prescriptive easements for utilities and access. Blue Bay also claimed damages because the Sluys did not grant a utility easement to Puget Sound Energy (“PSE”).

The Sluys moved for summary judgment on the damages claim because there was no evidence to show any obligation to grant an easement to PSE. Finding Blue Bay had not established a claim for damages, the trial court dismissed that claim.

Later, after a bench trial, the court resolved the boundary disputes largely as requested in the Sluys’ amended complaint.

On Blue Bay’s counterclaims, the court also resolved the disputes largely in favor of the Sluys. It denied Blue Bay’s request for a propane easement. It denied the claim for an access easement, finding it was reasonable to infer neighborly sufferance or acquiescence.

Despite the finding of neighborly acquiescence regarding the access easement, the court granted Blue Bay’s prescriptive utility easement claim. But it made no finding that the prior use was adverse, or that it was reasonable to infer adversity. There was no evidence at trial of adversity. The trial court erred by granting a prescriptive easement.

The trial court's denial of a damage claim, and judgment quieting title to the five small parcels should be affirmed. Because its conclusion regarding a prescriptive easement is not supported by any finding or evidence of adversity, it should be reversed.

II. ASSIGNMENT OF ERROR

The trial court erred by concluding Blue Bay is entitled to a prescriptive easement, and entering judgment in favor of Blue Bay granting a prescriptive utility easement, where the evidence presented at trial, and the trial court's findings of fact, do not support that conclusion and judgment. (CL 8, CP 467).

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

Did the trial court err by concluding Blue Bay had a prescriptive utility easement when it did not make any finding that Blue Bay's predecessor's use was adverse?

IV. STATEMENT OF THE CASE

A. FACTS

1. The Sluys and Blue Bay own adjacent commercial properties.

Dan Sluys and Stephanie Richards own Zonnebloem.² Mandl is owned by Marion and Loretta Sluys.³ Dan is Marion and Loretta's son.⁴

Mandl and Zonnebloem both own improved commercial properties in Poulsbo.⁵ They are referred to as the Mandl building and the Zonnebloem building.⁶ Between these buildings is Blue Bay's building.⁷ Blue Bay is owned by Jim and Erika Cecil.⁸ Each of the three buildings abut Front Street. Zonnebloem owns a parking lot behind the buildings.⁹

² CP 457, FF 1. A.

³ Id. FF 1. B.

⁴ Id. FF 1. A. First names are used to avoid confusion. No disrespect is intended.

⁵ CP 457, FF 1-2.

⁶ Id.

⁷ CP 458, CP 542-543.

⁸ CP 457, FF 1.C.

⁹ CP 451-454 (Exhibit 63).

2. The Sluys have a long history in Poulsbo, and have been familiar with the area at issue for decades.

Marion ran Sluys Bakery for about 40 years from 1966.¹⁰ The bakery is next to the Mandl building.¹¹ Marion and Loretta bought the Mandl building in 1971.¹² The building's footprint has not changed since then.¹³ They bought the Zonnebloem building and the parking lot in 2001 and transferred it to Zonnebloem in 2005.¹⁴

On Blue Bay's property was an old one-story structure that housed various businesses.¹⁵ It shared walls with the Zonnebloem building.¹⁶ The prior owners and tenants of those businesses got along well with the Sluys.¹⁷

¹⁰ VRP 35.

¹¹ VRP 35.

¹² VRP 35.

¹³ VRP 157.

¹⁴ CP 457.

¹⁵ CP 457-458. FF 2.C.

¹⁶ VRP 294.

¹⁷ VRP 57-58.

3. Blue Bay purchased its property in 2012 and begins its project to demolish and replace the old building.

Blue Bay purchased its lot in 2012 and decided to demolish and replace the old building.¹⁸ To do so it removed the electrical service from both the old Blue Bay building and the Mandl building.¹⁹

4. The Blue Bay building's electric line ran over the Sluys' property.

The old Blue Bay building and Mandl building were served by wires for electric and cable from a pole on the Sluys' property to a strike²⁰ on the Mandl building.²¹ A line then went down the side of the Mandl building and connected to the old Blue Bay building.

¹⁸ CP 457, FF 2.C.

¹⁹ VRP 78-79, CP 219.

²⁰ A "strike" is a physical connection of a power line to a box on the building. VRP 76.

²¹ CP 462-463, FF 6. A; VRP 77.

Because Blue Bay's new building would block where the electrical lines hit the Mandl building,²² Blue Bay's contractor told Marion he would have to relocate his strike or it would no longer be accessible.²³

Marion paid a contractor to move the strike to a new location on the Mandl building.²⁴

To resolve various issues that had arisen regarding the demolition of the old building and the new construction, the Sluys and Mr. Cecil met on April 24, 2014.²⁵ At the meeting, Marion asked Mr. Cecil if he needed any accommodation for the electric line. Mr. Cecil told him it was taken care of.²⁶ Despite the willingness Marion had expressed to work with Blue Bay to make sure it had power, four days later Mr. Cecil wrote to his contractor, "***I hope that we can get electricity in the front*** or another way. Marion will

²² VRP 78

²³ Id.

²⁴ Id.

²⁵ VRP 301-302.

²⁶ VRP 293.

never let it go over his property.... unless that I prove it is not his property.”²⁷

Marion attempted to negotiate an easement with PSE.²⁸ PSE required at least four feet, increasing the scope of the historical use. The easement would also have to be moved, and add substantive terms.²⁹ Marion did not agree to the proposal.³⁰ Because it could not go in from the back, electric was eventually provided to the Blue Bay Building just as Mr. Cecil had hoped, through the front.³¹

At trial, Blue Bay asked that the location of the power line be shifted from its historical route so it went directly to the Blue Bay building.³² Jim Cecil conceded the route they sought was not the historical route.³³

There was no evidence the historical utility lines serving the Blue Bay property were adverse to the Sluys. The trial court made no such

²⁷ CP 581-582 (Emphasis added); VRP 308.

²⁸ CP 61-62.

²⁹ CP 95-97; 558-560.

³⁰ CP 62.

³¹ VRP 219.

³² CP 463, FF 6.C, F.

³³ VRP 310.

finding.³⁴ Regarding other uses the court found, “it is reasonable to infer the use was permitted by neighborly sufferance or acquiescence.”³⁵

The trial court made no contrary inference regarding the utility lines but concluded, “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.”³⁶

5. The parties learn that their property lines do not coincide with the historical uses.

Before construction of the new Blue Bay building, both parties commissioned surveys.³⁷ Both surveys show that the properties’ legal descriptions did not match the lines of occupation.³⁸

Areas 1, 2, 3 and 5 are small encroachments that have existed for decades. Each party thought they owned the property their buildings were

³⁴ CP 456-467.

³⁵ CP 467.

³⁶ Id.

³⁷ VRP 287.

³⁸ VRP 287-289, CP 577-578, CP 542-543.

constructed upon.³⁹ Area 4 was a hiatus created when two plats did not meet.⁴⁰ The areas were defined in the Sluys survey and admitted by Blue Bay in its answer.⁴¹ The only area at issue in this appeal is Area 3.

6. Area 3 was historically used and maintained by the Sluys.

Area 3 is to the north of the Mandl building.⁴² The Mandl building and associated retaining wall are in this area.⁴³ From 1971 to 2001 Marion used the area to the north of the Mandl building for access.⁴⁴ A ramp or footbridge serving the Mandl building was located in this area.⁴⁵ He removed blackberries from the area using Round Up and a weed eater.⁴⁶ Tammy Mattson, a tenant of the Mandl building, observed Marion's contractors maintaining the bank areas.⁴⁷

³⁹ CP 1-14; 15-36.

⁴⁰ VRP 30.

⁴¹ CP 1-14; 15-36.

⁴² CP (Exhibit 2).

⁴³ VRP 315-316, 320.

⁴⁴ VRP 38, 68.

⁴⁵ VRP 69, 112, 121, 127-128.

⁴⁶ VRP 61; 82.

⁴⁷ VRP 116, 320.

Marion took plums from a tree in that area. He removed the tree about thirty years ago, because it was a maintenance issue.⁴⁸ A new HVAC system is installed in this area.⁴⁹

Ms. Mattson also used this area.⁵⁰ When her business first occupied the property there was a ramp in Area 3 and the building was accessed over Area 3.⁵¹ When describing the area she used, she indicated to the north of the Mandl building⁵² – Area 3 is to the north.⁵³ The ramp has since been replaced.⁵⁴

She also testified that the footbridge was located where the HVAC equipment is now – in Area 3.⁵⁵

Blue Bay had three witnesses at trial. Mr. Cecil admitted he had no first-hand knowledge of the property prior to 2011.⁵⁶

⁴⁸ VRP 70.

⁴⁹ CP 59, VRP 63.

⁵⁰ VRP 111-112.

⁵¹ VRP 113-114.

⁵² Id.

⁵³ CP 542-543.

⁵⁴ VRP 63.

⁵⁵ VRP 115.

⁵⁶ VRP 283.

Blue Bay's second witness, Mr. Waltenburg did not appear for trial, and his summary judgment declaration was admitted by stipulation.⁵⁷ Portions of his deposition testimony were also admitted.⁵⁸ His declaration states that he and his landlord maintained that area.⁵⁹ But in his deposition, he admitted that he did not do it personally. He admitted that he did not witness it being maintained, and he did not know who maintained it.⁶⁰

Blue Bay's third witness, Mr. Soltero, did not appear either and his summary judgment declaration was admitted under similar circumstances. His declaration stated he trimmed and maintained vegetation in Area 3.⁶¹ But his stipulated "cross-examination"⁶² testimony was that he did not personally do maintenance on the exterior and did not observe it being done.⁶³

⁵⁷ VRP 329-331. CP 568-576.

⁵⁸ Id.

⁵⁹ Id.

⁶⁰ Id.

⁶¹ CP 563-567.

⁶² Id, VRP 330.

⁶³ Exhibit 64 (last page)

Mr. Cecil admitted that Blue Bay has no feasible access to Area 3.⁶⁴ To access Area 3 from the Blue Bay property a person must jump 30 feet from the roof.⁶⁵

Blue Bay conceded the encroachments were adversely possessed, stating the Sluys had no claim to Area 3, “except they had a building – a retaining wall there, which we admit they should be able to keep.”⁶⁶

B. PROCEDURE

The Sluys sued to quiet title to the five areas. Blue Bay then purchased the hiatus (Area 4) from the record title holders.⁶⁷ The Sluys amended their complaint to conform this change in record title.⁶⁸

The Sluys did not claim all five encroachments as their own – their Amended Complaint asked the court to quiet title to two areas in Blue Bay.

⁶⁴ VRP 312-314.

⁶⁵ CP 563-567.

⁶⁶ VRP 411. Blue Bay’s counsel stated “[E]xcept they had a building – a retaining wall there, which we admit they should be able to keep.”

⁶⁷ VRP 242.

⁶⁸ CP 1-14.

The Sluys claimed Areas 1, 3 and 4 (the hiatus) belonged to them, but that Areas 2 and 5, to which the Sluys held title, should be quieted in Blue Bay.⁶⁹

Blue Bay denied the Sluys' claims and counterclaimed.⁷⁰ Blue Bay claimed a utility and a pedestrian easement, and damages arising from the prescriptive easement.⁷¹ At trial they also claimed a propane easement.⁷²

The Sluys moved for summary judgment on all claims.⁷³ But when Blue Bay put forth prima facie evidence to counter their claims, the Sluys reduced the scope of their motion to Blue Bay's damages claim.⁷⁴

The trial court granted partial summary judgment.⁷⁵ At trial, except for Zonnebloem's claim to Area 1, the trial court granted the relief sought by the Sluys regarding all five areas. And except for granting the utility easement, the trial court denied Blue Bays' claims.⁷⁶

⁶⁹ Id.

⁷⁰ CP 15-36.

⁷¹ Id.

⁷² VRP 272.

⁷³ CP 37-50.

⁷⁴ CP 208-210.

⁷⁵ CP 211-212.

⁷⁶ CP 456-468.

V. ARGUMENT

The trial court did not make a required finding – that the prior use was adverse – to support its conclusion that Blue Bay obtained a utility easement by prescription. Its judgment granting an easement should be reversed. Because Blue Bay was not entitled to a utility easement it cannot claim damages from the Sluys refusal to execute a utility easement to a third party.

Even if a prescriptive easement was established, no damages claim exists because: 1) Blue Bay did not preserve the claim it is now making on appeal; 2) the Sluys had no obligation to grant an easement to a third party (PSE); 3) the Sluys had no obligation to grant an expanded easement; and 4) the Sluys had no obligation to grant an easement in another location.

The trial court's findings regarding Area 3 are supported by substantial evidence. Blue Bay conceded a portion of Area 3 belongs to the Sluys. Even if the Sluys did not prove that they adversely possessed every square inch of area 3, the trial court did not abuse its discretion in drawing

straight lines to encompass, generally, the adversely possessed area to settle the boundary line issues.

A. BECAUSE THE TRIAL COURT MADE NO FINDING OF ADVERSITY, OR PRESUMPTION REGARDING ADVERSITY, IT ERRED IN CONCLUDING BLUE BAY ESTABLISHED A PRESCRIPTIVE EASEMENT.

1. Standard of Review.

The Sluys challenge the trial court's conclusion that Blue Bay proved a prescriptive easement. Whether the elements of a prescriptive easement are met is a mixed question of fact and law.⁷⁷ A trial court's factual findings should be upheld if supported by the record but the court's conclusion that the facts, as found, support a prescriptive easement is reviewed for errors of law.⁷⁸ Whether the trial court's conclusions of law are properly derived from the findings of fact is reviewed de novo.⁷⁹

Here the trial court's conclusions are not supported by its findings.⁸⁰

⁷⁷ *Petersen v. Port of Seattle*, 94 Wn. 2d 479, 485, 618 P.2d 67 (1980).

⁷⁸ *Stokes v. Kummer*, 85 Wn. App. 682, 689-90, 936 P.2d 4 (1997).

⁷⁹ *Gamboa v. Clark*, 180 Wn. App. 256, 267, 321 P.3d 1236, 1240, review granted, 181 Wn. 2d 1001, 332 P.3d 984 (2014), and aff'd, 183 Wn. 2d 38, 348 P.3d 1214 (2015).

⁸⁰ CP 456-468.

2. None of the trial court's findings support its conclusion that Blue Bay established a prescriptive easement because there was no finding or evidence of adversity.

Prescriptive rights are not favored.⁸¹ Use by a neighbor is presumed to be permissive and permission “may be implied in 'any situation where it is reasonable to infer that the use was permitted by neighborly sufferance or acquiescence.’”⁸² To establish a prescriptive easement, a claimant must prove “use of the servient land that is: (1) open and notorious, (2) over a uniform route, (3) continuous and uninterrupted for 10 years, (4) adverse to the owner of the land sought to be subjected; and (5) with the knowledge of such owner at a time when he was able in law to assert and enforce his rights.”⁸³

⁸¹ *Nw. Cities Gas Co. v. W. Fuel Co.*, 13 Wn. 2d 75, 83, 123 P.2d 771 (1942).

⁸² *Lingvall v. Bartmess*, 97 Wn. App. 245, 982 P.2d 690 (1999).

⁸³ *Drake v. Smersh*, 122 Wn. App. 147, 151, 89 P.3d 726, 729 (2004), as amended (May 26, 2004), as amended (July 1, 2004).

The issue here is whether Blue Bay proved use of the Sluys property that was “adverse to the owner of the land sought to be subjected.”⁸⁴ The trial court made no finding regarding this element. Because no findings support the trial court’s conclusion, it erred.⁸⁵

Blue Bay may argue that because the other elements for a prescriptive easement are met, the court may presume adversity. But if the trial court presumed the use was adverse, it erred.

The court had to presume the use was permissive.⁸⁶ A court must presume “that when someone enters onto another's land, the person ‘does so with the true owner's permission and in subordination to the latter's title.’”⁸⁷ The presumption of permissive use is usually found in three factual scenarios: 1) where there is unenclosed land;⁸⁸ 2) to enclosed or developed land cases where “it is reasonable to infer that the use was permitted by neighborly sufferance or acquiescence;⁸⁹ and 3) “where the evidence

⁸⁴ *Id.*

⁸⁵ *Lee v. Lozier*, 88 Wn. App. 176, 945 P.2d 214 (1997).

⁸⁶ *Gamboa v. Clark*, 183 Wn. 2d 38, 348 P.3d 1214 (2015).

⁸⁷ *Id.* citing *Nw. Cities*, 13 Wn. 2d at 84, 123 P.2d 771.

⁸⁸ *Id.*

⁸⁹ *Id.*

demonstrates that the owner of the property created or maintained a road and his or her neighbor *used the road in a noninterfering manner.*⁹⁰

Applying these situations to this case, the presumption of permissive use applied. First, the utility lines went over unenclosed land – a parking lot. In *Kunkel v. Fisher*⁹¹ homeowners sought a prescriptive easement over adjacent property based on their daily use of parking area on that property to access back of their own property. The Court found evidence of daily use was insufficient to support conclusion that permissive use ripened into adverse use. The adjacent property was large and there was evidence that successive owners of adjacent property were aware of homeowners' use.⁹²

Second, even if the land was considered developed, it was only reasonable to infer the use was by neighborly acquiescence. In its findings regarding the other claimed prescriptive easement – one for pedestrian access – the court found the relationship between the landowners was

⁹⁰ *Id.* (Emphasis added).

⁹¹ *Kunkel v. Fisher*, 106 Wn. App. 599, 603, 23 P.3d 1128, 1130–31 (2001).

⁹² *Id.*

good,⁹³ and that the permissive use was consistent with neighborly accommodation and sufferance.⁹⁴

But the trial court made no finding that the utility line, which is a more benign use than a right of access, was adverse.

The third instance where a court must presume a use is permissive also applies. In *Gamboa* the court held a presumption of permissive use applies where the evidence shows the owner of the property created or maintained a road and his or her neighbor used the road in a noninterfering manner.

While this case does not deal with a road, it is analogous. The same reasons for the presumption are present – the utility lines were noninterfering. Here, the utility lines serving the Blue Bay property did not interfere with the Sluys' use of their property.

The presumption is not dispositive. Blue Bay could have defeated the presumption of permissive use by showing that the user was adverse to the rights of the Sluys, or that the Sluys had indicated by some act or

⁹³ CP 464, FF 7.D.

⁹⁴ *Id.*

omission that the Blue Bay or its predecessor had a right of easement.⁹⁵ But Blue Bay introduced no evidence adversity. And the court made no findings. Its conclusion granting a utility easement was error.

B. BLUE BAY'S DAMAGES CLAIM WAS PROPERLY DISMISSED ON SUMMARY JUDGMENT BECAUSE THE UNDISPUTED FACTS DID NOT SHOW AN ENTITLEMENT TO DAMAGES.

1. Standard of Review.

The standard of review for a summary judgment order is de novo.⁹⁶

2. Because Blue Bay's prescriptive easement claim should have failed, any damages arising from it also fail.

As discussed above, the trial court's conclusions were not supported by any findings or evidence regarding adversity. Because the trial court's prescriptive easement grant must be reversed, no damages can flow from interference with it. This claim is moot.

⁹⁵ *Nw. Cities*, 13 Wn. 2d at 87, 123 P.2d 771.

⁹⁶ *Jones v. Allstate Ins. Co.*, 146 Wn. 2d 291, 300, 45 P.3d 1068 (2002).

3. The Sluys met their burden on summary judgment.

Blue Bay asserts that the Sluys failed to meet their burden on summary judgment. But a party moving for summary judgment can meet its burden by pointing out to the trial court that the nonmoving party lacks sufficient evidence to support its case.⁹⁷ The moving party must identify portions of the record, with the affidavits which demonstrate the absence of a genuine issue of material fact.⁹⁸

The Sluys motion did just that. The undisputed facts, taken in a light most favorable to Blue Bay, were as follows:

- Blue Bay Holdings' predecessor acquired a prescriptive easement for overhead electrical service from Mandl.⁹⁹

⁹⁷ *Young v. Key Pharmaceuticals, Inc.*, 112 Wn. 2d 216, 225 n. 1, 770 P.2d 182 (1989) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986)).

⁹⁸ *White v. Kent Medical Center, Inc.*, 61 Wn. App. 163, 170, 810 P.2d 4, 9 (1991) (citing *Celotex*, 477 U.S. at 323, 106 S.Ct. at 2553; *Baldwin v. Sisters of Providence in Washington, Inc.*, 112 Wn. 2d 127, 132, 769 P.2d 298 (1989)).

⁹⁹ This of course, is disputed, but the trial court was required to assume this on summary judgment.

- The electrical line that served the building on the Blue Bay parcel went over the Mandl parcel, attached to a strike on the Mandl building, and then went to the adjacent (former) Blue Bay Building.¹⁰⁰
- Before the former Blue Bay building was demolished, Blue Bay removed the electrical service from it.¹⁰¹
- To re-install electrical service; PSE required Mandl to execute a written easement agreement.¹⁰²
- The written easement agreement PSE required did not merely memorialize the prescriptive right. It added substantive terms: granting PSE a right of access; a right to cut, remove, and dispose of brush in the easement area; a right to trim or remove trees outside the easement area.¹⁰³

On summary judgment, Blue Bay produced no evidence to counter these facts and cited no authority establishing a cause of action for damages

¹⁰⁰ CP 61.

¹⁰¹ CP 27.

¹⁰² CP 61-62.

¹⁰³ CP 95-97, 558-560.

against the servient owner of a prescriptive easement when the servient owner refused to grant an easement to a third-party. Blue Bay complains that the dearth of authority offered on this point by the Sluys demonstrates that summary judgment was not warranted.¹⁰⁴

But the Sluys pointed out that under the above facts no cause of action existed.¹⁰⁵ Even Blue Bay's comprehensive and scholarly brief fails to identify a single case where a court awarded damages where a servient owner of a prescriptive or express easement refused to execute an easement in favor of a third party.

4. Because Blue Bay previously failed to raise the issues it raises now, it cannot raise them here.

Defending the summary judgment motion, Blue Bay cited no authority for its damages claim.¹⁰⁶ Its only citation to authority on this issue was to *Affiliated FM Ins. Co. v. LTK Consulting Services, Inc.*¹⁰⁷ That case had nothing to do with damages for an easement. Our Supreme Court was

¹⁰⁴ Appellant Blue Bay Holdings, LLC's Amended Opening Brief at 15.

¹⁰⁵ CP 208-210.

¹⁰⁶ CP 148-167.

¹⁰⁷ 170 Wn. 2d 442, 243 P.3d 521 (2010).

asked to answer a certified question from the Ninth Circuit Court of Appeals regarding the economic loss rule – a completely different issue. In reviewing a grant of summary judgment, the Court of Appeals should not consider issues not considered by trial court.¹⁰⁸

In its opening brief, Blue Bay argues that Washington law recognizes a claim for interference with a prescriptive easement. It analyzes treatises, Washington, and out-of-state case law. But this analysis was not provided to the trial court. It should not be considered here for the first time. The trial court found that no claim exists here, not that a claim cannot theoretically exist.

The trial court did not err.

5. Even if Blue Bay preserved the issue, its damages claim fails because it cannot require the Sluys to grant a third party and expanded easement in a different location.

Even if this Court considers Blue Bay's authority it cannot show an entitlement to damages under these facts for a litany of reasons.

¹⁰⁸ *Ronald Sewer Dist. v. Brill*, 28 Wn. App. 176, 622 P.2d 393 (1980).

First, the Sluys had no obligation to execute an easement to a third-party. Second, PSE required at least four feet of additional property for the easement. The scope of the prior use was much narrower. Third, Blue Bay sought an easement in a different location than was the historical use.

Prescriptive easements are disfavored because they “effect a loss or forfeiture of the rights of the owner.”¹⁰⁹ When “an easement is acquired by prescription, the extent of the right is fixed and determined by the user in which it originated, or, as it is sometimes expressed, by the claim of the party using the easement and the acquiescence of the owner of the servient tenement.”¹¹⁰

If Blue Bay does own a prescriptive easement its extent was fixed by the use in which it originated. It was a narrow (the width of a wire) path from the power pole to the Mandl building. This did not interfere with the Sluys use of their property at all because it co-existed with their utility line. Blue Bay was not entitled to expand the use to four feet, move its location,

¹⁰⁹ *Kunkel v. Fisher*, 106 Wn. App. 599, 603, 23 P.3d 1128, 1130–31 (2001).

¹¹⁰ *Nw. Cities Gas Co. v. W. Fuel Co.*, 17 Wn. 2d 482, 486, 135 P.2d 867, 869 (1943).

or add substantive terms. And they are not entitled to damages for the Sluys reasonable refusal to allow these modifications.

The case cited by Blue Bay as analogous and compelling, *Dolnikov v. Ekisian*,¹¹¹ is neither. First, *Dolnikov* dealt with an express easement, where the rights and responsibilities of the parties were identified in the grant. Here, there is no written easement supporting the claim. The only rights Blue Bay possibly acquired was to utility lines in a specific location.

Second, in *Dolnikov* the servient owner did not have to execute an easement in favor of a third party, expand the use of the easement, or relocate the easement. The servient owner was merely required to acquiesce to the dominant owner's land use permit so they could develop the access easement according to the express terms of the recorded easement.

Blue Bay is seeking a windfall. Just days after the Marion offered to work with Mr. Cecil to bring them power and Cecil declined,¹¹² Cecil candidly admitted in an email he hoped he could bring in power from the

¹¹¹ 222 Cal. App. 4th 419 (2013).

¹¹² VRP 293.

street.¹¹³ The trial court did not err in granting summary judgment. Blue Bay cannot claim damages for the Sluys failure to grant an easement to PSE.

C. THE FINDINGS OF FACT REGARDING AREA 3 ARE SUPPORTED BY SUBSTANTIAL EVIDENCE AND WASHINGTON AUTHORITY.

Blue Bay's challenge to the court's findings are overly technical, ignores the way the properties were used, and ignores controlling authority regarding a trial court's authority to establish boundary lines.

1. Standard of Review

An appellate court reviews a trial court's findings of fact under a "substantial evidence standard, defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true."¹¹⁴ "Applying this deferential standard, the court views all reasonable inferences from the evidence in the light most favorable to the prevailing party."¹¹⁵ An appellate

¹¹³ CP 581-582; VRP 308.

¹¹⁴ *Korst v. McMahon*, 136 Wn. App. 202, 206, 148 P.3d 1081, 1083 (2006) citing *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn. 2d 873, 879, 73 P.3d 369 (2003).

¹¹⁵ *Id* citing *Sunderland Family Treatment Servs. v. City of Pasco*, 127 Wn. 2d 782, 788, 903 P.2d 986 (1995).

court does not substitute its judgment for that of the trial court even though it might have resolved a factual dispute differently.¹¹⁶

Blue Bay complains that the trial court's findings are "inexact and over-conclusive."¹¹⁷ But they ignore the mandate that this court take all inferences in favor of the Sluys. "The party challenging a finding of fact bears the burden of showing that it is not supported by the record."¹¹⁸ Blue Bay fails to meet with burden.

2. A trial court has discretion to draw boundary lines when resolving boundary disputes.

Blue Bay complains that the testimony and evidence by the Sluys "did not concern the entire area...."¹¹⁹ But it fails to address Washington caselaw that gives a trial court wide discretion to "create a penumbra of

¹¹⁶ *Sunnyside*, 149 Wn. 2d at 879–80, 73 P.3d 369.

¹¹⁷ Appellant Blue Bay Holdings, LLC's Opening Brief at 23.

¹¹⁸ *Panorama Vill. Homeowners Ass'n v. Golden Rule Roofing, Inc.*, 102 Wn. App. 422, 425, 10 P.3d 417, 420 (2000) citing *Brin v. Stutzman*, 89 Wn. App. 809, 824, 951 P.2d 291, review denied, 136 Wn. 2d 1004, 966 P.2d 901 (1998).

¹¹⁹ Appellant Blue Bay Holdings, LLC's Amended Opening Brief at 27.

ground around areas actually possessed when reasonably necessary to carry out the objective of settling boundary disputes.”¹²⁰

Area 3 is a triangle with a base of just over five feet, and hypotenuse of about twenty-four feet – about 60 square feet.¹²¹ Part of the area is on a bank.¹²² Blue Bay held record title to this area, but the Mandl building and a retaining wall encroach into it.¹²³ Blue Bay conceded that the retaining wall and Mandl building encroachments were obtained by adverse possession.¹²⁴

In *Lloyd v. Montecucco*¹²⁵ the court addressed a similar argument that the trial court erred because it drew a boundary in a straight line while the actual possession would have been more fairly represented by a jagged line. The appellate court noted there is no direct evidence the adverse possessor actually possessed every square yard of the disputed tract but

¹²⁰ *Lloyd v. Montecucco*, 83 Wn. App. 846, 853–54, 924 P.2d 927, 931 (1996).

¹²¹ CP 543-543.

¹²² VRP 61.

¹²³ CP 543-543.

¹²⁴ VRP 411; Brief of Appellant Blue Bay Holdings, LLC’s Opening Brief at 22.

¹²⁵ 83 Wn. App. 846, 853–54, 924 P.2d 927, 931 (1996).

concluded the trial court's demarcation was proper. This is because courts may draw lines around areas actually possessed when reasonably necessary to carry out the objective of settling boundary disputes.¹²⁶ This is exactly what the trial court did here.

The *Lloyd v. Montecucco* court noted that a trial court “may project boundary lines between objects when reasonable and logical to do so,” citing *Frolund v. Frankland*¹²⁷, and *Chaplin v. Sanders*.¹²⁸

That case is analogous because the disputed strip in both cases have a steep bank. “[C]onsidering the area was heavily wooded and steep, the trial court did not err in drawing a straight line between the outside perimeter of the northwest corner of the fence and the northern edge of the bulkhead.”¹²⁹

Even if we ignore the disputed findings, it is undisputed the Mandl building and retaining wall encroached in Area 3, that the area contains a

¹²⁶ *Id.*

¹²⁷ 71 Wn. 2d 812, 820, 431 P.2d 188 (1967), overruled on other grounds.

¹²⁸ 100 Wn. 2d 853, 676 P.2d 431 (1984).

¹²⁹ *Lloyd*, 83 Wn. App. 846, 853–54, 924 P.2d 927, 931 (1996).

steep bank, and that there is no reasonable access to the area for Blue Bay. Under the authority cited above the trial court did not abuse its discretion by projecting boundary lines between objects.

3. The witnesses' testimony established the Sluys use and maintenance of Area 3.

Even if the above is not controlling, Blue Bay has not met their burden to show the trial court's findings are not supported by the record. First, the trial court observed the witnesses' testimony and their interaction with the exhibits. The inferences from the testimony and exhibits are that the Sluys were the only ones, from 1971 to 2011, that used and maintained Area 3. The trial court could reasonably infer there was never any use by Blue Bay. Further Blue Bay did not credibly rebut any of this evidence. ¶

While Blue Bay may complain the testimony was vague, Marion and Ms. Mattson provided ample evidence to support the trial court's findings that Area 3 was used and maintained as part of the Sluys' property.

The trial court found that the evidence showed Area 3 “had been used and maintained by the Sluys for a long time. [They] maintained it – including removal of a plum tree...”¹³⁰ Additionally, the court found:

In its former configuration of a pathway existed from the roof of the Mandl Building to the Parking Lot. This pathway consisted of a footbridge and was in Area #3. It went next to the garage on the Mandl property. The bridge and pathway were maintained by Mandl and its predecessors in excess of ten years... Portion of Mandl’s new HVAC system is in this area.¹³¹

These findings were supported by substantial evidence. Marion testified that he maintained the area and from 1971 to 2001.¹³² He used the area to the north of the Mandl building for access and located a footbridge there.¹³³ When her business first occupied the property, there was a footbridge in Area 3 and the Mandl building was accessed over Area 3.

¹³⁰ CP 461.

¹³¹ VRP 461.

¹³² VRP 37-38.

¹³³ VRP 38, 68.

Marion removed blackberries from the area using Round Up and a weed eater.¹³⁴ Tammy Mattson observed Marion's contractors maintaining this area.¹³⁵ Marion took plums from the plum tree in that area, but had to take it out about thirty years ago, because it was a maintenance issue.¹³⁶

The witnesses stated that the area the Sluys maintained and used were in the area the new HVAC system is installed (which is in Area 3)¹³⁷ and that the area was to the north of the Mandl building. Area 3 is directly to the north of the Mandl building.¹³⁸

The court's finding that Blue Bay presented no witnesses to counter this testimony¹³⁹ was consistent with the evidence. Mr. Cecil's only knowledge of the property was after 2011. The only other witnesses, former tenants of the Blue Bay building – admitted that they did not maintain this area, and did not observe the owner of building do so.¹⁴⁰

¹³⁴ VRP 61; 82.

¹³⁵ VRP 116.

¹³⁶ VRP 70.

¹³⁷ VRP 114-115.

¹³⁸ VRP 113-114.

¹³⁹ CP 461.

¹⁴⁰ CP 563-572.

Mr. Waltenberg said “whoever used it maintained it.”¹⁴¹ Because Marion used this area, Mr. Waltenberg’s testimony supports the Sluys’ claims.

The trial court drew a common-sense boundary line based on how the property was used and treated by the owners over decades. Blue Bay has never used the area and designed its new building to make Area 3 inaccessible.

The trial court was reviewing the testimony that the Sluys had used and maintained Area 3 – part of their building occupied it and it was bordered on all sides by property the Sluys own, and only connected to the Blue Bay property by a wall.¹⁴² There is no way to access Area 3 from the Blue Bay property.¹⁴³ The trial court drew lines that made sense to resolve this boundary dispute. It quieted Areas 2 and 5 in Blue Bay, and Areas 3 and 4 in the Sluys.

¹⁴¹ Id.

¹⁴² CP 542-543.

¹⁴³ VRP 312-314.

Blue Bay's challenge to the trial court's findings defy the purposes of adverse possession law. While prescriptive easements are disfavored, as discussed above, adverse possession is not disfavored because it promotes the maximum use of the land, encourages the rejection of stale claims to land and, most importantly, quiets title in land.¹⁴⁴

Because Blue Bay had and has no access to Area 3, it was keeping with the policies behind adverse possession law – to promote the maximum use of the land. The trial court's findings are supported by substantial evidence, and its order quieting title in Mandl should be affirmed.

D. ATTORNEY'S FEES

Blue Bay is correct that under RAP 18.1 and RCW 7.28.083 this court may award the prevailing party its attorney's fees. Because the Sluys should prevail on their cross-appeal, and the trial court's judgment in all other respects should be affirmed, the court should award the Sluys their attorney's fees on this appeal.

¹⁴⁴ *Chaplin v. Sanders*, 100 Wn. 2d 853, 859, 676 P.2d 431, 435 (1984).

VI. CONCLUSION

Because there was no finding, or evidence, showing adversity the trial court erred in concluding Blue Bay had proven a prescriptive utility easement. The judgment quieting title to the utility easement should be vacated.

Because Blue Bay did not establish an entitlement to damages the trial court's summary judgment dismissal of that claim should be affirmed.

Because the trial court's judgment quieting title to Area 3 in Mandl Holdings is supported by substantial evidence that judgement should be affirmed.

Respectfully submitted this 30th day of December, 2016.

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CERTIFICATE OF SERVICE BY _____
DEPUTY

I certify that on the 30th day of December, 2016, I caused a true and correct copy of this Opening Brief of Respondents and Cross Appellants to be served on the following in the manner indicated below:

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