

FILED

FEB 23 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 293360-III

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

CAROL A. FRANKLUND,

Plaintiff/Respondent,

v.

ARVID K. OLSON,

Defendant/Appellant.

BRIEF OF RESPONDENT CAROL A. FRANKLUND

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I. INTRODUCTION

Defendant Arvid K. Olson (deceased since the trial court judgment was entered) (hereinafter “Olson”) appeals a judgment determining that Plaintiff Carol A. Franklund (hereinafter “Franklund”) has an express easement for ingress and egress over the west 15 feet of his property. Olson specifically challenges the trial court’s ruling that he failed to show he had adversely possessed the easement by being the sole person to maintain, use, and repair it.¹

Olson also raises an entirely new issue for the first time on appeal. He argues a 25-year old historical, permanent fence along the eastern border of Franklund’s parcel, bordering the easement, establishes the boundaries between the parcels and cut off Franklund’s right to the easement. It is unclear whether Olson argues the fence cuts off the whole 30-foot easement or

¹ The trial court found a 30-foot express easement for ingress and egress over the east 15 feet of Franklund’s parcel and the west 15 feet of Olson’s parcel. (CP 20-21). Olson does not challenge the trial court’s determination that an easement was created. He only challenges the trial court’s ruling regarding no reclamation by Olson through adverse possession of the easement that is on the west 15 feet of Olson’s property. Thus, the existence of the easement is a verity on appeal. Boyd v. Kulczyk, 115 Wn. App. 411, 413, n.2, 63 P.3d 156 (2003).

just the east 15 feet. There is no reference to such a fence in the record.

The trial court's judgment for Franklund should be affirmed. Substantial evidence supports the trial court's finding that adverse possession of the east 15 feet of the easement back to Olson did not occur. Olson cites to no pertinent legal authority or evidence in the record to support his position. Olson also raises a new issue for the first time on appeal, and, in any event, there is insufficient evidence to support the new theory.

II. RESPONSE TO ASSIGNMENTS OF ERROR

1. Appellant Olson never raised the issue of a 25-year permanent fence as a basis for any adverse possession claim and it cannot therefore be considered for the first time on appeal. Secondly, the record does not support the establishment and existence of such a fence.
2. The trial court properly determined that Appellant Olson has not reclaimed title to (*i.e.*, extinguished) an express easement for ingress and egress for the benefit of Franklund. Olson does not dispute the initial creation of the express easement. The record establishes that the trial court properly found that

Olson had failed to establish the elements of adverse possession as to the easement.

III. COUNTER STATEMENT OF CASE

This appeal involves an easement reserved on Franklund and Olson's land. The testimony at trial and exhibits established the following facts:

Franklund and Olson (now his Estate) own adjoining parcels of real property in Yakima County, Washington. (RP 21-22). Franklund's property is more commonly known as 621 McPherson Lane, Selah, Washington (parcel no. 13003). (RP 21, 69). Olson's property is more commonly known as 581 McPherson Lane, Selah, Washington (parcel no. 13001). (RP 69). For ease of reference and for the purposes of this response brief, Franklund's parcel will be designated as Parcel A, and Olson's as Parcel B. An illustrative map of the parcels was included as Exhibit 1 in the trial record. (Ex. 1).

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Initially, Stanley and Jean Sinclair owned both parcels. (RP 35). The Sinclairs also owned Parcel C, to the north of the Parcels A & B. (RP 36-37; Ex. 1).

In 1977, the Sinclairs sold Parcel B to Olson via statutory warranty deed. (Ex. 4). In 1981, the Sinclairs sold Parcel A to Donald and David Briney, Franklund's predecessors in interest, by warranty fulfillment deed. (Ex. 5).

In both deeds, the Sinclairs provided for an express 30-foot easement "for ingress and egress" running north and south between the two parcels (RP 15-16; Ex. 4, Ex. 5). The centerline of the easement coincides with the boundary line of Parcel A and Parcel B. (RP 14-19; Ex. 4, Ex. 5).

After acquiring his parcel, Olson graveled the existing 30-foot wide dirt driveway running north and south located on the easement. (RP 26, 54, 71-74). For ease of reference, this driveway will henceforth be designated as "the easement." As noted, for the purposes of this appeal, Olson does not argue that the trial court erred in finding an express easement in

Franklund's favor; instead, Olson solely argues the east 15 feet of the easement was adversely possessed, thus extinguishing that portion of the easement.

Franklund's immediate three predecessors in interest (Scott, Dexter, and Mitchell) used the easement for access to Parcel A. (RP 76; Ex. 21, 22, 23, & 24).

In 2005, Franklund acquired Parcel A from Danny and Dawna Scott. (Ex. 3). Franklund used the easement to access an entry on the east side of Parcel A; she was also able to access Parcel A via a driveway located on the southwestern part of her parcel. (RP 24-25). When Franklund acquired the property, she believed she was acquiring the easement. (RP 25).

Parcels A and B are accessed by McPherson Lane. (Ex. 1). McPherson Lane runs north south in a direct, straight line toward the easement, and then turns sharply west to become the southern border of Parcel A. (Ex. 1; RP 23, 52, 104). Nothing physically distinguishes McPherson Lane that runs south of the parcels from the easement that runs between the parcels.

As a result of acquiring Parcel A, Franklund became party to a road maintenance agreement for McPherson Lane. (Ex. 26). The agreement was executed and signed in 1984, seven years after Olson acquired Parcel B, by several landowners abutting McPherson Lane, including Olson and the Brineys (Franklund's predecessor in interest). (Ex. 26). As part of the agreement, the signatories accepted responsibility for maintaining McPherson Lane. (Ex. 26). Franklund believed the easement was part of McPherson Lane, and that her road maintenance fees paid for the easement's maintenance. (RP 52).

Following her acquisition of Parcel A, Franklund continued to use the easement to access the eastern part of her property for about a year and a half. (RP 25). In time, Franklund's relationship with Olson deteriorated. (RP 55).

Approximately one and a half years after Franklund's purchase of Parcel A, Olson refused to allow Franklund to continue to use the easement, claiming it was his personal driveway. (RP 84). Olson attempted to block the easement with

trucks and other objects just south of where Franklund would turn west from the easement into the eastern portion of her property. (RP 26). Franklund called the County (which had the trucks removed from the easement) and she ultimately obtained a one-year anti-harassment order against Olson. (RP 25-26, 29). The very day of expiration, Olson twice attempted to gate the southern access to the easement in May 2009. (RP 29-30, 58-60). Both times, Franklund removed the gates. (RP 58-61).

Olson also attempted to fence off Franklund's east entryway leading off the easement by installing a fence along the western boundary of the easement located 15 feet west of the boundary line between Parcels A and B (*i.e.*, on Franklund's property). (RP 32-33, 55-56, 62-63, 84; Ex. 12). Olson later removed the fence. (RP 62-63).

On July 2, 2009, Franklund filed a Complaint for Injunctive Relief and to Quiet Title to the Easement in the Yakima County Superior Court. (CP 1-5). The complaint sought a judgment declaring the existence of the 30-foot

ingress-egress easement over the east 15 feet of Parcel A and the west 15 feet of Parcel B, together with an order prohibiting Olson from interfering with her use thereof. (CP 1-5).

Olson filed an Answer on July 29, 2009, denying the existence of an easement and asserting a counterclaim for trespass. (CP 6-10). In his Answer, Olson claimed he adversely possessed only the portion of the 30-foot easement existing on the west 15 feet of his property. (CP 7). Olson did not claim to have adversely possessed the remaining 15 feet of the easement existing on the east 15 feet of Franklund's property. (CP 6-10).

The matter went to trial before Judge F. James Gavin on July 15, 2010. Olson's trial brief claims he extinguished one-half the easement by adversely possessing the west 15 feet of his property (the driveway) for over 32 years. (CP 40-41). The trial brief demonstrates the basis of this argument was Olson's alleged exclusive use of the easement and the assertion he had maintained it. (CP 40-41). The trial brief makes no mention of a

“25 year permanent” “historical” fence as now (and for the first time on appeal) contended by Olson.

At trial, Olson claimed he satisfied the open and notorious element of adverse possession by graveling and maintaining the easement, and by using it exclusively. (RP 79, 81-84, 123-24). Franklund testified that she believed Olson was maintaining the easement pursuant to the road maintenance agreement and not in an effort to exclusively possess it. (RP 51). There is nothing in the trial record (testimony, exhibits, briefs, arguments, or the trial court’s Decision) suggesting that Olson ever raised the argument that he adversely possessed the east 15 feet of the easement via a 25-year-old permanent, historical fence.

The trial court entered its Decision on July 16, 2010. (CP 13-16). The trial court agreed with Franklund and concluded an express easement had been reserved over the west 15 feet of Parcel B and the east 15 feet of Parcel A, and enjoined Olson from interfering with the easement. (CP 14-15).

The trial court also found Olson “failed to prove the necessary elements of adverse possession.” (CP 16). The trial court noted, “The evidence is that he [Olson] has been maintaining an easement, not adversely possessing it.” (CP 16). The trial court concluded, “Ms. Franklund reasonably believed that he was maintaining it as part of the maintenance agreement, and not in an effort to adversely possess it. Others could also have reasonably concluded that was the reason he was maintaining it.” (CP 16).

The trial court entered its Findings of Fact and Conclusions of Law and a Judgment on August 6, 2010. (CP 19-24).

Finding of Fact No. 3 states: “An easement for ingress and egress over the West 15 feet of Parcel B was reserved for the plaintiff’s predecessor in title of Parcel A and others by deed from Stanley R. Sinclair et ux. recorded October 21, 1977, at the Yakima County Auditor’s File No. 2480077” (CP 20).

Finding of Fact No. 4 states: “An easement for ingress and egress over the East 15 feet of Parcel A was reserved for the defendant, as owner of Parcel B, and others by deed from Stanley R. Sinclair et ux. recorded March 26, 1981, at the Yakima County Auditor’s File No. 2611274” (CP 21).

Finding of Fact No. 5 states: “The access easements reserved are also described in both deeds as 30 feet being 15 feet on each side of a north-south centerline, which centerline runs for 1314.03 feet (approximately one quarter mile) and is the same as the north-south boundary of plaintiff’s and defendant’s parcels at the north end of the centerline.” (CP 21).

Finding of Fact No. 6 states: “The Court finds the intent was that the 30-foot easement benefits Parcel A and Parcel B as well as the other owners in the subdivision.” (CP 21).

Finding of Fact No. 8 states: “The Court does not find evidence of hostile or adverse use.” (CP 21).

Olson's appeal followed. Olson assigns no error to any of the foregoing findings. Olson's brief makes two assignments of error. These are set forth verbatim as follows:

- (a) The trial court committed reversible error by concluding it was discretionary to ignore a twenty-five year permanent fence and the adverse possession of the appellant-Olson concerning a contested driveway, bordered by the fence, which clearly cut off any claims of easement granted by deed; the court then exacerbated the error, concluding the deeded easement would eliminate the ownership rights of the appellant-Olson to the contested driveway.
- (b) The trial court committed reversible error by refusing to find that the evidence of record supported merely a permissive use by the adjoining landowner, plaintiff-respondent Franklund, and refusing to find that she had no ownership rights to the contested driveway for ingress and egress, since her ingress and egress was situated on the opposite side of her real property.

(App.'s Br. at 1).

Olson assigns no error to any findings of fact. Nor does he quote any findings of fact to which he purports to assign error. See RAP 10.3(g).

IV. ARGUMENT

A. STANDARD OF REVIEW

A trial court's findings on the elements of adverse possession are mixed questions of law and fact. Petersen v. Port of Seattle, 94 Wn.2d 479, 485, 618 P.2d 67 (1980). Appellate courts "review whether substantial evidence supports the trial court's challenged findings and, if so, whether the findings in turn support the trial court's conclusions of law and judgment." Harris v. Urell, 133 Wn. App. 130, 137, 135 P.3d 530, 533 (2006) (citing Ridgeview Prop. v. Starbuck, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982)).

Substantial evidence will support a finding when the evidence in the record is sufficient to persuade a rational, fair-minded person that the finding is true. Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). "A challenge to the sufficiency of the evidence admits the truth of [the opposing party's] evidence and any inference drawn therefrom and requires that the evidence be viewed in a

light most favorable to [the opposing party].” Bott v. Rockwell Int’l, 80 Wn. App. 326, 332, 908 P.2d 909 (1996).

There is a presumption in favor of the trial court’s findings, and the party claiming error has the burden of showing that a finding of fact is not supported by substantial evidence. Fisher Props., Inc. v. Arden-Mayfair, Inc., 115 Wn.2d 364, 369, 798 P.2d 799 (1990). Appellate courts defer to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence and credibility of the witnesses. Boeing Co. v. Heidy, 147 Wn.2d 78, 87, 51 P.3d 793 (2002). An appellate court may not substitute its evaluation of the evidence for that made by the trier of fact. Goodman v. Boeing Co., 75 Wn. App. 60, 82-83, 877 P.2d 703 (1994).

A reviewing court may not disturb findings of fact supported by substantial evidence even if there is conflicting evidence.” Merriman v. Cokeley, 168 Wn.2d 627, 631, 230 P.3d 162, 164 (2010). “We review the trial court’s conclusions of law de novo, according great significance to the court’s

conclusions of law.” 810 Properties v. Jump, 141 Wn. App. 688, 696, 170 P.3d 1209, 1213 (2007).

B. OLSON HAS NOT CHALLENGED THE TRIAL COURT’S FINDINGS OF FACT AND THEY ARE BINDING IN THIS APPEAL

1. Olson’s Brief Fails To Assign Error Pursuant to RAP 10.3(a)(4) and RAP 10.3(g) and Therefore the Trial Court’s Findings of Fact Are Verities on Appeal

Pursuant to RAP 10.3(a)(4), the brief of the appellant should contain “[a] separate concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error.” RAP 10.3(g) requires “[a] separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number.” (Emphasis added).

The burden is on the appellant “to furnish a sufficient statement of fact to apprise the court of the facts on which assignments of error are predicated.” State v. Holbrook, 66 Wn.2d 278, 280, 401 P.2d 971 (1965). Unchallenged findings

of fact are verities on appeal. In re Marriage of Akon, 160 Wn. App. 48, 57, 248 P.3d 94 (2011); In re Estate of Palmer, 145 Wn. App. 249, 265, 187 P.3d 758 (2008) (in the absence of a clear challenge, an appellate court treats findings of fact as verities on appeal); Boyd v. Kulczyk, 115 Wn. App. 411, 413 n.2, 63 P.3d 156 (2003) (undisputed findings of fact are verities on appeal); Sackett v. Santilli, 101 Wn. App. 128, 131, 5 P.3d 11, review granted 142 Wn.2d 1016, 16 P.3d 1264, aff'd 146 Wn.2d 498, 47 P.3d 948 (2000) (where appellant does not assign error to the trial court's findings of fact, they become verities on appeal).

Thus, assignments of error which do not point out specific error cannot be considered. Erdman v. Henderson, 50 Wn.2d 296, 298, 311 P.2d 423 (1957). See also State v. Roggenkamp, 115 Wn. App. 927, 943, 64 P.3d 92, review granted 150 Wn.2d 1009, 79 P.3d 447, aff'd 153 Wn.2d 614, 106 P.3d 196 (2003) (failure to make separate assignments of error for each finding of fact limited appellate court's function

to determining whether trial court's findings of fact supported court's conclusions of law and judgment). "A general assignment of error to the 'findings of fact,' . . . is insufficient under the rule." Id.

Olson fails to separately assign error to each finding of fact he claims was improperly made. Olson provides only two very general "Assignments of Error" to the trial court's conclusions without assigning error to any specific finding of fact. (App.'s Br. at 1). Olson's brief never refers to any of the trial court's finding of fact at any time. As such, this Court's review is limited to determining whether the findings of fact support the conclusions and judgment.

2. Olson Also Has Not Set Forth Verbatim the Findings of Fact and They Are Binding on Appeal Pursuant to RAP 10.4(c)

RAP 10.4(c) provides as follows:

If a party presents an issue which requires study of a . . . finding of fact . . . the party should type the material portions of the text out verbatim or include them by copy in the text or in an appendix to the brief.

RAP 10.4(c).

An appellant's failure to identify and set forth challenged findings in violation of the rule is alone sufficient justification for refusing to consider the assignment of error. M/V La Conte, Inc. v. Leisure, 55 Wn. App. 396, 401, 777 P.2d 1061 (1989).

Appellate courts have refused to consider errors relating to findings of fact when the pertinent findings were not set forth in the brief. For example, in Matter of Estate of Pflighar, 35 Wn. App. 844, 846, 670 P.2d 677, 679 (1983), this Court held the trial court's findings of fact were verities on appeal, where the appellant failed to set out the contested findings of fact verbatim in his brief.

Similarly, in Oblizalo v. Oblizalo, 54 Wn. App. 800, 802-03, 776 P.2d 166, 168 (1989), the court refused to consider arguments where the rule was violated, holding that:

Although he [the defendant] cites the challenged findings and conclusions in his assignments of error, he does not set forth verbatim the material portions of the challenged findings and/or

conclusions, in violation of RAP 10.4(c). Thus, we decline to address them here.

Id.

Likewise, in Fuller v. Employment Sec. Dept. of State of Wash., 52 Wn. App. 603, 762 P.2d 367 (1988), Division Two held that where the appellant failed to assign error to the agency's findings and failed to set forth the challenged findings in her brief, the findings would be treated as verities on appeal.

Here, Olson purports to assign error to two of the trial court's conclusions, but does not assign error to any findings of fact by setting out the contested findings of fact verbatim in his brief pursuant to RAP 10.4(c). Therefore, the trial court's findings are verities on appeal.

**C. THE COURT SHOULD NOT CONSIDER OLSON'S
NEW PERMANENT FENCE ISSUE/THEORY
BECAUSE IT WAS NOT RAISED AT THE TRIAL
COURT LEVEL AND THUS WAS NOT
PROPERLY PRESERVED FOR REVIEW**

"The general rule is that appellate courts will not consider issues raised for the first time on appeal." State v.

Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). See also Roberson v. Perez, 156 Wn.2d 33, 39, 123 P.3d 844, 847-48 (2005) (“In general, issues not raised in the trial court may not be raised on appeal.”); Wilson Son Ranch, LLC v. Hintz, 162 Wn. App. 297, 303, 253 P.3d 470, 473 (2011) (same) (declining to consider argument not raised at the trial court level). Likewise, courts do not consider theories not presented below. Doe v. Puget Sound Blood Ctr., 117 Wn.2d 772, 780, 819 P.2d 370, 374 (1991) (“Because this theory was not advanced below, we decline to rule upon the existence of any common law privilege.”).

In Wilson, this Court declined to consider an argument relating to an easement the plaintiff raised for the first time on appeal, finding that considering it would cause the defendants prejudice, since they were never on notice a record of the issue needed to be made. Wilson, 162 Wn. App. at 304-05.

At trial, Olson argued he adversely possessed the east 15 feet of the easement. The pleadings demonstrate the sole basis

for this argument was Olson's testimony that (1) he solely graveled and maintained the easement and treated it as his own, and (2) prior to Franklund's arrival, it was only used by others with his permission. (RP 9, 124). Olson set forth these same arguments in his trial brief. (CP 40-41).

Now, for the first time, Olson claims a 25-year permanent, "historical" fence demarcated the boundaries between the parcels and cut off Franklund's claims to the easement. (App.'s Br. at 1, 3). This issue was never raised at trial either in evidence or in argument. The trial record lacks any semblance of Olson's new permanent fence argument. Allowing Olson to raise the argument now would result in a significant injustice to Franklund, since she was never on notice that she needed to make a record of that issue. Wilson, 162 Wn. App. at 304-05, 253 P.3d 470, 474 (2011). Accordingly, it should not be considered.

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D. SUBSTANTIAL EVIDENCE SUPPORTS THE TRIAL COURT'S FINDING THAT OLSON DID NOT ADVERSELY POSSESS THE EASEMENT

1. Olson Failed To Satisfy the Elements of Adverse Possession

Olson first argues that the trial court erred in finding that he did not adversely possess the easement. (App.'s Br. at 1). He claims he used the easement exclusively for years, maintained it, and treated as his own. (Id. at 1-5). Therefore, he argues, Franklund's use of the easement was merely permissive. (Id.).

As with any possessive interest in property, an easement can be extinguished through adverse use. City of Edmonds v. Williams, 54 Wn. App. 632, 634, 774 P.2d 1241 (1989). "In such a case, however, the servient estate owner who seeks to extinguish the easement is already in possession of the property. Consequently, to start the prescriptive period, the adverse use of the easement must be clearly hostile to the dominant estate's interest in order to put the dominant estate

owner on notice.” Cole v. Lavery, 112 Wn. App. 180, 184, 49 P.3d 924, 926 (2002).

To establish adverse possession, Olson had the burden of showing that his possession of the easement was open and notorious, actual and uninterrupted, exclusive, hostile, and continued for a period of 10 years. ITT Rayonier, Inc. v. Bell, 112 Wn.2d 754, 757, 774 P.2d 6 (1989); Bryant v. Palmer Coking Coal Co., 86 Wn. App. 204, 209-10, 936 P.2d 1163 (1997). The hostility and open/notorious elements are objective. Downie v. City of Renton, 167 Wash. 374, 379, 9 P.2d 372, 374 (1932).

The trial court found Olson did not hostilely, openly and notoriously possess the easement, because “Ms. Franklund reasonably believed that he was maintaining it as part of the maintenance agreement, and not in an effort to adversely possess it.” (CP 16). For similar reasons, the trial court also found no such possession, stating, “Others could also have reasonably concluded that was the reason he was maintaining

it.” (CP 16). As a result, the trial court found no required “evidence of hostile or adverse use.” (CP 21). The trial court concluded Olson had merely maintained (and not objectively adversely possessed) the easement, and thus had not satisfied the elements of adverse possession. (CP 16, 21).²

The evidence supports the trial court’s conclusion that Olson did not adversely possess the easement. “Hostile use is difficult to prove” Id. at 184-85. “Mere nonuse, no matter how long, will not extinguish an easement.” Cole v. Lavery, 112 Wn. App. 180, 185, 49 P.3d 924, 926 (2002). See also Thompson v. Smith, 59 Wn.2d 397, 407, 367 P.2d 798, 803 (1962). Moreover, “the dimensions of an easement do not contract merely because the holder fails to use the entire easement area.” 810 Properties v. Jump, 141 Wn. App. 688, 699, 170 P.3d 1209, 1215 (2007). “During the period of nonuse, the servient estate may use the land subject to the easement in any way that does not permanently interfere with the

² Again, Olson never assigned error to this Finding of Fact.

easement's future use." Cole, 112 Wn. App. at 185. Olson's claimed exclusive use and maintenance of the easement, for however long, and the alleged infrequent use of Franklund and her predecessors in interest, did not extinguish the easement.

Further, nothing in the record indicates Olson's use of the easement was adverse.

[I]f an easement has been created and no occasion has arisen for its use, the owner of the servient estate may fence the land and that use will not be considered adverse until (1) the need for the right of way arises, (2) the owner of the dominant estate demands that the easement be opened, and (3) the owner of the servient estate refuses to do so.

Id.

In Thompson, the servient owner poured a concrete slab over a reserved roadway easement. Because the right of way was not in use at the time, the Supreme Court held that the concrete slab, which was used to store vehicles and lumber, did not interfere with the interest of the dominant estate. Thompson, 59 Wn.2d at 409.

For the same reason, Olson's argument that he adversely possessed the easement because Franklund and her predecessors did not use the easement does not establish adverse use. At the earliest, Olson's allegedly adverse use commenced in 2007, after Franklund moved in and began using the easement.

Olson's argument also ignores the road maintenance agreement signed by Olson and Franklund's predecessors in interest (the Brineys) in 1984. (Ex. 12). As noted, the agreement imposed dues for the maintenance of McPherson Lane. (Ex. 26, 51). Franklund's uncontroverted testimony at trial was that she did not regard Olson's use of the easement as a hostile, notorious use, because she believed the easement was part of McPherson Lane and that she was paying for its maintenance pursuant to the road maintenance agreement. (RP 52). Based on this testimony, the trial court agreed, finding on an objective basis Olson was maintaining the easement as part of the maintenance agreement and not as part of an effort to

adversely possess it. (CP 16). As the trier of fact, the trial court could properly rely on Franklund's testimony and the road maintenance agreement to support a finding that the elements of adverse possession were not met. Morse v. Antonellis, 149 Wn.2d 572, 574, 70 P.3d 125 (2003) (credibility determinations are solely for the trier of fact and cannot be reviewed on appeal).

Olson cites to nothing in the record that would call the trial court's decision into question. Moreover, Olson cites to no persuasive legal authority for his argument. He merely cites Cuillier v. Coffin, 57 Wn.2d 624, 358 P.2d 958 (1961), which does not support his position. Cuillier involved a failed attempt to assert prescriptive rights over a roadway. It did not involve the issues raised in this appeal. Nor did it suggest the maintenance of an easement constitutes hostile use, or call the trial court's decision into question in any way. Olson cites no other authority. Without any authority to support Olson's claim, there is no reason to question the trial court's judgment.

“Washington law does not favor termination of easements.” Cole v. Lavery, 112 Wn. App. 180, 186, 49 P.3d 924, 927 (2002). The only use of the easement area by Olson that could be considered obstructive to the easement was his construction and maintenance of the temporary fence and gate. This, however, “is not a sufficiently inconsistent use of the easement area to constitute adverse possession.” City of Edmonds, 54 Wn. App. at 637 (erection of fence insufficient).

Even if the Court finds evidence of adverse use, Olson cannot prove the other elements of adverse possession, *i.e.*, open and notorious possession, exclusivity, and possession for the requisite statutory period. The absence of any finding of fact by the trial court as to the other elements of adverse possession is deemed a finding against Olson. “The absence of a finding of fact in favor of the party with the burden of proof about a disputed issue is the equivalent of a finding against that party on that issue.” Wallace Real Estate Inv., Inc. v. Groves, 72 Wn. App. 759, 773, 868 P.2d 149, 158 aff’d, 124 Wn.2d 881, 881

P.2d 1010 (1994). See also Omni Group, Inc. v. Seattle-First Nat. Bank, 32 Wn. App. 22, 28, 645 P.2d 727, 731 (1982) (“If no finding of fact is entered as to a material issue, it is deemed to have been found against the party having the burden of proof.”). The burden of proving adverse possession is on the party seeking to prove it. ITT Rayonier, Inc., 112 Wn.2d at 757. There is no record Olson ever proposed counter findings of fact that addressed those other elements. Under the cases cited above, the absence of any findings of fact on those elements is a finding against Olson.

2. There Is No Evidence in the Record of Any 25 Year Permanent Fence Defining the Ownership Boundary between the Parcels

Next, Olson argues that the trial court erred in ignoring a 25-year old permanent, historical fence along the eastern border of Franklund’s parcel bordering the easement, which he claims established the boundaries between the parcels and cut off Franklund’s right to the easement. (App.’s Br. at 1). Olson suggests the alleged fence is an “uncontroverted fact[.]” (Id. at

2).³

Olson's contention is without merit. Aside from the fact the issue was not raised below, it is unclear from Olson's brief what fence he is claiming established the boundary between Parcel A and Parcel B and cut off Franklund's easement rights. The record is devoid of any evidence supporting the existence of a permanent, historical fence demarcating any boundary. There is no mention of any such fence in the testimony; there is no mention of any such fence in the trial memoranda. (CP 29-44). The only fences mentioned in the record are (1) the temporary fence Olson erected along the western border of the easement to impede Franklund's access to the eastside of Parcel A via the easement, (Ex. 12; RP 32), and (2) a small corral fence on Parcel A. (RP 85; Ex. 27). There is no evidence either of these fences precluded Franklund's ability to go up the easement. At most, the temporary fence Olson erected

³ Olson improperly attempts to place the burden of proof on Franklund, arguing that she "had no evidence to indicate she constructed that permanent fence, nor that it was less than 25 years old." (App.'s Br. at 2). The burden of proving adverse possession, however, was on Olson. ITT Rayonier, Inc., 112 Wn.2d at 757.

precluded Franklund from turning left from the easement into her property.

Olson's own briefing demonstrates his confusion about the identity of the alleged fence. Referring to it, he states, "[T]he Franklund property could not use the contested driveway, until the plaintiff-respondent destroyed the fence," citing page 57, lines 23-24 of the Report of Proceedings. That assertion clearly relates to the temporary fence Olson erected along the western edge of the 30-foot easement (on Franklund's property) when he attempted to impede Franklund's access from the easement to her east entryway, not to prevent her from accessing the easement! (RP 55-57).

Moreover, none of the exhibits Olson cites to support his argument illustrate a historical, permanent fence that established the boundary between the parcels. Olson cites Exhibits 2, 9, and 27. (App.'s Br. at 3). Exhibit 2 does not show such a fence. Exhibit 9 merely shows part of the temporary fence placed by Olson across Franklund's entryway to the east

side of her parcel from the easement. (RP 27-28, 84-85). Since Franklund acquired Parcel A only in 2005, this later erected fence cannot be a permanent boundary fence. Similarly, Exhibit 27 merely shows the small corral fence. (Ex. 27; RP 85).

The record does not support the conclusion that the corral fence is a historical, permanent fence that established the boundary between the parcels. The exhibits show it does not extend the length of the easement. (Ex. 7). From the record, it appears the corral fence is only present around Franklund's east entryway. (RP 85).

Olson cites no other part of the record for support. This begs the obvious question: how can the trial court have "ignored" something that was never mentioned in the record? The rule is that courts will decline to consider facts recited in the briefs, but not supported by the record. Sherry v. Financial Indem. Co. 160 Wn.2d 611, 160 P.3d 31 (2007). Because it is unsupported, the Court should not consider Olson's fence argument.

Moreover, because the trial court never entered any finding of fact regarding the alleged fence, its absence is deemed a finding against Olson. Wallace Real Estate Inv., Inc., 72 Wn. App. at 773.

Olson also cites to no relevant legal authority for support. Olson solely relies on Wood v. Nelson, 57 Wn.2d 539, 358 P.2d 312 (1961), for the proposition that “[w]here a fence purports to be a line fence, rather than a random one, and when it is effective in excluding an abutting owner from the unused part of a tract otherwise generally in use, it constitutes prima facie evidence of hostile possession up to the fence.” Id. at 541.

Wood does not support Olson’s position. In that case, the Supreme Court quieted title in the plaintiff to a 20-foot strip of land lying between the boundary line of two parcels and a fence approximately 20 feet on the defendant’s parcel. Id. at 540. The fence ran parallel to the boundary line throughout its length, effectively excluding the defendant from the strip. Id. The court concluded the trial court’s finding that the “property up to it

[the fence] has been occupied and used by the parties for such a period of time as to establish plaintiff's claim by adverse possession" was supported by the record, citing the above-referenced rule.

The circumstances in the instant case are vastly different. First, there is no evidence in the record—or any claim—that the alleged “historical” fence, or any fence, follows the entire length of the easement on Franklund’s side. At most, the exhibits show a small corral fence located around a small portion of Franklund’s residence. Thus, nothing in the record indicates any fence was intended as a “line fence” to form a boundary between the parcels.

Likewise, unlike in Wood, the record fails to show that the alleged fence effectively excluded Franklund from the easement. In Wood, the fence ran the entire length of the boundary line, thus cutting off the plaintiff’s access. Id. at 540. It is obvious the alleged “historical” fence did not in fact exclude Franklund from the easement, but only inhibited her

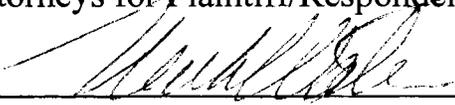
access to the east end of her parcel from the easement. Otherwise, Olson would not have had to build the temporary fence and gates in an attempt to impede her access to the easement. (RP 32-33, 55-56, 62-63, 84).

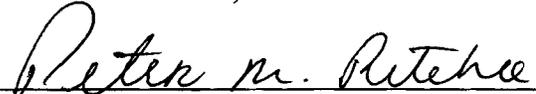
V. CONCLUSION

The trial court's judgment should be affirmed.

Respectfully submitted this 21st day of February, 2012.

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