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No. 635921

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

BEARRACH McMONAGLE & JENNIFER GLYZINSKI,

Respondents,

v.

DAVID ALLAN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
FOR SKAGIT COUNTY
THE HONORABLE JOHN M. MEYER

BRIEF OF RESPONDENTS McMONAGLE & GLYZINSKI

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INTRODUCTION

This is a boundary dispute. Plaintiffs own a 40 acre parcel immediately north of defendant's 9+ acres near Blanchard in Skagit County. The parties' deeds both show the boundary as a section line running east/west between their properties.

In October 2004, defendant came onto plaintiffs' property and cut down a number of trees, some more than 100 feet north of the line. Plaintiffs sued defendant in 2005 to quiet title to the disputed area, to recover damages and to eject defendant from the disputed area. Defendant counterclaimed to quiet title to the disputed area by adverse possession. After suit was filed, defendant moved his fences further north, destroyed a wetland over the line, built a pole barn which encroached upon the required setback, graded a driveway over the line and moved a trailer, boat, junk and other personal property over the line.

A 13 ½ day trial was held in 2008. On April 3, 2009, the trial court entered judgment quieting title to the disputed area in plaintiffs, awarding plaintiffs damages and ordering defendant to move his pole barn, driveway, and other personal property off plaintiffs' land. Defendant has filed this appeal, arguing that the trial court erred in disallowing certain evidence and in denying a jury.

ISSUES

1. Did the trial court abuse its discretion by excluding part of the testimony of witnesses whom defendant did not disclose as required by the discovery order?
2. Did the trial court abuse its discretion in excluding evidence of statements made by plaintiffs' predecessor-in-title as barred by the dead man statute?
3. Did the trial court abuse its discretion in denying a jury?

STATEMENT OF THE CASE

Unchallenged Findings & Conclusions. Please refer to the attached findings of fact and conclusions of law entered by the trial court on February 26, 2009, none of which have been challenged by defendant.¹

Forest Land. From 1987 to the present, plaintiffs' property has been taxed as forest land.² Special rules apply with regard to forest land in cases of adverse possession. In order to establish open and notorious possession of forest lands, the adverse claimant must establish by clear and convincing evidence that he made improvements on the land at issue

¹ CP 179-186, copies in Appendix.

² Finding of Fact No. 5; CP 180.

for which the cost of construction exceeded \$50,000. RCW 7.28.085.³

The trial court found that defendant made no such improvements on plaintiffs' land.⁴

RCW 7.28.085 does not apply to adverse claimants who, before the effective date of the statute—June 11, 1998—acquired title to the land at issue by adverse possession under the law then in effect.⁵ Defendant went into title in 1995.⁶ Thus, to establish adverse possession, defendant had to tack his possession onto that of his predecessors-in-title and show adverse possession for at least the period June 11, 1988, to June 11, 1998.

Predecessors-In-Title. The plaintiffs' predecessors-in-title were Larry and Lynne Hower, who sold to plaintiffs on August 13, 2004. The Howers' predecessors-in-title were the Fravel sisters, from whom the

³ RCW 7.28.085 reads in part:

(1) In any action... based on a claim of adverse possession ... the adverse claimant shall not be deemed to have established open and notorious possession of the forest lands at issue unless, as a minimum requirement, the adverse claimant establishes by clear and convincing evidence that the adverse claimant has made or erected substantial improvements, which improvements have remained entirely or partially on such lands for at least ten years...

(3) For purposes of this section:

...

(d) "Substantial improvement" means a permanent or semipermanent structure or enclosure for which the costs of construction exceeded fifty thousand dollars.

⁴ Finding of Fact No. 5; CP 180.

⁵ RCW 7.28.085(4).

⁶ Finding of Fact No. 6; CP 180.

Howers acquired title in 1983.⁷ Larry Hower died during the pendency of this action before trial. The last Fravel sister died in 1983.

Defendant's predecessors-in-title were Terry and Rebecca Read, who sold to defendant on May 10, 1995. The Reads' predecessor-in-title was Dale Hasselberg, who sold to the Reads on March 31, 1988.⁸

Plaintiffs called both Terry Read and Dale Hasselberg as witnesses at trial.

Terry Read. Terry Read testified that some of the fences now on defendant's property were not there when he sold to defendant in 1995.⁹ There was a stock fence Mr. Read used to pasture sheep and horses.¹⁰ There were also some remnant fences in disrepair that were once used to keep cattle from falling in the drainage area.¹¹

Mr. Read testified that he had Mr. Hower's permission to leave the stock fence up, which bowed over the line to the north.¹² Mr. Read also had Mr. Hower's permission to mow blackberries north of the line and to access the area north of the line for haying.¹³

⁷ Findings of Fact Nos. 3 & 4; CP 180.

⁸ Findings of Fact Nos. 6 & 7; CP 180.

⁹ 8/29/08 (morning) RP 4-6; 8-12; 18-20.

¹⁰ 8/29/08 (morning) RP 9-11.

¹¹ 8/29/08 (morning) RP 16-20.

¹² 8/29/08 (morning) RP 21-23. NB: This testimony was originally given as an offer of proof, which the trial court later accepted. 8/29/08 (afternoon) RP 3-4.

¹³ 8/29/08 (morning) RP 22-24.

Dale Hasselberg. Dale Hasselberg testified that the relationship between his family and the Fravel family was close and that, in fact, the families were related. Ms. Fravel gave the Hasselbergs permission to use her property.¹⁴ For example, Ms. Fravel gave the Hasselbergs permission to put a fence up to keep cows out of the corn, and the Hasselbergs shared the corn with Ms. Fravel.¹⁵ As another example, Ms. Fravel gave the Hasselbergs permission to run cattle north of the line over onto the Fravels' land.¹⁶

When Larry Hower inherited the property from Ms. Fravel, Mr. Hesselberg received the same permission from Larry Hower. Mr. Hower gave the Hasselbergs permission to graze cattle and cut hay north of the line.¹⁷

Permissive Use. On the basis of this and other evidence, the trial court held that the relationship between plaintiffs' predecessors-in-title (the Howers and the Fravels) and defendant's predecessors-in-title (the Reads and the Hasselbergs) were friendly and neighborly and that any fences erected on or near the boundaries were with the express or implied permission of the other party and were neither adverse nor hostile.¹⁸ This

¹⁴ 9/30/08 RP 121-122.

¹⁵ 9/30/08 RP 122-123.

¹⁶ 9/30/08 RP 115; 123-125.

¹⁷ 9/30/08 RP 122-126.

¹⁸ Finding of Fact No. 8; CP 181.

express or implied permissive use of the disputed area continued up until the time plaintiffs purchased the property from the Howers on August 13, 2004.¹⁹

Trespasses. In October 2004, defendant came onto plaintiffs' property and cut down trees.²⁰ Plaintiffs filed suit against defendant to quiet title to their property and for damages in 2005.²¹ Thereafter—while suit was pending—defendant extended his driveway onto plaintiffs' property, moved fences north across the line, built a swale and installed a culvert to divert water onto plaintiffs' property, cleared and disturbed a wetland on plaintiffs' property, erected a pole barn only nine feet south of plaintiffs' line in violation of the setback, and moved a trailer, boat, junk and other personal property onto plaintiffs' property.²²

Counterclaim. Defendant counterclaimed to quiet title in defendant to the property at issue on the ground of adverse possession.²³ The trial court held that defendant had failed to establish adverse possession or mutual recognition and acquiescence and dismissed the counterclaim.²⁴

¹⁹ Findings of Fact Nos. 9 & 10; CP 181.

²⁰ Finding of Fact No. 11; CP 181.

²¹ CP 208-212.

²² Findings of Fact Nos. 11, 13, 14, 15, 16 & 18; Conclusion of Law No. 7; CP 181-185.

²³ CP 3-4.

²⁴ Conclusion of Law No. 12; CP 185-186.

Judgment. The trial court quieted title in the property at issue in plaintiffs and awarded plaintiffs damages against defendant for the various trespasses.²⁵ Defendants' motion for reconsideration was denied, and this appeal followed.²⁶

STANDARD OF REVIEW

Findings. A finding of fact erroneously described as a conclusion of law is reviewed as a finding. *Willener v. Sweeting*, 107 Wn.2d 388, 393-4, 730 P.2d 45 (1986). Individual findings of fact must be read in the context of other findings of fact and of the conclusions of law. *In re Hews*, 108 Wn.2d 579, 595, 741 P.2d 983 (1987). Unchallenged findings are verities on appeal. *Nearing v. Golden State Foods Corp.*, 114 Wn.2d 817, 792 P.2d 500 (1990).

Conclusions. An unchallenged conclusion of law becomes the law of the case. *King Aircraft v Lane*, 68 Wn.App. 706, 716, 846 P.2d 550 (1993). Appellate review of a conclusion of law, based upon findings of fact, is limited to determining whether the findings are supported by substantial evidence, and if so, whether those findings support the conclusion. *American Nursery Prods., Inc. v. Indian Wells Orchards*, 115 Wn.2d 217, 222, 797 P.2d 477 (1990).

²⁵ Judgment entered April 3, 2009.

²⁶ CP 204-205.

ARGUMENT

Issue No. 1. Did the trial court abuse its discretion by excluding part of the testimony of witnesses whom defendant did not disclose as required by the discovery order?

Standard of Review. A trial court's decision to exclude a witness from testifying because of a discovery order violation is reviewed for abuse of discretion. *Lancaster v Perry*, 127 Wn.App. 826, 830, 113 P.3d 1 (2005). Error in excluding evidence is harmless where the party offering the evidence fails to make an adequate offer of proof as required by ER 103(a)(2). *Miller v Peterson*, 42 Wn.App. 822, 828, 714 P.2d 695 *rev den* 106 Wn.2d 1006 (1986). Error in excluding evidence is harmless unless it is reasonably probable that its exclusion changed the outcome of the trial. *Brundridge v Fluor Fed. Servs.*, 164 Wn.2d 432, 452, 151 P.3d 879 (2008).

Error Alleged. Defendant argues that the trial court excluded “[a]lmost all of Mr. Allan’s evidence”²⁷ for violation of the discovery order.²⁸ Defendant claims that plaintiffs violated the same discovery

²⁷ Appellant’s Opening Brief at 6.

²⁸ Appellant’s Opening Brief at 5-6.

order, so that the defendant was unfairly penalized.²⁹ Defendant also claims that the trial court refused to consider lesser sanctions³⁰ and implies that the effect of the ruling was to decide the case on a “mere technicality.”³¹ All of this is wrong.

Facts. The facts bearing on Issue No. 1 are set out below.

History of Discovery Abuses. Defendant abused the discovery process and ignored deadlines throughout the case.³² Defendant failed to respond to written discovery requests and follow-up requests and provided information only after plaintiffs scheduled CR 26(i) conferences. Even then, the discovery belatedly produced was often insufficient.³³

Witnesses Identified by Defendant. In his April 13, 2007 responses to written discovery, the only witnesses defendant identified were “Eric Allan and Carlene Allan—contact information unknown—and prior owners.” No experts were identified.³⁴

At his October 25, 2007 deposition, defendant said that Larry Hower, the Reads and defendant’s family had knowledge concerning the case. He again identified no experts.³⁵

²⁹ Appellant’s Opening Brief at 6-8.

³⁰ Appellant’s Opening Brief at 5.

³¹ Appellant’s Opening Brief at 6.

³² CP 70-76.

³³ CP 70-73.

³⁴ CR 71-72; 93-94.

³⁵ CP 72; 105-106.

Discovery Order. A discovery order entered June 22, 2007, required both parties to designate witnesses and experts no later than 90 days prior to trial.³⁶ Experts had to be deposed 30 days after their designation and lay witnesses 60 days after being designated.³⁷ The 6/22/07 Discovery Order also provided that “no witness or expert shall be allowed to testify at trial unless properly designated in accordance with the terms of this order.”³⁸

Trial Date. After several unsuccessful attempts,³⁹ the case was set for trial beginning April 15, 2008.⁴⁰ Thus, pursuant to the 6/22/07 Discovery Order, experts and witnesses had to be designated by January 16, 2008, experts had to be deposed by February 15, 2008, and the discovery cutoff date was March 16, 2008.⁴¹

Plaintiffs' Designation. Plaintiffs filed and served their designation of witnesses on January 16, 2008, including voluminous attachments (experts' reports, damage estimates, c.v.'s of experts and the like).⁴² Defendant filed nothing.

Amendment to Discovery Order. On January 17, 2008, plaintiffs

³⁶ CP 23-24.

³⁷ CP 24.

³⁸ CP 25.

³⁹ Plaintiffs noted the case for trial setting several times, but had to strike the requests due to developments in the case (such as defendant's jury demand). CP 73.

⁴⁰ CP 73.

⁴¹ CP 24.

⁴² CP 74.

filed an amended reply to defendant's counterclaim to quiet title by adverse possession to cite RCW 7.28.085 (forest lands defense) and noted their motion to amend for hearing on February 1, 2008.⁴³ Defendant objected to the amendment since it would give defendant "only 30 days to depose these experts while investigating and seeking discovery on the new defense."⁴⁴ Defendant argued that, if the amendment was to be allowed, the trial date should be continued.⁴⁵

After oral argument was taken, the trial court⁴⁶ entered an order on 2/1/08 allowing the amendment, but modifying the 6/22/07 Discovery Order to give defendant an additional 30 days in which to depose experts. In addition, the 2/1/08 Order provided that defendant's motion for continuance could be renewed upon a showing of good cause.⁴⁷

Defendant's Witness List. On March 7, 2008, defendant furnished a witness list naming 34 witnesses.⁴⁸ No experts were identified other than "Tom Hanson, arborist, rebuttal expert." No report, c.v., or other information was given.

Supplemental Discovery & Objection. On March 17, 2009, plaintiffs received supplemental discovery responses from defendant,

⁴³ CP 236-237.

⁴⁴ CP 52-53.

⁴⁵ CP 53.

⁴⁶ The Honorable David Needy.

⁴⁷ CP 54-55.

⁴⁸ CP 56-60.

including a 3/7/08 report by Thomas Hanson. Plaintiff filed an objection to defendant's witness list on March 18, 2008, pointing out that defendant's designation of witnesses was almost two months late, that the discovery cutoff date had passed and that the 6/22/07 Discovery Order prevented defendant from calling any of the witnesses listed.⁴⁹

No Further Relief Requested. Defendant did not respond to plaintiffs' 3/18/08 objection. Defendant did not move to amend the 6/22/07 Discovery Order for additional time to designate witnesses and did not ask for a continuance of the 4/15/08 trial date.

Motion to Exclude Testimony. Plaintiffs filed a memorandum regarding their objection to defendant's witness list⁵⁰ with a supporting declaration on April 10, 2008.⁵¹ The issue was heard on the second day of trial, April 16, 2008.⁵² Plaintiffs argued that defendant should not be allowed to call any witnesses (other than defendant himself) since the 6/22/07 Discovery Order so provides. Defendant argued that plaintiffs' 1/17/08 amended reply adding the forest lands defense brought the issue of tacking into the case, so defendant should be excused for not designating witnesses.⁵³ The trial court held a meeting with counsel in

⁴⁹ CP 128-129.

⁵⁰ CP 64-69.

⁵¹ CP 70-135.

⁵² 4/16/08 RP 193-203.

⁵³ 4/16/08 RP 193.

chambers the next morning to try to resolve the issue, but was unsuccessful.⁵⁴

Additional argument was taken on April 18, 2008, and defendant contended that the deadline for designating witnesses was not January 16, 2008, but August 13, 2007.⁵⁵ Since a trial date had at one time been assigned of November 13, 2007, and since the 6/22/07 Discovery Order provides that continuance of a trial date does not affect discovery timelines,⁵⁶ the deadline for designating witnesses ran out for both parties 90 days prior to 11/13/07—on 8/13/07. Thus, since neither party designated witnesses by 8/13/07, defendant should not be singled out for sanctions.⁵⁷

Plaintiffs responded that this was a red herring. What happened was that plaintiffs noted motions for entry of a discovery order and for trial setting for hearing on June 15, 2007,⁵⁸ but struck the motions on June 14, 2007. The clerk of court struck the motion for discovery order, but inadvertently set a trial date of November 13, 2007.⁵⁹ On June 19, 2007, plaintiffs filed and served notice that the 11/13/07 trial date had been set

⁵⁴ 4/17/08 RP 3.

⁵⁵ 4/18/08 RP 6-9.

⁵⁶ CP 25-26.

⁵⁷ 4/18/08 RP 13-19.

⁵⁸ CP 218-220.

⁵⁹ CP 231-232.

by mistake and should be stricken,⁶⁰ and the trial date was later stricken on stipulation of the parties.⁶¹ Thus, both parties knew that the November trial date was going to be stricken prior to entry of the 6/22/07 Discovery Order and were not relying upon that date in setting up deadlines for discovery.

4/21/08 Order. The trial court rejected defendant's argument regarding the 8/13/07 deadline by written order entered April 21, 2008:

The parties were aware on 6/22/07 that the 11/07 trial date would be scrubbed, and that the discovery schedule would be driven by the 4/08 trial date...On 2/1/08 Judge Needy made it very clear that he would hear a motion to continue, which the defense never brought. The defense's failure to timely designate has made discovery very difficult on plaintiff, thus prejudicial.⁶²

However, the trial court limited the remedy granted plaintiffs:

The appropriate sanction is as follows: defendant may call only lay witness whose name was disclosed in writing to plaintiff before 1/16/08. He may also call lay witnesses who can testify on the tacking issue if plaintiff has been given their names in writing. Tom Hanson may testify as an expert...Mr. Allan may testify as to tacking and any opinions within his expertise if appropriately disclosed to the plaintiff by EOB 4/24/08.⁶³

Defense Witnesses Allowed. Pursuant to the 4/21/08 Order, defendant then gave plaintiffs a new list of witnesses and was allowed to

⁶⁰ CP 229-230; 231-232.

⁶¹ CP 31-32.

⁶² CP 242.

⁶³ CP 242.

call April Soria,⁶⁴ Rick Soria,⁶⁵ Makennah Soria,⁶⁶ and Jerry Lomsdalen⁶⁷ on the tacking issue, including the Reads' use and occupancy of land over the line from 1988 to 1995. Defendant testified to his use of land over the line and to the Reads' use of the land prior to defendant's purchasing it.⁶⁸ And even though there was no disclosure until one week prior to the discovery cutoff date, defendant was allowed to call two expert witnesses, Thomas Hanson⁶⁹ and Robert Whitefield.⁷⁰

Lay Testimony Excluded. The Sorias and Mr. Lomsdalen were not allowed to testify to defendant's use of land over the line. Defendant made an offer of proof through Rick Soria to the effect that defendant cleaned up, maintained and used an area north of the line.⁷¹ There was no offer of proof as to whether defendant's use of the area was permissive.

Defendant's Expert Testimony Limited. Defendant (who installs septic tanks and drain fields for a living) was allowed to give expert testimony regarding septic tank/drain field issues,⁷² but not outside that area since defendant was not designated as an expert prior to trial.

⁶⁴ 5/2/08 RP 76-101.

⁶⁵ 6/10/08 RP 1-50.

⁶⁶ 6/10/08 RP 123-130.

⁶⁷ 6/11/08 RP 1-25.

⁶⁸ 6/10/08 RP 137-144.

⁶⁹ 6/9/08 RP 2-80.

⁷⁰ 6/10/08 RP 51-123. NB: Mr. Whitefield's testimony was received as an offer of proof, which the trial court later accepted. Conclusion of Law 13; CP 186.

⁷¹ 6/10/08 RP 23-24.

⁷² 8/28/08 RP 64-66.

Incidentally, even with regard to this exclusion, the trial court gave defendant another chance. The 4/21/08 Order allowed defendant to give expert testimony on any subject within his expertise if the substance of that testimony was provided to plaintiffs by close of business on 4/24/08.⁷³ Defendant failed to provide plaintiffs with such information by 4/24/08,⁷⁴ so he was not allowed to give expert opinions outside the area of septic tanks/drain fields.⁷⁵

Discussion. A trial court's decision to exclude testimony because of a discovery violation should not be disturbed on appeal except on a clear showing of abuse of discretion. Discretion is not abused unless the decision is manifestly unreasonable or is based on untenable grounds or reasons. *Lancaster v Perry*, 127 Wn.App. 826, 830, 113 P.3d. 1 (2005).

In *Lancaster*, defendant failed to disclose his expert witness by the deadline imposed under King County Local Rule (KCLR) 26. KCLR 26(f) provided that witnesses not timely disclosed may not testify at trial absent a showing of good cause. The trial court excluded the expert's testimony without any showing of prejudice. On appeal, this Court affirmed:

The purpose of the case management schedule and disclosure deadlines is to have an orderly process by which

⁷³ CP 242.

⁷⁴ 6/9/08 RP 81-86.

⁷⁵ 9/30/08 RP 42-46.

a case can proceed. Requiring parties to disclose witnesses allows the opposing party time to prepare for trial and conduct the necessary discovery in a timely fashion. Allowing disclosures to be made in the manner suggested by [defendant], in the absence of good cause that is not present here, would frustrate the purpose of the scheduling rules.⁷⁶

Here, defendant has shown no cause at all—much less good cause—for failing to disclose witnesses and experts by the 1/16/08 deadline. Although finding prejudice to plaintiffs, the trial court gave defendant considerable latitude and limited plaintiffs' remedy. Defendants were allowed to call a number of witnesses, as well as two experts. The only evidence excluded related to defendant's use of land over the line after he purchased in 1995. As in *Lancaster*, no abuse of discretion occurred.

Defendant also argues that the trial court should have granted a continuance rather than exclude testimony.⁷⁷ But the 2/1/08 Order invited defendant to renew his motion for continuance on a showing of good cause, and defendant nevertheless made no such motion until the second day of trial. Besides, defendant himself made such a remedy impractical by trespassing over the line while this action was pending (including grading a driveway over the line, destroying a Class II wetland over the line, erecting a swale and installing a culvert to direct water over the line,

⁷⁶ 127 Wn.App. at 833

⁷⁷ Appellant's Opening Brief at 5-6.

and moving his fences further north over the line). This case needed to be tried forthwith, and the trial court did not abuse its discretion by refusing to continue the case after trial had already begun.

Moreover, defendant's offer of proof regarding the excluded testimony related only to defendant's use of land north of the line and did not address whether that use was permissive.⁷⁸ Presumably, none of defendant's witnesses knew whether Larry Hower gave defendant permission to use his land—a conclusion bolstered by the fact that none of defendant's witnesses testified about the Reads' having Hower's permission to use the area north of the line. Under these circumstances, excluding testimony about defendant's use of the area made no difference. It was undisputed that the Reads and defendant used land north of the line. The issue was whether that use was permitted.⁷⁹

Further, even if defendant's possession over the line was not permissive, the excluded testimony made no difference. Since no error has been assigned to the finding that defendant did not erect a structure north of the line costing at least \$50,000, defendant's use of land over the line was only relevant for the 3-year period May 10, 1995 (when

⁷⁸ 6/10/08 RP 22-23.

⁷⁹The issue is moot at this point since defendant has not assigned error to the finding that the Reads' and defendant's use of the land north of the line was with the Howers' permission.

defendant purchased) to June 11, 1998 (effective date of RCW 7.28.085). The statute of limitations for adverse possession is ten years—not three years—so excluding evidence regarding defendant’s use of land over the line would not have changed the outcome of the trial. Any error was therefore harmless. Brundridge v Fluor Fed. Servs., *supra*.

Finally, any error in limiting defendant’s expert testimony to the area of septic tank/drain field issues made no difference. Defendant argues that his expert testimony would have affected the amount of damages awarded plaintiffs,⁸⁰ but this is incorrect for several reasons. First, defendant was not qualified to testify as an expert outside the area of septic tank/drain fields.⁸¹ Second, defendant’s two experts adequately addressed the damages claimed by plaintiffs,⁸² and defendant’s testimony would merely have been cumulative. Third, defendant’s offer of proof⁸³ did not address plaintiffs’ damage claims (timber trespass, clean-up costs and wetland remediation costs). Rather, the offer of proof concerned defendant’s counterclaim for betterments (such as the value of the portion of defendant’s dike which extended north of the line). No error is

⁸⁰ Appellant’s Opening Brief at 9 (“the cost of modifications requested by McMonagle and Glyzinski…”).

⁸¹ 9/30/08 RP 43, line 9 (“THE COURT: Has Mr. Allan ever built a dike…?”)

⁸² Mr. Hanson testified to the stumpage value of the timber cut by defendant—plaintiffs unsuccessfully argued for ornamental value—and the cost of cleaning up the slash and debris left behind. Mr. Whitefield testified about the wetland and minimized any damage done by defendant’s actions.

⁸³ 9/30/08 RP 35-47.

assigned to the trial court's refusal to allow defendant to make a counterclaim for the value of betterments on the next-to-last day of trial.⁸⁴ Defendant's testimony about the value of betterments was therefore irrelevant, and any error in excluding such testimony was harmless.

Brundridge v Fluor Fed. Servs., supra.

Issue No. 2. Did the trial court abuse its discretion in excluding evidence of statements made by plaintiffs' predecessor-in-title as barred by the dead man statute?

Standard of Review. Evidentiary rulings are reviewed for abuse of discretion. Estate of Bordon v Dep't of Corr., 122 Wn.App. 227, 244, 96 P.3d 764 (2004) *rev den* 154 Wn.2d 1003 (2005). Error in excluding evidence is harmless where the party offering the evidence fails to make an adequate offer of proof as required by ER103(a)(2). Miller v Peterson, 42 Wn.App. 822, 828, 714 P.2d 695 *rev den* 106 Wn.2d 1006 (1986). Error in excluding evidence is harmless unless it is reasonably probable that it changed the outcome of the trial. Brundridge v Fluor Fed. Servs., 164 Wn.2d 432, 452, 151 P.3d 879 (2008).

Error Alleged. Defendant claims that the trial court erred in excluding the testimony of plaintiff Jennifer Glyzinski about a

⁸⁴Defendant first made this counterclaim on 9/30/08. 9/30/08 RP 28-31. CP 168-171. The trial court noted that RCW 7.28.160&170 require that a counterclaim for betterments pursuant to RCW 7.28.150 "must be set forth in the answer..." (9/30/08 RP 46, line 17) and awarded defendant nothing for betterments.

conversation with defendant in which defendant said he was cutting firewood with the permission of Larry Hower. Defendant argues that plaintiffs opened the door to this testimony. Defendant also argues that the exclusion of this testimony caused the trial court to enter a damage award against defendant. Again, all of this is wrong.

Facts. The facts bearing on Issue No. 2 are set out below.

Dead Man's Statute. RCW 5.60.030 (dead man statute) prohibits a party from testifying to any transaction with, statement to, or statement made in the presence of, either party's predecessors-in-title. Therefore, the statute prevented plaintiffs and defendant from testifying about dealings with Larry Hower (plaintiffs' predecessor-in-title.)⁸⁵

Glyzinski Direct Testimony. Plaintiff Jen Glyzinski testified on direct that in November 2004 she was on the upper part of her property—hundreds of yards north of the line—when she heard a chain saw running. She investigated and found defendant and his daughter cutting firewood rounds.⁸⁶

Ms. Glyzinski asked defendant whose property he was on, and defendant said it was Larry Hower's property. Ms. Glyzinski told him that it was not Mr. Hower's property since she and Barry McMonagle had

⁸⁵ 5/2/08 RP 23-28.

⁸⁶ 5/2/08 RP 9-10.

bought the property in August. Ms. Glyzinski told defendant to finish up what he was doing and to please leave her property.⁸⁷

Cross-Examination. On cross-examination, defendant asked Ms. Glyzinski whether defendant claimed to have Mr. Hower's permission to cut firewood. Plaintiffs objected on the ground of the dead man statute. The defendant made an offer of proof⁸⁸ and argued that, having brought up part of the conversation, the door was opened to the entire conversation:

MR. LONG: ...They chose to introduce this conversation, not Mr. Allan. Having chosen to introduce the conversation is [sic] unfair to prevent us from having the rest of the conversation.⁸⁹

The trial court questioned this reasoning:

THE COURT: Well, what dead man's evidence did she introduce other than the fact that—what did she say about that transaction other than the fact that she said that he was cutting firewood on her property?⁹⁰

Ruling. The trial court reserved ruling on the objection.⁹¹ It is unclear whether the trial court considered the testimony, but in general the

⁸⁷ 5/2/08 RP 9.

⁸⁸ 5/2/09 RP 27-28.

⁸⁹ 5/2/09 RP 26.

⁹⁰ 5/2/08 RP 26.

⁹¹ 5/2/08 RP 28.

trial court gave defendant considerable latitude with regard to defendant's dealings with Mr. Hower.⁹²

Discussion. A party does not open the door to the admission of inadmissible evidence unless it first introduces inadmissible evidence. *Patterson v Kennewick Public Hosp.*, 57 Wn.App 739, 744-745, 790 P2d. 195 (1990). Here—as the trial court noted—plaintiffs did not introduce evidence regarding defendant's dealings with Mr. Hower in violation of the dead man statute. All plaintiffs showed was that defendant was cutting firewood and claimed to believe he was on the Howers' property, whereupon Ms. Glyzinski told him it was her property and to leave. This bore upon the willfulness of defendant's subsequent trespasses (such as defendant's destruction of plaintiffs' wetland in 2005-2006.)

It was defendant who then sought to go into his dealings with Mr. Hower on cross-examination of Ms. Glyzinski when he asked her about defendant's claim that he had Mr. Hower's permission to cut firewood. Plaintiffs' objection to this proffered testimony should have been sustained since the testimony violated the dead man statute and since there was no door open for defendant to walk through.

⁹² For example, see 8/28/08 RP 37-44, where the trial court ruled that defendant's clearing activities over the line in 1995 in Mr. Hower's presence was not a "transaction" for purposes of the dead man statute and therefore admissible over plaintiffs' objection.

A trial court's ruling on the admissibility of evidence is reviewed for abuse of discretion. When a trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons, an abuse of discretion exists. State v Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). No such abuse of discretion has been shown here.

In any event, assuming the evidence should have been admitted—and bearing in mind that it is unclear whether the trial court excluded the testimony or not—what difference could it make? The evidence tends to support the trial court's finding that defendant's use of property north of the boundary line was permissive (up until August 2004, when the Howers sold to plaintiffs.)⁹³ Any error in excluding the evidence would not have changed the outcome of the trial and is therefore harmless. Brundridge v Fluor Fed. Servs., supra.

Further, defendant misunderstands the facts in arguing that:

Without the benefit of evidence that Mr. Hower had given Mr. Allan permission to perform the clearing at issue in this matter, the Court found that Mr. Allan had committed timber trespass... and thereby awarded the Plaintiff treble damages for Mr. Allan's clearing activities in the aggregate amount of \$125,706.⁹⁴

The firewood Ms. Glyzinski caught defendant cutting in November 2004 had nothing to do with the \$5,000 damages awarded plaintiffs for timber

⁹³ Finding of Fact No. 10; CP 181.

⁹⁴ Appellant's Opening Brief at 11-12.

trespass.⁹⁵ The November 2004 cutting of windfall trees for firewood occurred on the upper part of the property.⁹⁶ The timber trespass occurred on the lower part of the property in October 2004, when defendant cut down dozens of healthy trees and yarded them into slash piles.⁹⁷

Plaintiffs were unaware that any trees had been cut on the lower part of their property until 2005.⁹⁸ After discovering the downed trees in February 2005, McMonagle and a friend, Andy Zikovich, confronted defendant, who admitted to cutting the trees the previous October.⁹⁹ In a conversation with McMonagle and Zikovich a few months later (in May), defendant admitted that “he cut [the trees] down for a view...”¹⁰⁰

Moreover, defendant never offered to prove that he inadvertently cut the trees in October, thinking he had Mr. Hower’s permission. (Indeed, how could defendant hope to prove that Mr. Hower’s permission to cut windfalls for firewood justified cutting healthy trees for a view?) Rather, defendant gave a number of explanations, such as that he cut some of the trees to assist the DNR in fighting a fire,¹⁰¹ that he cut the trees over a period of years ending prior to August 2004 (i.e. prior to plaintiffs’

⁹⁵ Finding of Fact 11; CP 181.

⁹⁶ 5/2/08 RP 9-10; 21 & 32-33; 8/28/08 RP 67-69.

⁹⁷ 4/15/08 RP 28-45

⁹⁸ 5/2/08 RP 28; 34-36; 4/15/08 RP 51-55.

⁹⁹ 4/15/08 RP 46.

¹⁰⁰ 4/15/08 RP 46-49; quote at 48, lines 19-21.

¹⁰¹ Which was denied by the DNR supervisor in charge. 9/30/08 RP 90-94.

ownership),¹⁰² that some of the trees he cut posed a fire hazard,¹⁰³ and, most important, that he owned the property where he cut down the trees:

- Q. Well, actually, my question is: If these trees are yours, what difference does it make whether they're a fire hazard or rotten or diseased or anything else? You'd have a right to cut or not cut them or burn them, wouldn't you?
- A. Yeah.
- Q. And yet you told a number of different reasons as to why you cut these trees. You talked about how you cleared for DNR fire crews in '04, did you not?
- A. Some cleaned up for that, yeah.
- Q. Then you talked back in June [2008, i.e. in trial] about how some of these trees you cut were a torch aimed at your property, didn't you?
- A. Yeah.
- Q. And some of them were rotten. You've also said that, right?
- A. Right.
- Q. Well, who cares, if you own them?
- A. You do. You keep on asking me why I cut them.
- Q. Well, when you cut them, did you think you owned them, sir?
- A. Yeah. Yes.¹⁰⁴

Unfortunately for the defendant, he lost his adverse possession claim, so they were not his trees after all, but the point is that any error in excluding testimony about defendant's alleged permission from Mr. Hower to cut firewood had nothing to do with the trial court's award of damages for timber trespass. The testimony therefore would not have

¹⁰² 9/30/08 RP 55.

¹⁰³ 8/28/08 RP 100.

¹⁰⁴ 8/20/08 RP 122-123.

affected the outcome of the trial, and any error in excluding the testimony was harmless. Miller v Peterson, supra; Brundridge v Fluor Fed. Servs, supra.

Issue No. 3. Did the trial court abuse its discretion in denying a jury?

Standard of Review. In cases involving both legal and equitable issues, the trial court has broad discretion to allow a jury on some, none or all issues presented. Green v Hooper, 149 Wn.App. 627, 646, 205 P.3d 134 *rev den* 166 Wn.2d 1034 (2009).

Error Alleged. Defendant argues that he was deprived of his constitutional right to a jury trial:

A party to an action for ejectment is entitled to a trial by jury...The fact that Mr. Allan made a counterclaim of adverse possession does not deprive the case of its character as an ejectment case, nor does it deprive him of his right to a jury trial.¹⁰⁵

Defendant misunderstands the facts and misapplies the law regarding this issue.

Facts. The facts bearing on Issue No. 3 are set out below:

Pleadings. Plaintiffs filed a complaint on December 28, 2005, alleging that defendant encroached upon their property and committed

¹⁰⁵ Appellant's Opening Brief at 14 & 16.

timber trespass. Plaintiffs prayed to quiet title to the disputed area, eject defendant from the disputed area and for an award of damages, including treble damages for the timber trespass.¹⁰⁶ Plaintiffs amended their complaint in April 2007, to allege additional trespasses and damages.¹⁰⁷

Defendant answered and counterclaimed on May 17, 2006, asking to quiet title to the area “up to the boundary fence” by adverse possession.¹⁰⁸ Defendant filed an amended answer and counterclaim on April 12, 2007, asking for title by adverse possession to “all property up to the boundary fence between the parties,” as well as “property beyond the fence.”¹⁰⁹ Defendant prayed for dismissal of plaintiffs’ complaint, to quiet title to the disputed area and for an award of attorney’s fees and costs.¹¹⁰

Motion to Consolidate. Plaintiffs moved to consolidate this case with another case filed against defendant—this one by defendant’s neighbor to the south, Lyle Gerrits—for assault and harassment.¹¹¹

Defendant opposed consolidation on the basis that:

The plaintiffs have made no showing of how combining the trial of a boundary line case, which would be to the court, with a tort case, which would be to a jury, would enhance judicial economy...
Trying the tort issues in the assault/harassment case

¹⁰⁶ CP 209-212.

¹⁰⁷ CP 5-11.

¹⁰⁸ 8/28/08 RP 97-99.

¹⁰⁹ CP 1-4; quote at CP 3; 8/28/08 RP 98-100.

¹¹⁰ CP 4.

¹¹¹ CP 233; 227.

to the jury while trying the adverse possession/
timber trespass issue to the court would increase
complication, [sic] skyrocket costs for the non-jury
case, and delay resolution of these unrelated
cases.¹¹²

The trial court accepted defendant's argument and denied
plaintiffs' motion to consolidate. However, no jury demand had been filed
in the assault case (Gerrits v Allan), so there was a possibility that the
assault case would also be tried non-jury. Accordingly, the order denying
consolidation entered June 22, 2007, read:

Plaintiffs McMonagle and Glyzinski's Motion to
Consolidate is denied without prejudice to renewing
[the] motion when [the] jury issue in Gerrits, et al. v
Allan, Skagit County Cause No. 06-2-00658-8, is
decided.¹¹³

The record does not show whether defendant ever filed a jury demand in
the assault/harassment case (Gerrits v Allan), but in any event plaintiffs
did not renew their motion to consolidate.

Jury Demand. Plaintiffs noted this case for trial setting, and
defendant filed a jury demand in the case at bar on November 6, 2007.¹¹⁴
Plaintiffs moved to strike the jury demand, arguing (among other things)
that: (1) defendant was judicially estopped from requesting a jury, having
previously taken the position that this case had to be tried to the court

¹¹² CP 226-227, emphasis supplied.

¹¹³ CP 234.

¹¹⁴ CP 35.

(non-jury); and (2) the case was primarily equitable in nature and would turn upon whether defendant could establish title to the disputed area by adverse possession.¹¹⁵ The trial court granted plaintiffs' Motion to Strike Jury Demand by order entered December 21, 2007.¹¹⁶

Discussion. As this Court said in Cunningham v. Reliable Concrete, 126 Wn.App. 222, 108 P.3d 147 (2005):

Judicial estoppel is an equitable doctrine that precludes a party from gaining an advantage by asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position.¹¹⁷

Here, defendant obtained an advantage before the trial court by opposing the motion to consolidate on the ground that the case at bar had to be tried to the bench, whereas the assault case would be tried to a jury. Allowing defendant to then take the opposite position—that this case should be tried to a jury—would offend the dignity of the Court. Accordingly, this Court should hold that defendant was judicially estopped from demanding a jury and affirm the trial court's order striking the jury demand on that basis alone.

Alternatively, the trial court did not abuse its discretion in denying a jury since the case was primarily equitable in nature. There was

¹¹⁵ CP 36-42.

¹¹⁶ CP 50-51.

¹¹⁷ 126 Wn.App. at 224-225.

never any dispute about where the surveyed boundary line was located—it was a section line—and the issue was whether defendant could establish title to an area north of the line by adverse possession. Indeed, defendant’s main defense to plaintiffs’ damage claims for timber trespass and destruction of wetlands in the disputed area was that defendant had acquired title to the area by adverse possession, so plaintiffs “cannot pursue a claim for damages to property they do not own.”¹¹⁸

Adverse possession is purely equitable, and the defendant was not entitled to a jury trial on his counterclaim. *Durah v. Wright*, 115 Wn.App. 634, 63 P.3d 184 (2003). The case also presented legal issues—plaintiffs’ claims for ejectment and damages—so the trial court had to determine whether the case was primarily equitable or legal. Such a determination involves the exercise of discretion, as the supreme court said in *Brown v Safeway*, 94 Wn.2d 359, 368, 617 P.2d 704 (1980):

In determining whether a case is primarily equitable in nature or is an action at law, the trial court is accorded wide discretion, the exercise of which will not be disturbed except for clear abuse. This discretion should be exercised with reference to a variety of factors including, but not necessarily limited to...

(1) who seeks the equitable relief; (2) is the person seeking the equitable relief also demanding trial of the issues to the jury; (3) are the main issues primarily legal or equitable in their nature; (4) do the equitable issues present complexities in the trial which will affect the

¹¹⁸ CP 136-144; quote at 140-141.

orderly determination of such issues by a jury; (5) are the equitable and legal issues easily separable; (6) in the exercise of such discretion, great weight should be given to the constitutional right of trial by jury and if the nature of the action is doubtful, a jury trial should be allowed; (7) the trial court should go beyond the pleadings to ascertain the real issues in dispute before making the determination as to whether or not a jury trial should be granted on all or part of such issues.¹¹⁹

Applying these factors here: (1) defendant was seeking the equitable relief of adverse possession; (2) defendant was also the party demanding trial by jury; (3) the main issue was equitable—had defendant prevailed on his adverse possession claim, plaintiffs' legal claims (ejectment and damages) would necessarily have failed; (4) the adverse possession claim involved the evidentiary issue of applying the dead man statute to the parties' dealings with Mr. Hower, which would have complicated a jury trial; and (5) it would not have been practical to separate the issues since most of the witnesses on adverse possession also testified about damages.¹²⁰ These are tenable reasons for the trial court to find that this case was primarily equitable and not an abuse of discretion.

Finally, the recent case of *Green v Hooper*, 149 Wn.App. 627, 205 P.3d 134 *rev den* 166 Wn.2d 1034 (2009) is instructive. There, the parties

¹¹⁹ 94 Wn.2d at 368, citations omitted, factors quoted from *Scavenius v Manchester Port Dist.*, 2 Wn.App. 126, 129, 467 P.2d 372 (1970).

¹²⁰ For example, the defendant's witnesses testified not only to the Reads' use of the disputed area, but also to the pre-existing damage to the wetland in the disputed area. The trial court accepted this and found that the wetland was only partly functioning when defendant destroyed it in 2005-2006. Finding of Fact No. 15; CP 182-183.

owned adjoining upland properties, and plaintiffs Green filed suit to quiet title to part of the shorelands on the theory of adverse possession and to eject the Hoopers from that portion of their property. The Hoopers counterclaimed to quiet title. The trial court denied the Hoopers' jury demand. The Greens substantially prevailed, and the Hoopers appealed.

On appeal, the Hoopers argued—as defendant argues here—that the Washington Constitution guarantees the right to a jury trial in actions for ejectment, which presents purely legal issues. However, since the case also involved an action to quiet title by adverse possession, which presents equitable issues, this Court held that:

This action presents a mixture of legal and equitable issues. Therefore, there is neither constitutional nor statutory authority to a trial by jury. We conclude the trial court did not abuse its discretion by denying the Hoopers' motion for a jury trial.¹²¹

As in *Green v Hooper*, this case presented both legal and equitable issues. However, the outcome of the case turned on the adverse possession issue—which is equitable—and the trial court did not abuse its discretion in denying defendant's request for a jury.

¹²¹ 149 Wn.App. at 647.

CONCLUSION

The trial court should be affirmed.

Respectfully submitted this 9TH day of November, 2010.

BELCHER SWANSON LAW FIRM, P.L.L.C.

By



JOHN C. BELCHER, WSBA #5040
Lawyer for Respondents/Plaintiffs

APPENDIX

Findings of Fact and Conclusions of Law entered February 26, 2009.
CP 179-186.

2009 FEB 26 AM 7:59

RECORDED

FEB 27 2009

COLLEEN STANSON
LAW FIRM, P.L.L.C.

SUPERIOR COURT OF WASHINGTON, FOR SKAGIT COUNTY

BEARRACH McMONAGLE, a single
person, and JENNIFER GLYZINSKI, a
single person,

Plaintiffs,

vs.

DAVID ALLAN, as his separate estate,
and/or DAVID ALLAN and JANE DOE
ALLAN, husband and wife,

Defendants.

NO. 05-2-02463-4

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This matter came on for bench trial on April 15-18, May 7-9, June 9-11, August 28-29, September 30 and October 1, 2008. Testimony was given, exhibits were received into evidence and reviewed, the scene of the dispute was twice viewed, and arguments were considered. This record is the basis for the following:

FINDINGS OF FACT

1. At all material times, plaintiffs Bearrach McMonagle and Jennifer Glyzinski were residents of the State of Washington.
2. At all material times, defendant David Allan was a resident of the State of Washington.

3. On August 13, 2004, Larry and Lynne Hower sold the plaintiffs a vendee's interest in a real estate contract to the following property ("Plaintiffs' Property"):

The Southeast ¼ of the Northwest ¼ of Section 22, Township 36 North, Range 3, E.W.M., situate in the County of Skagit, State of Washington.

The Howers gave the plaintiffs a fulfillment deed to this property, which was recorded August 2, 2007.

4. Larry and Lynne Hower acquired Plaintiffs' Property in 1983 from the Fravels.

5. From 1987 to the present, Plaintiffs' Property has been taxed as Forest Land. No permanent or semi-permanent structure or enclosure has been constructed on Plaintiffs' Property at a cost in excess of \$50,000.

6. On May 10, 1995, defendant David Allan recorded a Warranty Deed from Terry and Rebecca Read to the following described property (Defendant's Property):

That Portion of the Northeast Quarter of the Southwest Quarter of Section 22, Township 36 North, Range 3, E.W.M., described as follows: Beginning at the center of said Section 22; Thence due West 80 Rods to a stake on the right bank of the McElroy Slough; thence South 22 1/2 degrees East 40 rods and .13 links to a stake located at the corner of a dike on the right bank of said McElroy Slough; thence North 62 1/2 degrees East a distance of 75 Rods, more or less, to the Point of Beginning; EXCEPT THAT portion lying within the as built and existing Flinn Street.¹

7. Terry and Rebecca Read received a deed to Defendant's Property from Dale Hasselberg dated March 31, 1988, and recorded July 6, 1989.

8. The relationship between the Howers and the Fravels, on the one hand, and the Hasselbergs and the Reads, on the other hand, were friendly and neighborly. Any fences erected on or near their boundaries were erected for stock/gardening purposes and not as boundary fences. Such fences were erected with the express or implied permission of the other party and were neither adverse nor hostile.

9. After the Reads took possession in the spring of 1988, there was no change in the Reads' use of fences and surrounding land which would have put the Howers on notice of any adverse or hostile intention on their part. Permission continued and the Reads' possession of land on Plaintiffs' Property was neither adverse nor hostile.

10. After the Defendant took possession from the Reads in Spring 1995, there was no change in his use of fences and surrounding land that would have put the Howers on notice of any adverse or hostile intention on the Defendant's part. Permission continued until the Plaintiffs purchased their interest in the property on August 13, 2004.

11. In October 2004, defendant David Allan knowingly entered upon Plaintiffs' Property and cut down trees. The Plaintiffs failed to satisfy the Court that at any time in the reasonably foreseeable future the trees would be used for ornamental, privacy, or residential purposes or, if so, how any buildings would be situated or accessed and which trees would be brought into play. The trees had a reasonable stumpage value of \$5000.

12. After cutting the trees, defendant David Allan pushed some of the trees using heavy equipment into piles on Plaintiffs' Property. Some of the trees and debris

came from the Defendant's Property. The reasonable cost of cleaning up and burning these piles of timber, slash and debris from Plaintiffs' property is \$7500. In order to perform this work, plaintiffs will need access over Defendant's Property.

13. In 2006, defendant re-graded his driveway to the upper part of his property (to the east) and, in the course of doing so, extended his driveway onto Plaintiffs' Property. This encroachment interferes with the plaintiffs' ability to use this area.

14. At about this time, defendant built a swale and installed a culvert, which had the effect of redirecting the natural flow of water from Defendant's Property onto Plaintiffs' Property. Officials from Skagit County Department of Public Works told defendant to remove the swale and culvert, but defendant has not done so. This trespass interferes with the plaintiffs' wetland and surrounding area.

15. In the period 2006 – 2007, defendant intentionally cleared and otherwise disturbed a wetland and wetland buffer area on Plaintiffs' Property and placed fill in this area. Older fill identified in Plaintiff's wetlands occurred as a result of logging operations not attributable to the Defendant. It is easy to distinguish between the younger fill, circa 2005-2006, and the older layer immediately below, circa 1995 or earlier. Prior to 2005-6, the area was a partially functioning wetland, serving a valuable environmental function, and aesthetically pleasing.

The defendant's actions injured this wetland, which needs to be restored. The reasonable cost of restoring the damage, considering that this was a partially functioning wetland, is \$20,031 for replanting and \$9371 to remove the new fill, for a total cost of \$29,402. In order to perform this work, plaintiffs will need access over

Defendant's Property. In addition, the plaintiffs will need access over Defendant's Property for five years to water and replace the plantings on the wetland.

16. In 2006, defendant applied for a permit to erect a pole barn, to be set back from Plaintiffs' Property as required under Skagit County code. However, defendant knowingly erected the barn only nine feet or so from plaintiffs' south line. The Skagit County Planning and Building Department issued defendant a notice of abatement in 2007 requiring him to move the barn, but the planning department later decided that it would not enforce its order of abatement until this suit was concluded. The barn encroaches on Plaintiffs' Property, limits plaintiffs in their ability to use their property and interferes with the wetland on Plaintiffs' Property. The barn should be moved under the direction of the Skagit County Planning Department to a position where it complies with code.

17. Defendant has applied for a permit to build a septic tank/drain field which encroaches on Plaintiffs' Property and invades the setback required by Skagit County regulations. The Skagit County Department of Health has told defendant to redesign his septic tank/drain field to keep it the required distance from Plaintiffs' Property, and defendant should be ordered to do so.

18. Defendant moved a trailer, a boat, junk and other personal property onto Plaintiffs' Property during the period 2005-2008. These materials interfere with the plaintiffs' quiet enjoyment of their property and should be removed.

From the foregoing findings, the Court makes the following:

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the subject matter and of the parties to this action.

2. Defendant's cutting down of trees on Plaintiffs' Property was in violation of RCW 64.12.030 and entitles plaintiffs to treble the \$5000 damages, for a total of \$15,000. Defendant has failed to carry the burden of proving that the cutting of those trees was casual or involuntary for purposes of RCW 64.12.040.

3. Defendant's acts of pushing timber and slash on Plaintiffs' Property into piles with heavy equipment was intentional and in violation of RCW 4.24.630, entitling plaintiffs to treble the \$7500 cost of removing and burning these piles, for a total of \$22,500.

4. Defendant's act in clearing, damaging and filling plaintiffs' wetland was intentional and in violation of RCW 4.24.630, entitling Plaintiffs to treble the damages, for a total of \$88,206.

5. Defendant's acts in extending his driveway onto Plaintiffs' Property were intentional and in violation of RCW 4.24.630. Plaintiffs lack an adequate remedy of law, and defendant should be ordered to move his driveway off Plaintiffs' Property.

6. Defendant's acts in constructing a swale and installing a culvert to drain water onto Plaintiffs' Property were intentional and in violation of RCW 4.24.630. Plaintiffs lack an adequate remedy of law, and defendant should be ordered to remove the swale and culvert and to stop draining water from his property onto Plaintiffs' Property.

7. Defendant's acts of moving fences northward onto Plaintiffs' Property were intentional, as were defendant's acts of moving a trailer, a boat, junk and other

items onto Plaintiffs' Property. Plaintiffs lack an adequate remedy at law and are entitled to a mandatory injunction requiring defendant to move his fences and to remove these items from Plaintiffs' Property.

8. Defendant's construction of his pole barn in violation of Skagit County setback requirements was intentional. Plaintiffs lack an adequate remedy of law, and defendant should be ordered to move his pole barn beyond the 35-foot setback requirement.

9. Defendant's proposed drainfield/septic tank system encroaches onto Plaintiffs' Property and invades the setbacks required by Skagit County regulations. Plaintiffs lack an adequate remedy at law, and defendant should be ordered to re-design his septic tank/drainfield off Plaintiffs' Property and to respect the setbacks required by Skagit County regulations.

10. Defendant should allow plaintiffs to repair damage to their land caused by the defendant. To this end, defendant should be ordered to allow plaintiffs access over Defendant's Property to complete this work and any follow-up work (such as watering and replacing vegetation planted on the wetland) for up to five years after planting.

11. Plaintiffs have substantially prevailed on their complaint and are entitled to judgment in their favor for damages and injunctive relief. Plaintiffs' attorney's fees, costs of investigation and litigation-related expenses are recoverable under RCW 4.24.630. The amount of these damages will be determined by separate hearing.

12. Pursuant to RCW 7.28.085, in order to prevail on his counterclaim, defendant must show all the elements of either adverse possession or mutual recognition and acquiescence for a 10-year period ending prior to June 11, 1998.

Defendant has not sustained his burden of proof (preponderance) with regard to either adverse possession or under the doctrine of mutual recognition and acquiescence (clear, cogent and convincing). Defendant's counterclaim should be dismissed with prejudice.

13. Defendant's mid-trial Motions to Dismiss for failure to prove damages on wetlands and failure to establish which trees were cut by the Defendant are denied. The Court grants the Defendant's motion to determine that stumpage, not ornamental value, is the proper measure of damages to the trees. The Court, finding no prejudice to the Plaintiffs, has considered Robert Whitefield's testimony received under offer of proof relating to the condition of the wetlands injured by the Defendant.

DONE IN OPEN COURT this _____ day of 2/26, 2009.



JUDGE

BELCHER SWANSON LAW FIRM,
P.L.L.C.

By: _____
JOHN C. BELCHER, WSBA #5040
Lawyer for Plaintiffs

By: _____
K. GARL LONG, WSBA #13569
Lawyer for Defendant

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