NO. 308260-III

COURT OF APPEALS, DIVISION III

STATE OF WASHINGTON

MAGDALENO GAMBOA and MARY J. GAMBOA, husband and wife,

Plaintiffs/Respondents,

v.

JOHN M. CLARK and DEBORAH C. CLARK, husband and wife,

Defendants/Appellants.

CORRECTED BRIEF OF RESPONDENTS

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I. INTRODUCTION

The transcripts received by the undersigned on October 22, 2012 included three volumes entitled "Report of Proceedings", comprised of pages 1 – 249, plus a separate transcript entitled "Verbatim Transcript Of Proceedings Held On December 14, 2011 and March 22, 2012" comprised of pages 1 – 80. As required by RAP 10.4(f) the three volumes of Report of Proceedings shall be referred to as "RP", but the separately-numbered 80 pages regarding the proceedings on December 14, 2011 and March 22, 2012 shall be referred to as "TOP". Appellant's Opening Brief shall be referred to as "AOB"; Findings of Fact shall be referred to as "FOF"; and Conclusions of Law shall be referred to as "COL".

Also, in the interests of brevity, the Appellants herein shall be referred to simply as "Mr. Clark" and the Respondents as "Mr. Gamboa". Although the wives of both were also named as parties, neither of said wives testified at the trial, and neither authored any of the documents in evidence.

II. STATEMENT OF THE CASE

A. Response To Appellants' Statement Of the Case

Throughout his opening brief, Mr. Clark places undue reliance upon his own self-serving testimony as opposed to the letters which he

authored prior to retaining counsel, which the trial court found more credible. RP 285; Ex 25 - pp 2, 3. Also throughout his statement of the facts of the case, Mr. Clark takes every opportunity to characterize the roadway in question as "his" roadway, and to emphasize the physical location of said roadway on his side of the common boundary, even though he did not know such to be the fact until after the Sundquist survey was performed in March, 2009. Prior to that time, Mr. Clark was uncertain whether the roadway was on his property or on Mr. Gamboa's property. RP 130; Ex. 25, 55. In fact, his letter to Mr. Gamboa dated December 3, 2008 acknowledges that a survey might result in his own loss of "half a grape row". Ex. 25 p.2. He there also refers to the true common boundary between their respective parcels as "an unknown line". Ex. 25 p.3.

At AOB 8, Mr. Clark parrots the language of FOF 1, which makes a subtle distinction in the "primary uses" of the respective parcels, i.e.: "primarily. . . residential" v. "primarily to farm", a distinction which the undersigned challenged below. CP 213; TOP 4. Despite his slightly smaller acreage, Mr. Gamboa has been just as much a farmer as has Mr. Clark. RP 37. Both parties use their land for both residential and farming purposes.

Contrary to Mr. Clark's assertion at AOB 9, the driveway constructed by the McConnells, which ran south from the ground-level garage of their new house built in 1965, did not run all the way to East Allen Road. As should be evident from the aerial photo, it terminated near the NE corner of Parcel #13402 where it joined up with the old orchard road at a point where the old road had a slight jog to the west, or "S" curve, before it continued south to East Allen Road. Ex. 3; RP 84, 89, 187. The reference to Nadine McConnell's testimony at RP 185, line 2: "to the road, the Allen Road" is subject to interpretation either way, and Mrs. McConnell admitted that she wasn't sure of any of the matters of which she testified. RP 186-188.

Witness Joe Rollinger was a long-time neighbor of both parties and appeared to the trial judge to be a man in his 50's. RP 283. Mr. Rollinger testified that the old orchard road which Mr. Gamboa currently uses as his driveway has basically been configured the same way since he, (Joe Rollinger), was a child. RP 89. From his perspective from the other side of East Allen Road, it was mainly Mr. Gamboa's family that used the roadway in dispute. RP 86. He had observed Mr. Gamboa blading the roadway in dispute many times. RP 87. He had occasionally observed Mr. Clark spraying weeds on the driveway, but not doing anything more than that to maintain said

roadway. RP 87. His understanding was that the disputed roadway was on Mr. Gamboa's property. RP 86.

Although it is true that Mr. Gamboa's 17 acres has 654 feet of frontage along East Allen Road as asserted at AOB 11, the creation of an alternate driveway entirely on Mr. Gamboa's own property is not a reasonable alternative to his continued use of the existing roadway. The construction of such an alternate driveway would destroy Mr. Gamboa's current irrigation system, and he would lose a significant amount of his alfalfa crop. RP 37, 240; Ex. 46, 69. In addition, he would still need to have access to, and to "trespass" upon, the existing roadway in order to access his residence as well as to access his garage with a vehicle. RP 81.

Mr. Clark at AOB 12 asserts that it is apparent from the photographs in Exhibit 7A-E that Mr. Gamboa's sprinklers used to irrigate his alfalfa crop "are supplied by above-ground portable aluminum pipe, which can be readily relocated to accommodate travel on that (alternate) way." However, the five photographs of Exhibit 7 do not support that contention. Ex. 7A-E.

Although AOB 13 and 14 recite Mr. Clark's own testimony about conversations he contends he had both before and shortly after closing escrow on the purchase of his 25-acre parcel, Mr. Gamboa

repeatedly asserted that he never even met Mr. Clark until approximately two years after the Clarks purchased their property. RP 25, 42, 43, 236. In fact, the parties never discussed the use of the driveway or the ownership of the land on which the driveway was situated prior to their argument in 2008. RP 26, 44, 52; Ex. 25, p.2. This direct conflict in the evidence was acknowledged by Mr. Clark's trial counsel during closing arguments as "basically an issue of credibility" as between Mr. Clark and Mr. Gamboa. RP 264, 266.

At AOB 16, Mr. Clark states: "Mr. Gamboa acknowledges that it would be possible to reach his garage either from the road or by traveling up or behind the garage." However, the actual testimony was that this was "possible" only by "trespassing. . . on the roadway". RP 81; Ex. 46, 52.

At AOB 17, reference is made to Exhibit 37, a tersely-worded notice dated "May 22, 2009" which Mr. Clark placed on Mr. Gamboa's vehicle insisting that he move the vehicle off of the farm road. Ex. 37. That one occasion was two months' after the Sundquist survey of March, 2009, which finally disclosed to both parties here that the driveway, which since 1992 had been used by Mr. Gamboa to access his home and garage as well as to farm his acreage, was mostly on Mr. Clark's side of the true common boundary. Ex. 29.

At AOB 17-18, Mr. Clark makes the self-serving statement about "one of the reasons" why he "allowed" Mr. Gamboa "to use the road", but no citation to the record is provided as required by RAP 10.3(a)(5).

At AOB 18, reference is made to Mr. Gamboa's testimony that he had seen Mr. Clark spraying weeds on the driveway, but omits Mr. Gamboa's additional testimony that Mr. Clark had not done anything more to maintain the driveway beyond spraying weeds, and that he believed that said spraying of weeds was done more to protect Mr. Clark's own vineyard than to maintain the driveway. RP 241.

At AOB 19, while discussing Exhibit 24, (Mr. Gamboa's letter to Mr. Clark dated October 29, 2008), Mr. Clark refers to the disputed roadway as "the Clarks' farm road" but Mr. Gamboa's said letter actually repeatedly, (10 times), refers to said roadway as "my driveway", or "our driveway", or "my property", consistent with his sincere belief that he owned the land on which the roadway was situated. RP 29; Ex. 24.

At AOB 20, reference is made to Exhibit 25, (Mr. Clark's letter of December 3, 2008 to Mr. Gamboa), in which Mr. Clark acknowledged that the ownership of the roadway in dispute "has not even been mentioned between us during our entire 13 year period of

being neighbors." Ex. 25, p. 2. Said letter concludes with Mr. Clark's reference to the common boundary between his land and Mr. Gamboa's land as "an unknown line", confirming his uncertainty prior to the survey of March, 2009 as to whether the roadway was on his land or on Mr. Gamboa's side of the true common boundary. Ex. 25 p. 3.

At AOB 22, reference is made to Exhibit 36, the lease which Mr. Clark offered to Mr. Gamboa in the latter half of June, 2009, well after the March, 2009 survey had established that although the driveway used by Mr. Gamboa to reach his home and garage started off on Mr. Gamboa's own land at its southern end, near East Allen Road, for most of its length it was on Mr. Clark's land. Ex. 9, 36. Said reference at AOB 22 omits several material facts about said lease proposed by Mr. Clark, such as: that it was only for one year at a time, with no protection for Mr. Gamboa from the annual risk of termination of the lease, or from a drastic increase in the amount of the annual rent. Ex. 36. Said lease expressly concludes with the statement "The Lessors are under no obligation to offer an annual renewal of the Lease". *ibid.* Said lease was non-transferable by Mr. Gamboa; required Mr. Gamboa to hold harmless and indemnify Mr. Clark against liability for personal injury incurred on the driveway;

required Mr. Gamboa to maintain liability insurance in the minimum amount $300,000, and had other onerous provisions. *ibid.* It was by no means a "long term lease" as had been earlier suggested by Mr. Clark's then attorney, Daniel Peterson, in his letter of March 26, 2009. Ex. 29, 36.

Mr. Peterson's letter of March 26, 2009 is the only place in this record where the basis of the lease rental is mentioned; none of Mr. Clark's other citations to the record support the statement made at AOB 22 in the second sentence of the only full paragraph on that page of his brief. Mr. Peterson's actual statement was: "Any 'rental' amount proposed could (not "would") be relatively nominal and somewhat consistent with the income the Clarks could derive from an additional row of grapes." Ex. 29. But nowhere in the proposed lease itself, nor in any of Mr. Clark's testimony at trial, can a similar statement be found. Ex. 36, RP 131-140, 161-178, 194-235.

B. <u>Response To Appellants' Description of Procedure</u>.

At AOB 24, first paragraph, reference is made to the trial court's uttered finding that "no permission was given" by Mr. Clark to Mr. Gamboa regarding the latter's use of the driveway. RP 285. Mr. Clark asserts that "The trial court did not address implied permission in its oral ruling". AOB 24.

Actually, the trial court did not limit its finding to only "express" permission. RP 285. The oral finding was merely that "no permission was given". RP 285. It is reasonable to infer that the trial court by this simple, unequivocal uttered finding meant that "no permission, express or implied, was given", and that is exactly what the trial court stated in discussing the wording of FOF 15 with both counsel at the hearing of December 14, 2011. TOP 21-22. Furthermore, not once during his closing argument did Mr. Clark's trial counsel mention "implied permission"; only express permission was contended and argued below on behalf of Mr. Clark. RP 259-275. Hence, even without adopting the reasonable inference set forth above, there was no need for the trial court to address "implied permission" in its oral ruling.

III. ARGUMENT

A. Standards of Review

Mr. Gamboa concurs with the standards of review that are set forth at AOB 27-28 with the exception of the last paragraph. Based upon the case there cited by Mr. Clark, the standard should read as follows: "A trial court's exercise of discretion to award attorney's fees pursuant to a statute allowing same is reviewed for abuse of discretion. *Humphrey Industries, Ltd v. Clay Street Associates, LLC,*

170 Wn.2d 495, 506, 242 P.3d 846 (2010). The trial court's decision will be reversed under this standard only if it is manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons, with the last category including errors of law." ***ibid. (underscored portions added from cited case.)***

In addition to the above correction, Mr. Gamboa would add the following two standards to Mr. Clark's standards of review stated at AOB 27-28:

(1) Where the testimony at trial conflicts regarding a material fact, and the case turns upon the credibility of witnesses, an appellate court must give full credence to the veracity of the witness whose testimony tends to sustain the judgment below. ***Ford Motor Co. v. Pierson*****, 40 F.2d 858 (9th Cir. –Wash. – 1930). An appellate court is not entitled to weigh either the evidence or the credibility of witnesses, even though the court may disagree with the trial court in either regard.** ***Bartel v. Zucktriegel*****, 112 Wn. App. 55, 47 P.3d 581 (2002).**

(2) A trial court abuses its discretion only when it takes a view that no reasonable person would take. ***Brundridge v. Fluor Federal Services, Inc.*****, 164 Wn.2d 432, 191 P.3d 879 (2008).**

B. Mr. Clark Failed To Preserve For Appeal The Issues Of Which He Now Complains

Mr. Clark assigns error to FOF 4, 5, 6, 15 and 16, and also to COL 2, 3, 4, 5 and 8, as well as to the Judgment itself. AOB 29; CP 213-218. However, at both hearings held for the purpose of formulating the FOF/COL, the trial court worked off of Mr. Clark's own proposed version of the FOF/COL, not Mr. Gamboa's proposed version. TOP 3, 41-42, 47-48; CP 212-218. As the trial court and both counsel worked through Mr. Clark's proposed version of FOF/COL on December 14, 2011 and March 22, 2012, taking each FOF and each COL in turn, after some discussion, both counsel agreed with the language adopted by the trial court, and all objections asserted on behalf of Mr. Clark were dealt with and resolved. TOP 1-78. At the conclusion of each session, the trial court inquired of both counsel if there were any further comments or objections, and none were asserted. TOP 43-45, 76-78. The FOF/COL and Judgment forms adopted and signed by the trial court were, with some slight modifications, those which had been proposed on behalf of Mr. Clark. CP 212-218, 220-225.

Having failed to object to any of the Findings, Conclusions, or to the Judgment before entry of same, the Appellant Mr. Clark failed to preserve for appeal the issues of which he now complains.

It is a longstanding tenet of appellate practice that an appellate court may refuse to review a claim of error that was not raised in the trial court. ***New Meadows Holding Co. by Raugust v. Washington Water Power Co.*****, 102 Wn.2d 495, 687 P.2d 212 (1984). RAP 2.5(a). The purpose of this rule is to promote judicial efficiency by allowing the trial court the opportunity first to consider all issues and arguments and correct any errors, thereby avoiding unnecessary appeals and retrials.** ***Smith v. Shannon*****, 100 Wn.2d 26, 666 P.2d 351 (1983).**

Unchallenged Findings of Fact by the trial court become verities on appeal and this appellate court should not entertain objections asserted for the first time on appeal. ***Davis v. Dept. of Labor & Industries*****, 94 Wn.2d 119, 615 P.2d 1279 (1980);** ***Allard v. La Plain*****, 152 Wash. 211, 277 P.2d 843 (1929).**

C. The Trial Court Did Not Err In Awarding The Gamboas A Prescriptive Easement For The Use Of The Roadway On The Clarks' Property.

The trial court adopted FOF 4 precisely as proposed by Mr. Clark's trial counsel. CP 213; TOP 7, 49-50. FOF 4 is supported by

substantial evidence in the record. CP 213; RP 21-26, 33-38, 43-44, 49, 86-87, 96.

FOF 5 was adopted substantially as initially proposed by Mr. Clark's trial counsel with some minor changes made by the trial court which were not objected to by either party. CP 213; TOP 7-10, 49-50. There was substantial evidence at trial to support FOF 5. CP 213; RP 22-24, 28-29, 34-36, 60, 77, 79-81.

FOF 6 was determined by the trial court with the concurrence and approval of both counsel below. CP 214; TOP 10-12. FOF 6 is supported by substantial evidence in the record. CP 214; RP 24, 34-37, 40-41, 87.

FOF 15 was adopted substantially as proposed by Mr. Clark's counsel at the initial hearing of December 14, 2011, with one minor addition as suggested by Mr. Clark's own counsel at said initial hearing, and with another minor addition as suggested by Mr. Gamboa's counsel at the final hearing of March 22, 2012. CP 216; TOP 21-22, 56-57. The trial court acknowledged that the first sentence of FOF 15 was really a conclusion of law, but left it in as part of FOF 15 in order to clarify the balance of that finding. CP 216; TOP 21.

The second sentence of FOF 15 is supported by substantial evidence in the form of Mr. Gamboa's testimony at RP 25, 26, 42-44, 52, 236; Mr. Clark's statements in his letter to Mr. Gamboa of December 3, 2008, before any attorney was involved, (Ex. 25, pp. 2 & 3); and in the total absence of any mention of a prior granting of permission in any of the letters authored by, or on behalf of, Mr. Clark prior to this litigation. CP 216; Ex. 23, 25, 26, 28, 29. Even Mr. Clark's initial Answer of October 26, 2009 to Plaintiffs' Complaint, and his more thorough Answer to First Amended Complaint filed nearly a year later on October 18, 2010, fail to affirmatively assert "permissive use" as a defense. Ex. 20, 22.

The alleged prior grant of permission by Mr. Clark was not asserted until September 8, 2011, which was only a few days before commencement of the trial on September 12, 2011, in the form of Defendants' Trial Brief. CP 117, 118, 123. These facts support Mr. Gamboa's contention that this "prior grant of permission" defense was contrived at the last minute and is simply <u>not</u> credible. The trial court weighed the conflicting evidence and concluded that Mr. Gamboa's version of the facts regarding his early contacts with Mr. Clark was more credible than Mr. Clark's testimony at trial. TOP 18-22, 55-57.

Applying the standard of review provided by *Ford Motor Co. v. Pierson*, 40 F.2d 858 (9th Cir. – Wash. – 1930); and by *Bartel v. Zucktriegel*, 112 Wn. App. 55, 47 P.3d 581 (2002), this court should defer to the trial court's determination as to where the truth lay; having had the opportunity to observe the witnesses' demeanor while testifying. As eloquently stated by Judge Learned Hand in *Dyer v. MacDougall*, 201 F.2d 265, 269 (2nd Cir. 1952):

> **[D]emeanor evidence may satisfy the tribunal, not only that the witness' testimony is not true, but that the truth is the opposite of his story; for the denial of one, who has a motive to deny, may be uttered with such hesitation, discomfort, arrogance or defiance, as to give assurance that he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies.**

FOF 16 was also adopted substantially as proposed by Mr. Clark's counsel. CP 216; TOP 57. Even though the western edge of the actual roadway is separated from the common boundary between the respective parcels owned by the parties by an irregular strip of land varying in width from zero to 4.12 feet at its widest point, Mr. Gamboa necessarily had to traverse this strip of land repeatedly over the years in order to access his home and his garage from the actual roadway in dispute, and also to access his alfalfa field for farming purposes. This irregular strip of Mr. Clark's land was necessarily

included in the described easement area in order to continue to afford Mr. Gamboa this access. TOP 28-30. FOF 16 is supported by substantial evidence. CP 216; Ex. 8 (photos A, C, E, H, I, J), 9, 46 (Attachments A and B), 47-51; RP 165-167, 222.

Having himself proposed the language of the above five Findings of Fact, and having agreed to the wording of same in the trial court, Mr. Clark should not now be heard to claim error regarding same. Even so, in the event that this court elects to address the merits of Mr. Clark's arguments on this issue despite his failure to preserve same for appeal, further analysis of the case law is necessary.

Mr. Clark relies heavily upon *Kunkel v. Fisher*, 106 Wn. App. 599, 23 P.3d 1128 (2001 – Div. I). Indeed, Appellants' Opening Brief cites *Kunkel* sixteen times in the fourteen pages of his argument devoted to the prescriptive easement issue. AOB 29-42. In *Kunkel*, the Plaintiffs operated a house moving business and parked their trucks in the back portion of their residential lot. The access to the truck parking area in the back of Kunkel's property was across a portion of the adjacent property owned by Fisher. Kunkel traversed the Fisher property on daily basis for approximately 20 years. The area of the Fisher lot that was traversed by Kunkel to gain access to

the back portion of his own property was also a parking area that was half asphalt and half gravel. The Fisher property was large, and although Fisher and his predecessors in interest were aware of Kunkel's use, they rarely observed Kunkel traversing their property, either because they did not reside on the property, or because Mr. Kunkel would depart before they arrived and return after they left. Kunkel did not take any action to maintain the passage that he traversed except on one occasion when he observed a tenant on the property bringing in some gravel, and he helped him spread it. One of Fisher's predecessors in interest testified that when he owned the Fisher property, he operated an insurance business on it and that he and Mr. Kunkel had on numerous occasions discussed Kunkel's use of the Fisher property parking area to gain access to the rear portion of his own lot. He testified that Mr. Kunkel had asked him if his use was a problem, and that he answered that it was not. Kunkel himself testified that his neighbors were very accommodating to him about his use of their lot to gain access to the back portion of his own lot.

Although the trial court in *Kunkel* granted the plaintiff a prescriptive easement, Division I reversed, finding that the only reasonable inference from the evidence was that the Kunkel's use of the Fisher property was permissive in nature, and that said use never

ripened into an adverse use. In short, the evidence in *Kunkel* was insufficient to overcome the perceived presumption in favor of a permissive use, thus justifying Division I's reversal.

However, three years later, in *Drake v. Smersh*, 122 Wn. App. 147, 89 P.3d 726 (2004), Division I acknowledged that its decision in *Kunkel* was not clearly reasoned, stating:

> **Second, we recognize on reflection that our analysis in *Kunkel* extended the *implication* of permissive use by neighborly accommodation too far when we applied a *presumption* of permissive use. At least one legal scholar criticizes *Kunkel* for applying a presumption of permissive use akin to the 'vacant lands doctrine'[1] in a case where both pieces of land were developed and in the face of Washington cases establishing that another's use of improved land is presumed hostile or adverse.[2] Because *Kunkel* has been interpreted to apply a presumption of permissive use in prescriptive easement cases involving developed land, we take this opportunity**

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[1] The vacant lands doctrine was articulated in *N.W. Cities Gas Co. v. W. Fuel Co.*, 13 Wn.2d 75, 123 P.2d 771 (1942). It held that in cases of vacant land, there is a presumption that the use was permissive. To prevail on a prescriptive easement claim when the vacant land doctrine applies, the claimant must present evidence rebutting the presumption. This is an exception to the general rule that in cases where the land is developed, if the claimant proves the elements of adverse possession, there is an assumption the use was adverse. *See generally* 17 WILLIAM B. STOEBUCK, Washington Practice: Real Estate: Property Law § 2.7, at 101.

[2] *See N.W. Cities Gas*, 13 Wn.2d at 85 ("|P|roof that use by one of another's land has been open, notorious, continuous, uninterrupted, and for the required time, creates a *presumption* that the use was *adverse*, unless otherwise explained, and, in that situation, in order to prevent another's acquisition of an easement by prescription, the burden is upon the owner of the servient estate to rebut the presumption by showing that the use was permissive."); *see also* 17 STOEBUCK, *supra*, at 101 (interpreting Washington law as holding that "|I|f the claimant shows use of another's land that is unexplained and is open and notorious, 'continuous,' and exclusive, there is a 'presumption' that the use was hostile. . . .").

> **to clarify the rule. In developed land cases, when the facts in a case support an inference that use was permitted by neighborly sufferance or accommodation, a court may *imply* that (the) use was permissive and accordingly conclude the claimant has not established the adverse element of prescriptive easements. In contrast, courts should apply the 'vacant lands doctrine' and its *presumption* of permissive use only in cases involving undeveloped land because, in those cases, owners are not in the same position to protect their title from adverse use as are owners of developed property.**

***Id.* at 153-154.**

The court in *Drake* then went on to affirm the trial court's finding of a prescriptive easement in favor of the plaintiffs on facts markedly similar to the case at bar.

***Kunkel* is also factually distinguishable from the case at bar. Unlike Mr. Gamboa, Kunkel himself did not do anything over a 20-year period to maintain the passage that he traversed over his neighbor's land other than the one occasion where he helped spread some gravel. In addition, it is apparent that the Fishers and their predecessors in interest did not reside on their property, whereas Mr. Clark resides on his approximately 25-acre parcel. RP 131, 218. Furthermore, it was apparently undisputed in *Kunkel* that a prior owner of the Fisher property had given express permission for Mr. Kunkel to continue using the passage to gain access to the back**

portion of his own property. Here, Mr. Clark's self-serving testimony that he gave Mr. Gamboa express permission to continue using the roadway in dispute was flatly disputed, and also was contrary to his letters sent to Mr. Gamboa prior to this litigation. RP 236; Ex. 23, 25, 26, 28, 29.

Mr. Clark's opening brief also relies heavily on *Imrie v. Kelley*, 160 Wn. App. 1, 250 P.3d 1045 (2010), a case in which Mr. Clark's current counsel also represented the appellant. *Imrie* is cited on at least seven of the fourteen pages of said brief devoted to the prescriptive easement issue. AOB 31-32, 35, 37, 39-44.

In *Imrie* the Klickitat County Superior Court granted a prescriptive easement to Imrie for the use of a roadway across Kelley's property to gain access to a remote portion of the land owned by Imrie. Upon review, after considering 26 assignments of error, with 37 issues pertaining to these assignment of errors, this Court reversed.

However, *Imrie v. Kelley* is also distinguishable on its facts from the case at bar. In *Imrie*, there was no uncertainty as to who owned the land on which the roadway was situated. In contrast, the evidence in the case at bar establishes that although Mr. Clark is now known to be the true owner of the land on which the disputed

roadway is situated, prior to the completion of the 2009 survey, he was uncertain whether he or Mr. Gamboa owned said area of land. Ex. 25, 55; RP 130. Furthermore, in *Imrie* the evidence established that a locked gate was placed across the roadway by Kelley's predecessor in interest, who gave Mr. Imrie a key, thus implying the grant of permission; whereas the case at bar involves no gates whatsoever. In addition, Mr. Imrie did nothing to maintain the roadway with the singular exception that he provided gravel for the roadway on one occasion, but that one occasion was outside of the ten-year period from 1951 to 1961 which the trial court relied upon in granting his claim of a prescriptive easement. In the case at bar, the evidence establishes that Mr. Gamboa applied a substantial amount of gravel during the period of his prescriptive use, and in addition to applying gravel, he repeatedly bladed the roadway in order to fill in the potholes and make it smoother for use. Ex. 46 p. 2; RP 24. He also routinely bladed the snow off of the roadway in wintertime, and until this controversy arose in 2008, periodically mowed the grass and weeds alongside and in the middle of the driveway. RP 24, 241; Ex. 46 p.2.

Furthermore, in *Imrie*, the plaintiff did not use the roadway over his neighbor's land to gain access to his home, but used it during

the ten years in question only to take care of his livestock. Mr. Gamboa's use is residential as well as for farming his alfalfa field. Ex. 46; RP 37. Finally, the Findings in *Imrie* failed to mention his provision of gravel, and also failed to state that anyone asked for Mr. Imrie's consent when a lock was put on the gate across the roadway. Here, the Findings do reference Mr. Gamboa's maintenance of the roadway in dispute in the same manner as an owner would, including not only the application of gravel to the roadway, but also the repeated blading of the roadway to smooth out the potholes, and the clearance of snow from it in wintertime. (*See* FOF 6.) CP 214. The Findings here also reference Mr. Gamboa's construction of a 40' x 60' shop/garage alongside the disputed roadway to which vehicles could gain access only by traversing the roadway, and that this construction of a substantial improvement on his own property, the utility of which was dependent upon access by vehicles to and from the roadway, was done in Mr. Gamboa's good faith belief that the roadway was situated entirely on his side of the true common boundary. (*See* FOF 5.) CP 213.

In arguing that Mr. Gambo's use of the disputed roadway was "presumptively permissive", Mr. Clark attempts to apply the "vacant lands doctrine" to the facts of this case. Said "vacant lands

doctrine" was articulated in *NW Cities Gas Co. v. W. Fuel Co.*, 13 Wn.2d 75, 123 P.2d 771 (1942). Our Supreme Court there held that in cases involving vacant and unenclosed land, there is a presumption that the use is permissive. Said "vacant lands doctrine" was an exception to the general rule then prevailing that, in cases where the land is developed, once the claimant establishes that his use was open, notorious, continuous, uninterrupted, and for the required period of time, there was a presumption that the use was adverse, unless otherwise explained. *Id.* at 85.

Mr. Clark at AOB 34 correctly notes that in 1961 our Supreme Court restated the general rule to substitute "inference" for presumption", as follows: "[S]uch unchallenged use for the prescriptive period is a circumstance from which an inference may be drawn that the use was adverse." *Cuillier v. Coffin*, 57 Wn.2d 624, 627, 358 P.2d 958 (1961). The difference between a presumption and an inference is that a presumption <u>requires</u> the trier of fact to assume Fact B upon proof of Fact A, while an inference simply <u>allows</u> the trier of fact to assume Fact B upon proof of Fact A. 5 Washington Practice: Evidence: Tegland: § 301.9. The effect of this revision of the general rule is to give greater discretion to the trier of fact.

***Cuillier* arose from Yakima County following a bench trial in**

which the trial court found against the claimants of a prescriptive easement over a roadway which undisputedly was entirely situated on their neighbor's land, and was used by their neighbor for farming purposes, the same as the claimants there. In affirming the trial court's decision, the *Cuillier* court deferred to the trial court as the finder of fact in determining from all of the circumstances of that case that no prescriptive easement had been established.

The *Cuillier* opinion goes on to state the rule as follows:

> **Where the way in question is shown to have been opened or maintained by the owner of the soil for his own benefit, and the claimant's use of it appears to have been merely in common with him, no presumption arises that the latter's use of it was adverse or under a claim of right. In the absence of additional circumstances pertaining to the origin or nature of the claimant's use, and expressing a purpose to impose a separate servitude upon the land, the use is presumed to be permissive only.**
> **170 A.L.R. 825**

As stated, said rule was determinative in *Cuillier* because there was no question as to which side of the common boundary the roadway lay in that case, nor was it disputed that the "owner of the soil" maintained the roadway, not the claimant. In the case at bar, it was not clear until the 2009 surveys were conducted as to which of the parties was the "owner of the soil" on which the roadway was

situated. Ex. 25 p. 2; RP 130. Also in the case at bar, nearly all of the maintenance of the roadway was performed by Mr. Gamboa, not "the owner of the soil" – Mr. Clark. Ex. 46; RP 24, 86-87.

Under the circumstances of this case, the first sentence of FOF 15 is not an erroneous statement of the law. CP 216. However, even if this court concludes that said portion of FOF 15 is erroneous, then it is nothing more than a harmless error, as the trial court here clearly weighed the evidence, and was justified under all of the circumstances of this case to infer that said use by Mr. Gamboa was adverse to the interests of Mr. Clark. CP 216. Once again, this Court should defer to the trier of fact on this issue unless it determines that there has been an abuse of discretion.

At AOB 38-42, Mr. Clark argues redundantly on the same grounds, over and over, that the trial court erred in entering COL 2, 3, 4, 5, 7 & 8, and in entering the Judgment consistent with those conclusions. CP 216-218, 220-225. But at both sessions devoted to the wording of these documents on December 14, 2011 and March 22, 2012, the trial court chose to work with the FOF/COL and Judgment form as proposed by Mr. Clark's own counsel; not the version proposed on behalf of Mr. Gamboa. TOP 3, 41-42, 47-48; CP 212-218. The Judgment form signed on April 2, 2012 was that which

was prepared and submitted by Mr. Clark's own counsel. CP 220-225. At the conclusion of the session on March 22, 2012, the trial court twice invited comment and/or objections from counsel, and no objections were asserted by either counsel to any of the FOF/COL. TOP 76, 77; CP 212-218. In fact, the FOF/COL signed on March 22, 2012 was presented only by Mr. Clark's counsel. CP 212-218. The final Judgment form entered April 2, 2012 was jointly presented. CP 220-225.

As argued in Topic B above, Mr. Clark should not now be heard to complain or assert error, having failed to object or raise these issues in front of the trial court. However, in the event this Court elects to consider the merits of Mr. Clark's appeal, some discussion and argument is warranted.

At AOB 38, Mr. Clark attacks COL 2 and 3 on the premise that Mr. Gamboa's use of the roadway did not become adverse until 2008, when this dispute over who owned the land on which the roadway is situated first arose. CP 216-217. Said premise is based upon Mr. Clark's perception that the "vacant lands doctrine" and its presumption of permissive use applies to this case. But Mr. Clark's vineyard property is not "vacant, open, unenclosed, and unimproved" as was the case in *Todd v. Sterling*, 45 Wn.2d 40, 273

P.2d 245 (1954); nor is it "a wilderness" as was the case in *State ex rel. Shorett v. Blue Ridge Club*, 22 Wn.2d 487, 156 P.2d 667 (1945); nor does it have the "pioneer settling" characteristic of the 34 beachfront properties with no public roads, as was the case in *Roediger v. Cullen*, 26 Wn.2d 690, 713, 175 P.2d 669 (1946).

The reasoning behind the "vacant lands doctrine" is that the owner of the vacant land, because of his absence, may not be aware of the claimant's use, and thus not in a position to protect his or her legal rights. The absence of the owner of the servient estate is critical to the application of the doctrine. *Lingvall v. Bartness*, 97 Wn. App. 245, 255, 982 P.2d 690 (1999). Mr. Clark resides on his property, which is improved with a cultivated vineyard, and an irrigation system. Mr. Clark is not entitled to the benefit of the presumption of permissive user under the "vacant lands doctrine".

As stated in *Cuillier v. Coffin*, *supra*, Mr. Gamboa's "unchallenged use for the prescriptive period is a circumstance from which an inference may be drawn that the use was adverse." *Id.* at 627. Such an inference is reimbursed and bolstered by several other circumstances in this case: Mr. Gamboa's repeated blading of the roadway, his mowing of the weeds and grass alongside and in the middle of it, his removal of the snow in winter, and his treatment of

the roadway as a true owner would due to his sincere belief that he was in fact the owner. Another such circumstance is the lack of any maintenance or improvements to the roadway performed by Mr. Clark.

Although Mr. Gamboa's good faith belief that he owned the land on which the roadway was situated is not relevant by itself, it does explain why he treated the roadway as a true owner would. It also explains why he built the 40' x 60' garage in such close proximity to the driveway that it could only be accessed by a vehicle from the driveway. Given all these circumstances the trial court here was justified in inferring that Mr. Gamboa's use of the roadway was adverse to the interests of Mr. Clark.

In concluding that Mr. Gamboa's entitlement to a prescriptive easement extended to his shop/garage, even though that structure was not constructed until the time frame 1999-2001, the trial court considered the shop/garage as part of the "close" encompassing the area around the residence, and therefore included access to that structure as part of the non-exclusive prescriptive easement. This is apparent from the discussion between the court and counsel on December 14, 2011. TOP 30-37. Thus, the trial court did not err in entering COL 2 and 3. CP 216-217.

At AOB 39, Mr. Clark attacks the trial court's recognition of Mr. Gamboa's "primary right to utilize the roadway . . ." in COL 4; CP 217. Although there was no discussion or controversy regarding the use of that language during either of the sessions on December 14, 2011 or March 22, 2012, in adopting this language, the trial court recognized that this roadway was the only means by which Mr. Gamboa could gain access to his residence and shop/garage, and had utilized the roadway much more frequently than Mr. Clark, who only needed to utilize the roadway occasionally for the purpose of farming the western edge of his vineyard. It should be noted that along with the "primary right to utilize", the trial court also imposed upon Mr. Gamboa the "duty to maintain the roadway". No such duty to maintain was imposed upon Mr. Clark. The trial thus did not err in entering COL 4. CP 217.

At AOB 40, Mr. Clark attacks COL 5, which sets forth the legal description of the easement awarded to Mr. Gamboa because said description includes the irregular narrow strip of Mr. Clark's land between the western edge of the roadway and the eastern boundary of Mr. Gamboa's land. CP 217. However, as discussed in connection with FOF 16 above, the inclusion of this narrow strip within the easement area was necessary to allow Mr. Gamboa to

access his residence, access his shop/garage, and access his acreage under cultivation for farming purposes. CP 216. It would make little sense to award an easement up the roadway without having the right to also traverse over this narrow strip separating the roadway from the common boundary so as to access his residence, shop/garage, and to farm his acreage. The trial court thus did not err in entering COL 5. CP 217.

Mr. Clark's attack upon COL 8 at AOB 40 is merely based upon the same premise and arguments previously asserted and it should not be necessary to repeat here the same rebuttal arguments previously made. CP 218. The trial court did not err in entering in COL 8. CP 218.

For all of the above reasons, the trial court also did not err in entering Judgment for the Gamboas in the form signed April 2, 2012 or in awarding Mr. Gamboa his statutory costs as the substantially prevailing party. CP 220-225.

The inclusion in the costs of the $410 for the aerial photos was on the basis of Plaintiffs' Amended Cost Bill, which had attached to it a copy of the Washington State Department of Transportation invoice in said amount for the copies of the aerial photographs on record, and the receipt for the payment of the $410 on behalf of Mr.

Gamboa. CP 207-210. The trial court thus did not err in awarding Mr. Gamboa statutory attorney fees of $200 and other costs in the amount $1,583.55.

D. The Trial Court Did Not Err In Denying The Clarks' Request For Relief Under RCW Ch. 7.48

Pursuant to the arguments and authorities set forth under topic C above, the trial court did not err in concluding that Mr. Gamboa had prevailed on his claim for a prescriptive easement. *ibid.*

Mr. Clark's counterclaim sought relief under RCW 7.48.315, a relatively recent addition to the chapter of the Revised Code dealing with nuisances. Enacted only seven years ago in 2005, there are no reported appellate cases interpreting this new section.

Statutory construction begins by reading the text of the statute and giving the words used their plain and ordinary meaning unless a contrary intent is evidenced in the statute. *State v. Lilyblad*, 163 Wn.2d 1, 177 P.3d 686 (2008) The legislature is presumed not to use nonessential words, and each word of the statute therefore must be accorded meaning and interpreted so that no portion of the statute is rendered meaningless or superfluous. *State v. Base*, 131 Wn. App. 207, 126 P.3d 79 (2006).

A literal reading of the first two subsections of RCW 7.48.315 requires an "allegation" in Mr. Gamboa's pleadings that Mr. Clark's agricultural activities either constituted a "nuisance", or were "in violation of specified laws, rules or ordinances". But no such allegations appear in either Mr. Gamboa's original Complaint filed September 24, 2009 or in the First Amended Complaint filed July 6, 2010. CP 3-9, 22-27. Since neither of the requisite alternative allegations were made in either of Mr. Gamboa's pleadings, this new section of the nuisance chapter of the Revised Code is simply not applicable.

Even if this Court determines that this new section of RCW Ch. 7.48 is somehow applicable to this case, the legislature used the word "may" rather than "shall", meaning that the award of costs and expenses to a prevailing farmer is at the trial court's discretion. Here, the trial court exercised its discretion and determined that Mr. Clark was not entitled to relief under this section. Mr. Clark is therefore not entitled to any award of attorney's fees or costs. He is also not entitled to an award of damages, even if there were any evidence that he indeed had suffered any damage to his land or crops as a result of any action or claim by Mr. Gamboa based upon the requisite allegations.

Thus, the trial court did not err in concluding that there was no basis for an award to Mr. Clark of attorney's fees or costs under RCW Ch. 7.48. (*See* COL 7.) CP 218.

E. The Clarks Are Not Entitled To An Award Of Attorney's Fees And Costs On Appeal.

As Mr. Clark was not entitled to an award of reasonable attorney's fees in the proceedings before the trial court under RCW Ch. 7.48.315, he is not entitled to recover same on appeal under RAP 14.2 or RAP 18.1.

IV. CONCLUSION

By failing to object or otherwise afford the trial court the opportunity to review and reconsider the FOF/COL which he now claims to be error, Mr. Clark failed to preserve for appeal the issues of which he now complains. His current arguments are being made for the first time to this Court, and this Court would be justified in refusing to hear said arguments.

Mr. Gamboa's use of the disputed roadway for the 16-year period 1992-2008 was not permissive, as contended by Mr. Clark, because the land owned by each of these parties was and is developed and improved, with neither party an "absentee" owner. The "vacant lands doctrine" is thus not applicable, and Mr. Clark is not entitled

to the benefit of the presumption of permissive user that said doctrine provides. Instead, the trial court was entitled to infer adverse use by Mr. Gamboa from the facts and circumstances of this case, and did not abuse its discretion in doing so. No error was committed in awarding Mr. Gamboa a non-exclusive limited prescriptive easement over the described area of Mr. Clark's parcel.

RCW 7.48.315 by its own terms is inapplicable to this case, because Mr. Gamboa's pleadings do not now and never did allege a "nuisance" or a "violation of any specified law, rule or ordinance" on the part of Mr. Clark. Such alternative allegations are a pre-requisite for application of the statute. The trial court therefore did not err in concluding that there was no basis for an award to Mr. Clark of his attorney's fees or costs under this statutory section. Such an award would have been solely at the trial court's discretion in any event.

Likewise, there is no basis for an award of reasonable attorney's fees on this appeal to either party.

The trial court's Findings, Conclusions, and Judgment should be affirmed, and Mr. Gamboa awarded his statutory costs on appeal.

Respectfully submitted this 14th day of December, 2012.

DAVID A. THOMPSON (WSBA 13336)
Attorney for Plaintiffs/Respondents

CERTIFICATE OF SERVICE BY MAIL

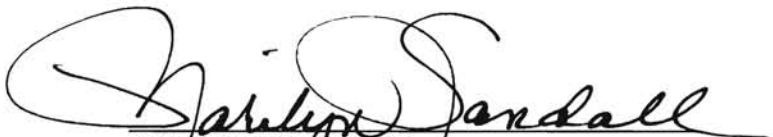
I, Marilyn Sandall, hereby certify under penalty of perjury under the laws of the State of Washington that the following is true and correct:

I am the legal assistant to David A. Thompson, attorney for Plaintiffs/Respondents Gamboa and am competent to be a witness herein.

On the 14th day of December, 2012, I caused to be served via the method indicated below, a copy of CORRECTED BRIEF OF RESPONDENTS and this CERTIFICATE OF SERVICE to:

CLERK OF THE COURT **COURT OF APPEALS, DIVISION III** **500 N. Cedar Street** **Spokane, WA 99201**	**via U.S. Mail** **First Class/Postage Prepaid**
OF COUNSEL INC., P.S. **P.O. Box 7125** **Tacoma, WA 98417-0125**	**via U.S. Mail** **First Class/Postage Prepaid**

DATED at Yakima, Washington this 14th day of December, 2012.



MARILYN SANDALL
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