

No. 34849-7-II

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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NORMA M. KINSMAN, a single woman,

Respondent,

v.

MICHAEL ENGLANDER and CAROLYN ENGLANDER, et. al.,

Petitioners.

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COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
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DENOMY

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ON APPEAL FROM PIERCE COUNTY SUPERIOR COURT  
Cause No. 04-4-11904-2

**BRIEF OF RESPONDENT**

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## TABLE OF CONTENTS

	Page
A. STATEMENT OF THE CASE.....	1
1. Procedural Facts.....	1
2. Substantive Facts.....	4
B. ARGUMENT.....	8
1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING THAT BEVERLY VERGOWE WAS UNAVAILABLE TO TESTIFY AT TRIAL.....	8
2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE DEPOSITION OF BEVERLY VERGOWE WHEN VERGOWE WAS UNAVAILABLE TO TESTIFY IN PERSON AT TRIAL.....	11
3. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT FOUND VERGOWE WAS AVAILABLE FOR THE LIMITED PURPOSE OF PROVIDING REBUTTAL TESTIMONY TELEPHONICALLY.....	13
4. EVEN IF THE TRIAL COURT ERRED IN DETERMINING VERGOWE WAS UNAVAILABLE AND IN ADMITTING HER DEPOSITION IN LIEU OF LIVE TESTIMONY, ANY ERROR WAS HARMLESS.....	14

5.	SUBSTANTIAL EVIDENCE SUPPORTED THE TRIAL COURT'S FINDINGS AND CONCLUSION THAT KINSMAN ACQUIRED THE DISPUTED PROPERTY EITHER BY ADVERSE POSSESSION OR BY ACQUIESCENCE.....	17
	i. Adverse Possession.....	17
	ii. Acquiescence.....	23
C.	CONCLUSION.....	26

## TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<i>Burnside v. Simpson Paper Co.</i> , 123 Wn.2d 93, 864 P.2d 937 (1994).....	8, 14
<i>Chaplin v. Sanders</i> , 100 Wn.2d 853, 676 P.2d 431 (1984).....	18, 21
<i>Crites v. Koch</i> , 49 Wn. App. 171, 741 P.2d 1005 (1987).....	18
<i>Danner v. Bartel</i> , 21 Wn. App. 213, 584 P.2d 463 (1978).....	19
<i>Douglas v. Freeman</i> , 117 Wn.2d 242, 814 P.2d 1160 (1991).....	14
<i>Frolund v. Frankland</i> , 71 Wn.2d 812, 431 P.2d 188 (1967).....	19, 20, 21
<i>Hammond v. Braden</i> , 16 Wn. App. 773, 559 P.2d 1357 (1977).....	8, 13
<i>ITT Rayonier, Inc. V. Bell</i> , 112 Wn.2d 754, 863 P.2d 64 (1989).....	17
<i>Kesinger v. Logan</i> , 51 Wn. App. 914, 756 P.2d 752 (1988).....	23
<i>Lamm v. McTighe</i> , 72 Wn.2d 587, 434 P.2d 565 (1967).....	23, 24, 25
<i>Lilly v. Lynch</i> , 88 Wn.App. 306, 945 P.2d 727 (1997).....	18, 19, 26

<i>Petersen v. Port of Seattle</i> , 94 Wn.2d 479, 618 P.2d 67 (1980).....	17
<i>Ridgeview Props. v. Starbuck</i> , 96 Wn.2d 716, 638 P.2d 1231 (1982).....	17
<i>State v. Bourgeois</i> , 133 Wn.2d 389, 945 P.2d 1120 (1997).....	15
<i>State v. Hill</i> , 123 Wn.2d 641, 870 P.2d 313 (1994).....	17
<i>Shelton v. Strickland</i> , 106 Wn. App. 45, 21 P.3d 1179 (2001).....	21, 22
<i>State v. Whisler</i> , 61 Wn. App. 126, 810 P.2d 540 (1991).....	8, 9, 10, 11, 12, 13
<i>Thomas v. French</i> , 99 Wn.2d 95, 659 P.2d 1097 (1983).....	15
<i>Viereck v. Fireboard Corp.</i> , 81 Wn. App. 579, 915 P.2d 581 (1999).....	12

#### FEDERAL CASES

<i>United States v. Campbell</i> , 845 F.2d 1374 (6th Cir. 1988).....	12
<i>United States v. Keithan</i> , 751 F.2d 9 (1st Cir. 1984).....	12

RULES, STATUTES AND OTHER

CR 32(a)(3).....11, 12, 27

CR 43(a)(1).....13, 14

ER 804(a)(4).....4, 8, 9, 10, 11

ER 804(a)(5).....10

## **A. STATEMENT OF THE CASE**

### **1. Procedural Facts**

Respondent, Norma Kinsman, brought suit to quiet title in an approximately 18 inch strip of property (the disputed property) based on a claims of adverse possession and acquiescence. CP at 3-6. Petitioners, Michael and Carolyn Englander, filed an answer and counterclaim asserting a prescriptive easement over a portion of Kinsman's property commonly referred to as the lookout. CP at 7-11.

In anticipation of trial, Kinsman arranged for the deposition of Beverly Vergowe. Vergowe is the prior owner of the Englander property and had lived on the property from 1967 until 2002 when she sold it to the Englanders. Exhibit 31 at 7. At the time of the deposition, Vergowe was in her early eighties and in poor health. CP at 38-39. Out of concern that Vergowe may not be alive or able to testify at the time of the trial, Kinsman took a video deposition of Vergowe and noted that it was for preservation purposes. CP at 40-41. A transcript of the deposition was also made. The deposition was conducted in Vergowe's room in an assisted living home due to Vergowe's medical conditions and difficulty in traveling. Counsel for the Englanders was present at the time of the deposition. CP at 38-

39; Exhibit 31 at 4-5.

Before its December 2005 trial date, Kinsman prepared a joint statement of evidence listing the witnesses and exhibits to be relied upon at trial. CP at 106. Kinsman included the preservation video deposition and transcript of Beverly Vergowe in her joint statement. CP at 106-07. Although the Englanders objected to admission of the deposition under ER 904, they made no further objections prior to trial. CP at 14-15.

Kinsman filed a second joint statement of evidence when the parties' trial date was moved to March 2006. CP at 111-14. Kinsman again included the preservation video deposition and transcript of Beverly Vergowe in her list of exhibits to be used at trial. CP at 113. The Englanders did not object to its inclusion.

Trial began on March 1, 2006. RPI<sup>1</sup> at 4. In her opening statement, Kinsman stated her intention to submit the deposition of Beverly Vergowe. RPI at 9-10. Kinsman moved for admission of the deposition on the second day of trial and supported the motion with a declaration from counsel explaining Vergowe's unavailability. RPII at 4-6; CP at 38-41. The Englanders objected on the grounds that

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<sup>1</sup> RPI refers to Volumes 1-2a and 3-8 of the Verbatim Report of Proceedings.

Vergowe was alive and available to testify. RPII<sup>2</sup> at 4, 7-8.

The trial court heard argument from the parties as to the admissibility of the deposition and then conducted a telephone interview of Vergowe in the presence of the parties in open court. RPII at 1515-18. In the interview, Vergowe explained that she suffers from congestive heart failure, diabetes, chronic obstructive pulmonary disease and stenosis. RPII at 16. She also explained that she is on oxygen and requires assistance in leaving her nursing home because she is wheelchair bound. RPII at 16-17. The trial court then gave the parties an opportunity to question Vergowe as to her ability to appear and testify, and the Englanders declined to do so. RPII at 18. The trial court found Vergowe was unavailable to testify and admitted her video deposition and transcript. RPII at 18-19.

The Englanders rested on March 9, 2006 and the case proceeded to rebuttal. RPI at 809. Kinsman sought to call Vergowe to testify telephonically as the first rebuttal witness. RPI at 810. The Englanders objected on the grounds that the trial court had previously found Vergowe unavailable to testify. RPI at 811-12. The trial court again called Vergowe and conducted a telephonic interview in the

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<sup>2</sup> RPII refers to Volume 2b of the Verbatim Report of Proceedings taken 3/2/06.

presence of the parties to determine her availability. RPI at 813-14, 816. Vergowe stated that the conditions affecting her availability to testify in person had not changed since her previous interview with the trial court. RPI at 817-18. The court then found Vergowe unavailable to testify in person under ER 804 (a)(4) and ruled that Vergowe could provide rebuttal testimony telephonically. RPI at 819-821. Both parties were provided the opportunity to fully examine Vergowe on rebuttal.

Upon the conclusion of the proceedings, the trial court found in favor of Kinsman and granted an order quieting title to the disputed property in her favor. RPI at 1022-24; CP at 75-83. The Englanders now appeal. CP at 84.

## 2. Substantive Facts

Norma Kinsman is the owner of waterfront property located in Gig Harbor, Washington. RPI at 285-86. The property was originally acquired in the 1930's by Kinsman's grandfather, Olaf Johnson, and has remained in the Kinsman family to the present day. RPI at 286. Kinsman and her family have historically used the property for recreational purposes and never for full time residence. RPI at 201-03, 312-13.

When Kinsman's grandfather first acquired the property, the shoreline area was unimproved. RPI at 287. A few years later, Kinsman's grandfather installed a log bulkhead along the property's shoreline. RPI at 287; Exhibits 15 and 16. The bulkhead also enclosed a natural outcrop made by dirt, shrubs and a tree stump that protruded out onto the beachfront. RPI at 295-96. Kinsman's family called this protruding area the lookout. RPI at 295.

In 1983, Kinsman's neighbor, Coy and Beverly Vergowe, hired Lawrence Jopp to replace their log bulkhead with a cement bulkhead. RPI at 145-46. Coy Vergowe provided Jopp with the measurements and dimensions for the Vergowe bulkhead. RPI at 153-54.

Shortly after Jopp finished the Vergowe bulkhead, Kinsman's father hired him to replace their log bulkhead. RPI at 157. Jopp agreed to build the new cement bulkhead on top of the existing log bulkhead. RPI at 158. This increased the size of the bulkhead by approximately three and a half feet. RPI at 159. Jopp consulted with both Kinsman's father and Coy Vergowe regarding the location of their properties' boundary line before building the Kinsman bulkhead. RPI at 159. Jopp then attached the southern wall of the lookout to the portion of Vergowe's bulkhead that returned inland to the beach. RPI

at 163-64; Exhibits 7-8. This attachment or "tie in" was done to prevent the erosion of both the Kinsman and Vergowe beach fronts. RPI at 164.

Due to the increased size of the Kinsman bulkhead and the need to tie into the Vergowe bulkhead, the lookout portion of the Kinsman bulkhead encroached onto the Vergowe property line. RPI at 103, 326-27; Exhibit 31 at 37, 43. Coy Vergowe and Kinsman's father agreed to this encroachment before construction of the Kinsman bulkhead. RPI at 159, 376, 409; Exhibit 31 at 37, 43.

Over the years that Kinsman's father and the Vergowes were neighbors, they built other physical markers that reflected their understanding of the boundary line between the two properties. Kinsman's father built a cement block garden wall that connects to a second garden wall made of cement cylinders. RPI at 315-16. Kinsman's father and Coy Vergowe built this second wall together. RPI at 317-18. The walls were later shown to create an encroachment upon the Vergowe's boundary line. RPI at 109, 114; Exhibits 4, 33, 38. Additionally, Kinsman's parents placed a metal rose arbor and decorative rock stanchions along or near what they believed to be was the boundary line. RPI at 330-334; Exhibits 9, 21.

These markers were in place at the time Norma Kinsman inherited the property from her parents in 1994 and remained unchanged until 2003.

During Kinsman's family's ownership of the property, it was common for children of the neighboring families to play along the shore lines and in the yards of the neighboring properties, including the lookout on Kinsman's property. RPI at 38-39, 389-90. Kinsman's family also allowed their neighbor Jones to use the lookout to hit golf balls into the water. RPI at 307. Other than Jones' occasional repair of divots in the lookout's grass, the Kinsman family maintained their property and shore front. RPI at 25-27, 78, 306-07.

In 2002, Beverly Vergowe sold her property to Michael and Carolyn Englander. RPI at 511. The Englanders conducted a survey of the boundary line between their property and Kinsman's in 2003. RPI at 94. Their survey results showed that the garden wall and the lookout encroached upon their property. RPI at 103, 114. The Englanders then installed a chain-link fence a quarter foot south of the surveyed boundary line. RPI at 114, 346. When the Englanders refused to remove the fence, Kinsman initiated the present action. CP at 3-6.

## B. ARGUMENT

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING THAT BEVERLY VERGOWE WAS UNAVAILABLE TO TESTIFY AT TRIAL.

The trial court did not err when it found that Vergowe was unavailable to testify at trial. "A trial court's finding of unavailability is a matter within the sound discretion of the trial court and will not be reversed absent abuse of discretion." *State v. Whisler*, 61 Wn. App. 126, 132, 137, 810 P.2d 540 (1991). A court abuses its discretion when it is exercised in a manifestly unreasonable manner or when it bases its decision on untenable grounds. *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 107, 864 P.2d 937 (1994) *citing* *Davis v. Globe Mach. Mfg. Co.*, 102 Wn.2d 68, 77, 684 P.2d 692 (1984).

Under ER 804(a)(4), a witness is unavailable to testify when he or she is "unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity..." Typically, the unavailability of a deponent witness is determined at the time his or her deposition is offered into evidence. *See e.g. Hammond v. Braden*, 16 Wn. App. 773, 775, 559 P.2d 1357 (1977).

The seminal case in Washington on medical unavailability is

*State v. Whisler*, 61 Wn. App. 126 (1991). In *Whisler*, the trial court found a legally blind, 94 year old woman who had a heart condition unavailable to testify at trial. On appeal, the defendant asserted that the trial court's determination of unavailability violated ER 804(a)(4) and the federal and state confrontation clauses. The reviewing court upheld the ruling on unavailability and found that the State's affidavit regarding the witness' medical condition, as well as the witness' daughter's testimony as to her mother's condition, was sufficient evidence of the witness' unavailability under ER 804(a)(4). *Whisler*, 61 Wn. App. at 140.

Similarly here, the trial court found that Vergowe was unavailable due to her advanced age and the severity of her medical conditions. In making its determination, the trial court considered the declaration of respondent's counsel. The declaration stated that Vergowe was wheelchair bound and received full time supplemental oxygen. CP at 39. The declaration also stated that Vergowe had severe diabetes and was hospitalized on at least one occasion before trial. CP at 39. Although the declaration was prepared in anticipation of the parties' first trial date in December 2005, Vergowe's medical condition was unchanged at the time of the April 2006 trial.

Further, the trial court was able to interview Vergowe via telephone and in the presence of the parties regarding her medical conditions and ability to testify. In that interview, Vergowe testified that she was 81 years old, had several severe medical conditions, was wheelchair bound and required supplemental oxygen. RPII at 16. She also explained that she had limited means of transportation and relied on the assistance of others to leave her nursing home. RPII at 17. Finally, Vergowe testified that she would be unable to be present in court to testify due to her medical condition. RPII at 17-18. The declaration of counsel and the testimony of Vergowe provided ample evidence to support the trial court's finding under ER 804(a)(4) that Vergowe was unavailable to testify.

The *Whisler* court also held that in order to satisfy the confrontation clauses, the State had to make a good faith effort to procure the witness' attendance at trial. *Whisler*, 61 Wn. App. at 138. In its analysis, the court distinguished unavailability under ER 804(a)(5), which by its language imposes a good faith requirement, from unavailability under ER 804(a)(4). The court found that while the language of ER 804(a)(4) does not explicitly require good faith, the demands of the confrontation clause require a good faith attempt to

procure witness attendance under ER 804(a)(4).

In the present case, *Whisler's* confrontation clause analysis does not apply as this is not a criminal matter. Even if it were to apply, Kinsman made a good faith effort to procure Vergowe's attendance at trial. Respondent's counsel contacted Vergowe regarding her ability to testify and Vergowe specifically stated that she would refuse to attend the trial even if she were subpoenaed. Vergowe repeated this assertion to the trial court.

The declaration of counsel as well as telephonic testimony from Vergowe provided a sufficient basis for the court's determination of unavailability. Further, a respondents made a good faith attempt to procure Vergowe's appearance. The trial court did not abuse its discretion in determining that an ailing 81 year old woman who is wheelchair bound and oxygen dependant is unavailable to appear in court to testify.

**2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE DEPOSITION OF BEVERLY VERGOWE WHEN VERGOWE WAS UNAVAILABLE TO TESTIFY IN PERSON AT TRIAL.**

The admission of a deposition at trial is governed by CR 32. CR 32(a)(3) provides that the deposition of a witness may be used by

any party for any purpose if the court finds “that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment...” CR 32(a)(3)(C). A trial court’s decision to admit or deny evidence is reviewed for abuse of discretion. *Viereck v. Fireboard Corp.*, 81 Wn. App. 579, 587, 915 P.2d 581 (1999).

The trial court acted within its discretion when it admitted the deposition of Beverly Vergowe based upon its finding that Vergowe was unavailable to testify at trial. CR 32(a)(3) specifically authorizes the use of a deposition in lieu of testimony in circumstances where a witness is found unavailable due to age or infirmity. The admission of a witness’ deposition is common in cases where a witness is unavailable due to their advanced age and poor health. See e.g. *Whisler*, 61 Wn. App. at 136; *United States v. Keithan*, 751 F.2d 9, 12 (1st Cir. 1984)(admitted deposition of witnesses who were unavailable due to advanced age and physical infirmities that prevented their leaving the home); *United States v. Campbell*, 845 F.2d 1374, 1377-78 (6th Cir. 1988)(admitted deposition of elderly witnesses who were found unavailable due to poor health). The trial court did not abuse its discretion when it admitted the deposition of Beverly Vergowe under CR 32(a)(3).

3. THE TRIAL COURT DID NOT ABUSE  
ITS DISCRETION WHEN IT FOUND  
VERGOWE WAS AVAILABLE FOR THE  
LIMITED PURPOSE OF PROVIDING  
REBUTTAL TESTIMONY  
TELEPHONICALLY.

As discussed above, the determination of a witness' availability is reviewed for abuse of discretion. *Whisler*, 61 Wn. App. 132. The unavailability of a deponent witness is determined at the time his or her deposition is offered into evidence. *Hammond*, 16 Wn. App. at 775. Here, the court's determination of unavailability did not change throughout the course of the trial. At the time the trial court asked Vergowe to testify telephonically, Vergowe was still deemed unavailable for purposes of appearing in court to testify. If the trial court believed Vergowe was available to testify in court, then the trial court would not have requested her to testify by telephone. RPI at 812-13.

Further, CR 43(a)(1) provides that testimony shall be taken orally in open court unless otherwise directed by the court. CR 43(a)(1) therefore contemplates that testimony may be given in a means other than orally in open court and authorizes the trial court to exercise its discretion in hearing testimony in another fashion.

Finally, telephonic rebuttal testimony was appropriate as Vergowe's deposition could not provide the information sought on

rebuttal. Vergowe testified while under oath and her testimony was limited to the scope of rebuttal, so there would be little surprise regarding the subject matter of her testimony. Also, as in the case of Vergowe's deposition, opposing counsel was present and able to cross examine Vergowe and make objections where appropriate.

Vergowe's unavailability due to her advanced age and medical conditions made her unavailable for the purpose of in court testimony. The trial court did not abuse its discretion in allowing Vergowe to testify telephonically for the limited purpose of rebuttal when alternative means of testimony are authorized by CR 43(a)(1) and when opposing counsel was given full opportunity to confront Vergowe.

4. EVEN IF THE TRIAL COURT ERRED IN DETERMINING VERGOWE WAS UNAVAILABLE AND IN ADMITTING HER DEPOSITION IN LIEU OF LIVE TESTIMONY, ANY ERROR WAS HARMLESS.

A trial court's decision to admit evidence is reviewed for an abuse of discretion. *Douglas v. Freeman*, 117 Wn.2d 242, 255, 814 P.2d 1160 (1991). A court abuses its discretion when it is exercised in a manifestly unreasonable manner or when it bases its decision on untenable grounds. *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 107, 864 P.2d 937 (1994) *citing Davis v. Globe Mach. Mfg. Co.*, 102

Wn.2d 68, 77, 684 P.2d 692 (1984).

If evidence is erroneously admitted, the question then becomes whether the error was prejudicial. Error without prejudice is not grounds for reversal. *Thomas v. French*, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983). An error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. *State v. Bourgeois*, 133 Wn.2d 389, 402, 945 P.2d 1120 (1997).

Petitioners were not prejudiced by the finding of Vergowe's unavailability and the admission of her deposition. Opposing counsel was present at the time Vergowe was deposed and had the opportunity to question her, place exhibits before her and make objections. Further, the notice of deposition informed the Englanders of Kinsman's intent to take a preservation deposition that would later be used at trial. CP at 40.

Because of concerns over Vergowe's age and poor health, respondent noted Vergowe's deposition as a preservation deposition and requested that it be videotaped in the event that Vergowe would be unable to testify at trial. The deposition was consistently referred to as a preservation deposition throughout discovery and it was also included in both of the parties' joint statement of evidence as

evidence to be admitted at trial. The Englanders were clearly aware of Kinsman's intent to admit the deposition at trial because they objected to its inclusion before trial. CP at 14-15. Petitioners can not therefore claim that they were surprised by respondent's use of the deposition at trial.

Furthermore, petitioners cannot show that the admission of the deposition materially affected the outcome of the trial. Multiple witnesses testified to the historical use of the disputed property. Additionally, Jopp testified to the agreement regarding the building of the lookout and the understanding between Kinsman's predecessors and the Vergowes as to the location of the property boundaries. Norma Kinsman also testified to the agreement between her predecessor and the Vergowes regarding their mutual boundary line.

Beverly Vergowe's deposition testimony, while helpful to respondents, was cumulative of evidence provided by other witnesses at trial. The Englanders cannot, therefore, show that the admission of Vergowe's deposition materially affected the outcome of the trial. Any error in admitting Vergowe's deposition is therefore harmless.

5. SUBSTANTIAL EVIDENCE SUPPORTED THE TRIAL COURT'S FINDINGS AND CONCLUSION THAT KINSMAN ACQUIRED THE DISPUTED PROPERTY EITHER BY ADVERSE POSSESSION OR BY ACQUIESCENCE.

i. Adverse Possession

A trial court's findings on the elements of adverse possession are mixed questions of law and fact. *Petersen v. Port of Seattle*, 94 Wn.2d 479, 485, 618 P.2d 67 (1980). The trial court's challenged findings are reviewed to determine whether they are supported by substantial evidence and, if so, whether the findings in turn support the trial court's conclusions of law and judgment. *Ridgeview Props. v. Starbuck*, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982). Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair minded, rational person of the truth of the finding. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

To establish adverse possession, there must be possession that is (1) open and notorious, (2) actual and uninterrupted, (3) exclusive, and (4) hostile. *ITT Rayonier, Inc. V. Bell*, 112 Wn.2d 754, 757, 863 P.2d 64 (1989). Possession of the property with each of the required elements must exist for the statutorily prescribed period of ten years. . *ITT Rayonier, Inc*, 112 Wn.2d at 757 citing RCW 4.16.020. Where there is privity between successive occupants

holding continuously and adversely to the true title holder, the successive periods of occupation may be tacked to each other to compute the required ten year period. *Lilly v. Lynch*, 88 Wn.App. 306, 312-13, 945 P.2d 727 (1997). Here, the Englanders only challenge the sufficiency of the trial court's findings of fact regarding the elements of exclusivity and hostility.

There is substantial evidence to support the finding that the Kinsmans and their predecessors exclusively used the disputed area. "In order to be exclusive for purposes of adverse possession, the claimant's possession need not be absolutely exclusive. Rather, the possession must be of a type that would be expected of an owner under the circumstances." *Crites v. Koch*, 49 Wn. App. 171, 174, 741 P.2d 1005 (1987). *citing Russell v. Gullett*, 285 Or. 63, 589 P.2d 729, 730-31 (1979); 3 Am.Jur.2d § 75, at 171. Important to a consideration of what use an owner would make are the nature and location of the land. *Chaplin v. Sanders*, 100 Wn.2d 853, 863, 676 P.2d 431 (1984).

The Englanders contend that, because the Vergowe's drain line ran through the lookout and because it was common for neighbors to use the lookout, Kinsman's use was not exclusive. However, an occasional, transitory use by the true owner usually will

not prevent ownership transfer by adverse possession if the adverse possessor permits the use as a "neighborly accommodation." *Lilly*, 88 Wn. App. at 313. The mere fact that the Englanders' drain line ran through the lookout is not enough to defeat Kinsman's exclusive possession. In *Danner v. Bartel*, the court found that title owner's maintenance of a drainage ditch that ran through the disputed property was insufficient to rebut the exclusive possession of the adverse possessor. *Danner v. Bartel*, 21 Wn. App. 213, 584 P.2d 463 (1978) *overruled in part on other grounds by Chaplin v. Sanders*, 100 Wn.2d 853. Here, the Englanders have even less evidence of possession that was present in *Danner* as there was no evidence that showed the Englanders actively maintained the portion of the drain line that ran through the lookout. The passive presence of the Englander's drain line is insufficient to defeat Kinsman's exclusive possession of the lookout.

The Englanders' contention that the neighborly use of the property controverts Kinsman's exclusive possession is likewise incorrect. In its discussion of the relationship between exclusive possession and the use a true owner would make of the land, the Supreme Court in *Frolund v. Frankland* held:

[T]he evidence reveals that the children of the parties,

as well as those of other neighbors, played about and over the various neighborhood beach areas with no more than the usual parental approval and restraint, and that the parties themselves occasionally, socially, and casually visited back and forth, and sometimes assisted one another in the performance of various work projects, e.g., beaching the swimming raft for winter storage. Such conduct, under the circumstances, denotes neighborliness and friendship. It does not amount to a subordination of defendant's adverse claim to the disputed wedge . . .

*Frolund v. Frankland*, 71 Wn.2d 812, 818-19 71, 431 P.2d 188 (1967), *overruled on other grounds by Chaplin*, 100 Wn.2d at 861. In the present case, there was testimony from both parties that it was historically common for the neighboring children and pets to have relatively free range over the lookout and neighboring properties. RPI at 38-39, 389, 725-27. Several witnesses also testified that it was common for them to use the bulkheads and stairs of their neighbors to access the beach. RPI at 38-39, 389, 725-27. Even Jones, who commonly used the lookout to hit golf balls, testified that he used the lookout because he felt he had permission from Kinsman to use it. RPI at 724-25. Further, Jones testified that when Christopher Kinsman asked him to stop using the lookout, Jones discontinued his use. RPI at 711. Substantial evidence in the record demonstrates that it was common neighborly use for the adjoining property owners to access each other's properties for recreational purposes. As in

*Frolund*, this use is consistent with neighborliness and friendship, and does not defeat Kinsman's exclusive use of the disputed property.

The Englanders also dispute the hostility of Kinsman's possession. Proof of the element of hostility requires only that the claimant treat the land as her own as against the world throughout the statutory period. *Chaplin*, 100 Wn.2d at 860-61. The nature of her possession will be determined solely on the objective manner in which she treats the property. *Chaplin*, 100 Wn.2d at 861. "Subjective beliefs regarding a true interest in the land and any intent to dispossess or not dispossess another are irrelevant to the determination." *Shelton v. Strickland*, 106 Wn. App. 45, 50-51, 21 P.3d 1179 (2001).

The Englanders claim that their predecessor, the Vergowes, gave Kinsman permission to occupy the disputed area. A true owner's granting of permission will defeat an adverse possessor's claim of hostility. *See Chaplin*, 100 Wn.2d at 860. However, this allegation is contradicted by Vergowe's testimony that she and her husband gave Kinsman's predecessors the disputed property. When asked to clarify whether she merely gave permission to construct a portion of the lookout on her property, Vergowe stated that she and her husband gave permission and gave the property to Kinsman's

predecessor out of friendship. Exhibit 31 at 37, 43, 50. Vergowe also stated that she always considered the lookout to be on the Kinsman property and that she considered the water front boundary of her property to be the intersection of her bulkhead with Kinsman's lookout. Exhibit 31 at 34, 36-37. Vergowe's testimony is corroborated by the testimony of Jopp regarding the instructions he received from Vergowe on the placement of the bulkhead.

Substantial evidence supports the conclusion that Kinsman's use of the property was not permissive but instead done out of a belief of actual ownership. This is further supported by the construction of permanent structures along what Kinsman and her predecessors believed to be the boundary line. "The construction and maintenance of a structure on, or partially on the land of another, almost necessarily is exclusive, actual and uninterrupted, open and notorious, hostile and made under a claim of right." *Shelton*, 106 Wn. App. at 50-51.

As formerly noted, in 1983, Kinsman's predecessor built the concrete bulkhead and the lookout, the southern wall of which marks the boundary of the Kinsman property. Kinsman's predecessor also built a concrete wall approximately 150 feet inland from the bulkhead. Like the lookout, this wall also protrudes past the survey line

approximately 18 inches and onto what would be the Englander's property. Other markers such as a rose arbor, tree stumps and decorative concrete monuments were placed along what Kinsman's predecessor and the Vergowes believed to be the boundary line. These structures and the line formed by these structures, encroach upon what the Englanders claim to be the correctly surveyed boundary line between the two properties. The mutual agreement of the previous owners as to the boundary line combined with the construction of permanent structures that conform to the agreed boundary line demonstrates hostile possession and defeats a presumption of permissive use. See *Kesinger v. Logan*, 51 Wn. App. 914, 920, 756 P.2d 752 (1988). Substantial evidence supports Kinsman's hostile possession of the disputed property.

ii. Acquiescence

The Englanders also dispute the trial court's findings that Kinsman acquired right to the disputed property through mutual recognition and acquiescence. Acquiescence is an equitable doctrine which supplements the doctrine of adverse possession. It provides title to property that has, through time, been accepted as the established boundary line between neighboring properties. *Lamm v. McTighe*, 72 Wn.2d 587, 434 P.2d 565 (1967). The following basic

elements must, at a minimum, be shown to establish a boundary line by recognition and acquiescence:

(1) The line must be certain, well defined, and in some fashion physically designated upon the ground, e.g., by monuments, roadways, fence lines, etc.; (2) in absence of an express agreement establishing the designated line as the boundary line, the adjoining landowners, or their predecessors in interest, must have in good faith manifested, by their acts, occupancy, and improvements with respect to their respective properties, a mutual recognition and acceptance of the designated line as the true boundary line; and (3) the requisite mutual recognition and acquiescence in the line must have continued for that period of time required to secure property by adverse possession.

*Lamm*, 72 Wn.2d at 592-93.

The doctrine of acquiescence does not require an express agreement between the adjoining landowners. *Lamm*, 72 Wn.2d at 592-93. Instead, the court in *Lamm* focused on the actions of the parties and looked to see whether the adjoining landowners' actions indicated that they acquiesced to the location of the boundary line. *Lamm*, 72 Wn.2d at 593. If the parties actions demonstrated acquiescence, then they may not later dispute that location. *Lamm*, 72 Wn.2d at 592 citing *Thomas v. Harlan*, 27 Wn.2d 512, 518, 178 P.2d 965 (1947).

In the *Lamm* case, the neighbors, Vail and Pentecost, owned

adjoining strips of property. Following discussion with Pentecost concerning the desirability of more definitive markings of the division between their properties, Vail erected a fence. Thereafter, Pentecost cleared portions of the property up to the fence line, planted some berry bushes, mowed some of the grass and occasionally utilized a strip adjacent to the fence line as a roadway for fuel deliveries. Eventually, the Vail fence fell into disrepair and practically disappeared. Vail's successors in interest erected a wire mesh fence on approximately the same location as the Vail fence. At a later date, the Pentecost's successors in interest discovered that the fence line was not in the correct location. In *Lamm*, the court held that the original fence line established the boundary between the two properties by acquiescence, because it was, in essence, an agreed boundary line. *Lamm*, 72 Wn.2d at 593-94.

The instant case parallels the facts in *Lamm*. The parties' predecessors expressly, agreed on an established boundary between the properties. That boundary was marked by the garden wall and southern wall of the lookout, as well as other intervening markers. The garden wall and the Kinsman's lookout are permanent, concrete objects, which together with other monuments, form a clear boundary line established by Kinsman and their predecessors over 20 years

ago. The actions of the parties over the following decades also supported their agreement. This is established by Vergowe's testimony that she did not maintain the lookout or the north side of the garden wall because she believed they were on the property of Kinsman's predecessor. Exhibit 31 at 38-39, 47-49. Chris and Norma Kinsman also testified that they maintained the lookout and what they believed was their side of the garden wall.

"[W]here boundaries have been defined in good faith . . . and thereafter for a long period of time acquiesced in, acted upon, and improvements made with reference thereto, such boundaries will be considered the true dividing line and will govern, and whether the lines as so established are correct or not becomes immaterial." *Lilly*, 88 Wn. App. at 316. Here, the parties both agreed to and manifested by their actions a mutual recognition of the boundary line marked by the line created by garden wall and the lookout. Evidence at trial established that the parties' predecessors and Kinsman treated this as the boundary line for a period in excess of the requisite ten years. Substantial evidence therefore supports the trial court's findings on acquiescence.

### **C. Conclusion**

The trial court did not abuse its discretion in finding Vergowe

unavailable to testify in person at trial. Based on her unavailability, the trial court properly admitted Vergowe's deposition under CR 32(a)(3). Vergowe's continuing unavailability necessitated Vergowe's telephonic rebuttal testimony at trial and the trial court did not abuse its discretion in permitting her testimony.

Lastly, substantial evidence exists in the record to support the court's findings on adverse possession and acquiescence. Kinsman and her predecessors held hostile and exclusive possession to the property. This possession was based on the mutual recognition of the parties predecessors. Kinsman therefore respectfully requests this court to affirm the trial court's decision.

Respectfully submitted this 7 day of March, 2007.

  
Robert Denomy, WSBA # 9050  
Attorney for Respondent Kinsman

COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY DEPUTY

IN THE WASHINGTON COURT OF APPEALS  
DIVISION II

NORMA KINSMAN, a single woman,  
Plaintiff/Respondent

34849-7  
NO. ~~35831-0 II~~

DECLARATION OF SERVICE

v.

MICHAEL ENGLANDER, et al.  
Defendant/Petitioners,

The undersigned declares, under penalty of perjury under the laws of the State of Washington, that on March 1, 2007, I caused a true and a correct copy of Respondent's Reply to be delivered via ABC Legal Services, to the following:

Mark R. Roberts  
Davis Roberts & Johns  
7525 Pioneer Way, Suite 202  
Gig Harbor, WA 98335

Executed this 1<sup>st</sup> day of March, 2007, at Tacoma, Washington.

  
Sharon Kossman

ORIGINAL

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