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ASSIGNMENTS OF ERROR AND ISSUES PRESENTED

I. Assignments of Error

Assignment of Error No. 1: The trial court erred in making Finding of Fact No. 10.1.

Assignment of Error No. 2: The trial court erred in making Finding of Fact No. 10.2.

Assignment of Error No. 3: The trial court erred in making Finding of Fact No. 10.4.

Assignment of Error No. 4: The trial court erred in making Finding of Fact No. 11.2.

Assignment of Error No. 5: The trial court erred in making Finding of Fact No. 11.3.

Assignment of Error No. 6: The trial court erred in making Finding of Fact No. 11.4.

Assignment of Error No. 7: The trial court erred in making Finding of Fact No. 12.5.

Assignment of Error No. 8: The trial court erred in making Finding of Fact No. 12.6.

Assignment of Error No. 9: The trial court erred in making Finding of Fact No. 12.7.

Assignment of Error No. 10: The trial court erred in making Finding of Fact No. 12.8;

Assignment of Error No. 11: The trial court erred by making Finding of Fact No. 28.2

Assignment of Error No. 12: The trial court erred in concluding that Mr. Malella is entitled to the disputed property on the basis of adverse possession as stated in Conclusion of Law No. 31.1.

Assignment of Error No. 13: The trial court erred by entering Conclusion of Law No. 32.1.

Assignment of Error No. 14: The trial court erred by concluding that title to the disputed property should be quieted in plaintiff and entering Conclusion of Law No. 33.1.

Assignment of Error No. 15: The trial court erred by entering Conclusion of Law No. 34.1.

Assignment of Error No. 16: The trial court erred by entering Conclusion of Law No. XXXV.

Assignment of Error No. 17: The trial court erred by entering the Order Quietening Title in Real Property on Remand.

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II. Issues Presented.

a. Issues Related to Assignments of Error 1-11.

Were the Findings of Fact the trial court made supported by substantial evidence in the record, especially when they are contradicted by other Findings of Fact that the trial court made?

Should one or more of the Findings of Fact be reviewed as conclusions of law?

Does the law of the case doctrine preclude Finding of Fact No. 10.2?

b. Issues Related to Assignments of Error 12-17.

Do the findings of fact that the trial court made support its conclusions of law?

Does the permission given by defendant eliminate the claim for adverse possession for the property in the disputed area on which the encroaching garage sits?

Did the plaintiff place fill near the garage more than ten years before suit was filed?

Are the uses by plaintiff and his predecessors—clearing of a trail, attempting to remove trespassers, and picking up refuse left by trespassers—sufficient to show actual, open, notorious, and hostile possession?

Can the use of the disputed property by plaintiff and his predecessors be considered exclusive when the defendants were making similar use of the property during the same periods of time?

Was the posting of “No Trespassing” signs and the eviction of trespassers adverse to Mrs. Keist’s interest in the disputed area?

Can any use of the property by defendant and her licensees be considered “neighborly accommodation” when all such uses were either unknown to plaintiff or opposed by him?

STATEMENT OF THE CASE

I. Introduction.

This matter was tried to the court. It entered Amended Findings of Fact and Conclusions of Law on Remand on March 24, 2010. This Statement of the Case will refer to the Findings of Fact which no error is assigned whenever appropriate with the designation “FF.”

II. Description of the Disputed Property.

Washougal River Road runs in generally in an east to west direction roughly parallel with the Washougal River. Salmon Falls Road runs in a northerly direction. Its length includes a bridge over the Washougal River near where it intersects with Washougal River Road.

(CP 60)

The Lona Paulson Living Revocable Trust (Mrs. Keist) owns the southeast quarter of the northwest quarter of Section 33, Township 2 North Range 5 East of the Willamette Meridian in Skamania County. (CP 25, 51, FF 1) A portion of the property that she owns lies west of the bridge on Salmon Falls Road that spans the Washougal River. (CP 25, 53, FF 5.2; Ex. 25) Anthony Malella (Mr. Malella) is currently the owner of approximately 1.5 acres of land in the southwest quarter of the northwest quarter of Section 33, Township 2 North, Range 5 East of the Willamette Meridian. (CP 25, 49, FF 4.1) The disputed area is a portion of the property titled in Mrs. Keist's name that is west of the bridge over the Washougal River. (CP 25, 53, FF 5.2) When the litigation began, it included property both north and south of the Washougal River.

The disputed area is a steep incline from the road to the Washougal River. It is largely overgrown with blackberries. (CP 29, FF 10.4; RP 185) For that reason, it is not capable of being maintained in any significant way. (CP 29, FF 10.4; RP 61-62) It is also slippery and presents a danger for anyone trying to go from the road to the river. (CP 38, FF 17.4; RP 176,192) There is a residence on Mr. Malella's property. There is also a garage partially on his property. A portion of the garage encroaches onto Mrs. Keist's property in the disputed area. (CP 53)

III. Ownership of the Properties.

Mrs. Keist and her deceased husband acquired her property in 1952. (CP 27, FF 9.1) In the 1970's, she conveyed the property to her children who conveyed it in turn to Edwin Hoffman. Mr. Hoffman then deeded the property back to Mrs. Keist. She conveyed the property to her living trust in 1996 and has owned the property since that time. (CP 27-28, FF 9.1-9.6)

Jack and Johanna Phillips acquired Mr. Malella's property in 1963. In 1980, they sold the property to William Crisman and Kimberly Bryan. (CP 26, FF 6.1) Mr. Crisman and Ms. Bryan then conveyed the property to Roger and Maynette Manwaring in 1981. (CP 26, FF 7.1) The Manwarings stayed on the property until 1990 when they sold the property to Mr. Malella. (CP 26, FF 7.1-8.1) Mr. Malella has remained in title to the property since that time. (CP 27, FF 8.4)

IV. Use of the Disputed Property.

a. The Trespassers in the Area.

People would often go to the area to fish and swim in the Washougal River. Sometimes, there might be as many as thirty to forty persons in the area. They might be consuming alcoholic beverage. They did so without any invitation from either Mrs. Keist or her family or

persons living in the house now owned by Mr. Malella. These persons would disturb the local residents with the noise they would make. This has been an ongoing problem from the 1960's through the time of trial. It is considered a nuisance by the neighborhood. (RP 58-61; 111; 118; 194-95; 224)

Mr. Phillips attempted to control persons coming onto the property to swim in the Washougal River. He put up "No Trespassing" signs. He did not try to control fishermen, however. He considered his efforts to be futile. He left the attempt of control of fishermen to another neighbor, Mr. Stelter. Mrs. Keist's renters, Bob Irvin and Wenona Hendrickson also attempted to control swimmers and fishermen. (CP 29-30, FF 10.6; RP 58-61)

Mr. and Mrs. Manwaring also posted "No Trespassing" signs. These rarely lasted a week before they were taken down, presumably by the trespassers. (RP 249-50; 276-77)

Richard Malella is Mr. Malella's son. He leased the property from his father between 1996 and 2003. He posted "No Trespassing" signs on the east side of the bridge approximately six times during the period of his residence. It was his perception that these signs were taken down shortly after they were put up. (CP 36, FF 15.1; RP 117-19, 123)

Susan Stauffer and Cynthia Howell are neighbors of Mr. Malella. He asked them to assist him in removing trespassers. (CP 38, FF17.7; RP 180, 202-204) They would ask trespassers to leave. (CP 38, FF 17.5) They also posted “No Trespassing” signs. These were torn down until they were posted higher. (CP 38, FF 17.6; RP 183)

George Elkins is a son of Lona Keist. (CP 42, FF 24.3) Beginning in 1963, he posted “No Trespassing” signs both above and below the bridge. These were torn down. (CP 43, FF 24.6) Mrs. Keist obtained no trespassing signs and asked her children and grandchildren to post them in the area to including the disputed area. She signed approximately twenty-five to thirty of these signs. (CP 44, FF 26.1; RP 460)

b. The Water Source.

A spring in the disputed area supplies water for the house in which Mr. Malella owns. (CP 29, FF 10.2; RP 53-55) Mr. Phillips attempted to maintain a path from the house to the water source. (CP 29, FF 10.4; RP 61) While Richard Malella leased the property from his father, he made no attempt to maintain the area around the water source. (CP 37, FF 15.6)

Don Bryden repaired frozen spring pipes and cleared brush on the path leading to the spring. (CP 35; FF 13.2) The trial court did not find precisely when Mr. Bryden did this work.

c. Use and Maintenance of Trails.

Mr. and Mrs. Manwaring cleared pathways between the garage and the river. They let one of the pathways grow over and then cleared another. (CP 32, FF 11.10; RP 247-48) Richard Malella maintained these trails. (CP 37, FF 15.4)

George Elkins cleared brush from the trail in the 1980's and thereafter until his son, Mark, became friends with the Manwarings. (CP 42, FF 24.5) He did additional work in clearing a trail in the area in April of 2001. (CP 42, FF 24.4)

d. The Garage.

There is a garage associated with the property Mr. Malella owns. It lies east of the house and encroaches into the disputed area. The southeast corner of the garage is 9.4 feet east of the property line. (CP 60) Mr. Phillips built the garage. (RP 55)

When Mrs. Keist saw that Mr. Phillips was building a garage, she told him that she believed that it was encroaching onto her property. She added, however, that the encroachment presented no problem to her. (CP 63-64; Deposition of Lona Keist, pps. 74-75) Mr.

Phillips did not remember the conversation but did not deny that it occurred. (RP 67-68)

e. Fill Near the Garage.

There is a parking area east of the garage. Don Bryden built this area for Mr. Malella in 1991 and spread some gravel on it in 1996. (CP 35; FF 13.1) The trial court did not find precisely when in 1991 Mr. Bryden performed this work.

The parking area may encroach into the disputed area. The trial court did not find that it specifically did encroach or, if it did, the precise dimensions of its encroachment.

f. Use of the Disputed Area By Mrs. Keist, Her Family, and Licensees.

Mrs. Keist and her friends and family utilized the disputed area regularly over the years.

George Elkins would swim in the disputed area during the 1980's and thereafter. He used a trail now grown over by blackberries to access the river from the road. (CP 42, FF 24.3) George Elkins fished on the property countless times over the years. He last fished there in 1992 when he was threatened by one of Mr. Malella's renters. He also swam in the area on numerous occasions. (CP 41-42, FF 23.3)

Mark Elkins is George Elkins' son. (CP 41, FF 23.3) He helped with the clearing of blackberries from the trails and with picking up litter left by trespassers. (CP 42, FF 23.4) He believed that he had the right to swim and fish on the disputed property because of his grandmother's ownership. He believed that he had to ask for permission to utilize a portion of the Washougal River to the west of the property line. (RP 367-68) The Manwarings believed that they gave Mark Elkins permission to use the property because he was a friend of their son, Christopher Hightower. (CP 32, FF 11.9, 11.11)

Kris Leonard fished in the disputed area hundreds of times beginning in 1967. He believed that he had authority to do so because he was a friend of Mrs. Keist. He obtained a written permission slip from her. He obtained a written permission slip from her. After being confronted by persons representing Mr. Malella, Mr. Leonard obtained permission on occasion from Mr. Malella to fish on the disputed property. (CP 43, FF 25.2, 25.3) Mr. Leonard has also maintained trails from the road to the river. (CP 44, FF. 25.4)

John Thomas and Steve Koch received permission from Mrs. Keist to fish on the disputed property. When they did during the year 2000, they were confronted by persons representing Mr. Malella. (CP 40-41, FF 20.1, 20.2, 21.1)

The disputed property is now in a current use classification pursuant to RCW 84.34. Mrs. Keist put the property into that classification in 1992. (CP 40, FF 18.6)

V. Proceedings in This Matter.

Mr. Malella filed suit in this matter on August 31, 2001. At length, he filed the Amended Complaint to Quiet Title, Trespass Damages, and Permanent Injunction. (CP 125-43) Mrs. Keist submitted the Answer and Amended Counter Claim and Cross Claim. In that pleading, she sought to quiet title to the disputed property in herself and to eject Mr. Malella from the property. (CP 110-119).

The matter was tried to the court beginning on September 29, 2003. (RP 1) Prior to trial, the parties stipulated that certain depositions would be published without objection. (CP 163-64) The trial court ruled that Mr. Malella was entitled to the disputed property by adverse possession but granted Mrs. Keist a prescriptive easement.

Mr. Malella appealed the trial court's ruling, and Mrs. Keist cross-appealed. In an unpublished opinion filed July 5, 2005, the Court of Appeals first ruled that Mrs. Keist was not entitled to a prescriptive easement. It then ruled that Mr. Malella had not established any right to the property south of the Washougal River on the basis of adverse

possession. (Slip Opinion, p. 12) It then stated that the trial court's findings of fact and conclusions of law were too inconclusive to support the award it had made on Mr. Malella's behalf. It remanded the matter to the trial court for it to enter new findings of fact and conclusions of law that resolve the disputed facts and legal issues. *Malella v. Keist*, Court of Appeals No. 31681-2-II. The Court specifically stated:

In so doing, the trial court shall award to Malella by adverse possession only such property that the trial court finds that he specifically used adversely to Keist's interests for the requisite period; in support of such award, the trial court must set forth specific, necessary facts to support such adverse possession and precisely delineate a legal description of the adversely possessed land that comport with these findings.

Slip Opinion, p. 13.

The trial court then entered the Amended Findings of Fact and Conclusions of Law on Remand and the Order Quietening Title in Real Property on Remand. (CP 21-60) It ruled, in essence, that Mr. Malella was entitled to all property north of the Washougal River from the boundary line between the two parcels to the bridge based on his claim of adverse possession. (CP 57) Mrs. Keist then appealed. (CP 66-107)

ARGUMENT

I. Standard of Review Generally.

This matter was tried to the court. It entered Findings of Fact and Conclusions of Law. Therefore, appellate review is limited to determining whether substantial evidence supports the Findings of Fact and, if so, whether the Findings support the trial court's Conclusions of Law and Judgment. *Holland v. Boeing Co.*, 90 Wn.2d 384, 390-91, 583 P.2d 621 (1978); *Saviano v. Westport Amusements, Inc.*, 144 Wn.App. 72, 180 P.3d 874 (2008). Substantial evidence is that quantum of evidence sufficient to persuade a rational and fair-minded person that the stated premise is true. *Sunnyside Valley Irrigation District v. Dickie*, 149 Wn.2d 873, 879-80, 73 P.3d 369 (2003); *Stieneke v. Russi*, 145 Wn.App. 544, 560, 190 P.3d 60 (2008); *Durand v. HIMC Corp.*, 151 Wn.App. 818, 832, 214 P.3d 189 (2009).

In this case, Mr. Malella seeks to establish his title to certain real property by adverse possession. Adverse possession is a mixed question of law and fact. The trier of fact determines what essential facts exist. Whether those facts constitute adverse possession is for the Court to determine as a matter of law. *Peeples v. Port of Bellingham*, 93 Wn.2d 766, 771, 613 P.2d 1128 (1980); *Chaplin v. Sanders*, 100 Wn.2d 853, 863, 676 P.2d 431 (1984); *Lloyd v. Montecucco*, 83 Wn.App. 846, 853, 924

P.2d 927 (1996). In this context, the “essential facts” are exactly what has occurred and what use has been made of the land in question. The Court made that clear in *Chaplin v. Sanders, supra*, when it discussed the scope of review and then set out facts regarding the use of the land in question. 100 Wn.2d at 863. This statement is consistent with the general standard for review of mixed questions of law and fact—they are subject to the same *de novo* review as conclusions of law. *Clayton v. Wilson*, 168 Wn.2d 57, 62-3, 227 P.3d 278 (2010).

Several of the trial court’s Findings of Fact are not supported by substantial evidence. In fact, some of them are contradicted by other Findings of Fact. The findings that the trial court made also do not support the Conclusions of Law that the trial court reached.

II. Assignment of Error 1-11.

a. Substantial Evidence Does Not Support Statements Made in Certain of the Findings of Fact That Mr. Malella or His Predecessors Used the Property “to the Exclusion of All Others.”¹

i. Introduction.

Portions of Findings of Fact Nos. 10.1, 10.2, 11.2, 11.3, and 12.5 discuss, respectively, the use of the property made by Mr. and Mrs. Phillips, Mr. and Mrs. Manwaring, and Mr. Malella. They all

¹ In accordance with RAP 10.4(c) these Findings of Fact are set out in the Appendix.

share a common flaw. Each states that one of them exercised control over the disputed property or maintained the property “to the exclusion of all others.” These statements are, in fact, not true. They are contradicted by other findings of fact that the trial court made. The trial court erred to the extent that it included language “to the exclusion of all others” in these findings of fact.

ii. Findings Concerning Mr. and Mrs. Phillips.

In Finding of Fact No. 10.1, the trial court found that “to the exclusion of all others, Jack Phillips and his wife exercised dominion and control of the disputed property...” In Finding of Fact No. 10.2, the trial court found that “during his ownership of the real property, to the exclusion of all others, Jack Phillips...attempted to keep the public off the property, posted no trespassing signs...” The trial court made other findings of fact that show these statements are not true. In Finding of Fact No. 10.6, the trial court found that Mr. Stetler — one of Mr. Phillips’ neighbors — also attempted to control usage of the property by trespassers below the bridge. (CP 38) The trial court also found that George Elkins, one of Mrs. Keist’s sons, began posted no trespassing signs in the area beginning in 1963 in Finding of Fact No. 24.6. (CP 43)

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iii. Findings Concerning Mr. and Mrs. Manwaring.

In Finding of Fact No. 11.2 the trial court found that “during their ownership, to the exclusion of all others,” Mr. and Mrs. Manwaring posted no trespassing signs; attempted to keep people off the property; cleared paths; and picked up litter. In Finding of Fact No. 11.3, the trial court found that “to the exclusion of all others, Roger Dean Manwaring and Maynette Manwaring exercised dominion and control of the disputed property...” In Finding of Fact No. 11.4, the trial court stated that Marc Elkins used the property because he was a friend of their son but then stated that, “No one else used maintained or used the property during Roger Dean and Maynette Manwaring’s ownership.” Other findings that the trial court made belie these statements in these Findings of Fact. Once again, George Elkins posted “No Trespassing” signs. He also cleared brush of the trail and swam in the area during the 1980’s and thereafter. (CP 42, FF 24.3, FF 24.5) Marc Elkins, Mrs. Keist’s grandson, fished in the disputed area, helped clear blackberries and tree branches, and also picked up garbage. (CP 42, FF 23.4) Mrs. Keist posted “No Trespassing” signs in the area at least during the fifteen years prior to trial. (CP 44, FF 26.1; RP 460) Kris Leonard also fished in the area numerous times. (CP 43, FF 25.2)

iv. Findings Concerning Mr. Malella.

In Finding of Fact No. 12.5, the trial court found that “no other persons without the owner’s permission, maintained, used or exercised dominion and control over the disputed property other than Plaintiff, his renters or agents. To the exclusion of all others, Anthony G. Malella exercised dominion and control of the disputed property...” (CP 34) The finding is contradicted by Findings of Fact Nos. 12.7 and 21.1 where the trial court found that Mrs. Keist allowed John Thomas to fish on the property. (CP 34, 41) It is also contradicted by the statements in Finding of Fact Nos. 12.7, 25.2, and 25.3 that Kris Leonard received written permission from Mrs. Keist to fish on the property and did so thirty to forty times during between 1990 and the time of trial. (CP 34, 43) The trial court also found that both Mrs. Keist and her son George Elkins had posted “No Trespassing” signs in the area as discussed above.

In another sense, it cannot be said that Mrs. Keist, Mr. Phillips, Mr. and Mrs. Manwaring, or Mr. Malella has ever had exclusive control over the disputed property. If there is one constant in this case, it is the continuing and unabated presence of trespassers coming to the area to swim and fish in the Washougal River regardless of the presence of “No Trespassing” signs.

b. Certain Findings Contain Conclusions of Law or Mixed Findings of Fact and Conclusions of Law and Should Be Reviewed *De Novo*.

In Findings of Fact No. 10.1, 11.3, 12.5, and 12.6, the trial court purported to make findings as to whether Mr. and Mrs. Phillips, Mr. and Mrs. Manwaring, Mr. Malella, and Mrs. Keist had or had not exercised “dominion and control.” In this context, “dominion and control” is equivalent to the element of actual possession in an adverse possession claim. As the Court stated in *Wood v. Nelson*, 57 Wn.2d 539, 540, 358 P.2d 312 (1961), “exclusive dominion over land is the essence of possession.” Stated another way, the Court must determine if the use made of the disputed property by Mr. Malella and his predecessors rises to the level of sufficient actual possession to make out an adverse possession claim. Since it must determine actual possession, it must necessarily determine the synonymous term “dominion and control.” Those questions are subject to *de novo* review as mixed questions of law and fact.

In Finding of Fact No. 12.7, the trial court found that “anyone who wanted to go on the disputed property intending to fish or swim had to first obtain the permission of Plaintiff or his agents.” That statement represents a conclusion of law, not a finding of fact. In order for that statement to be true, Mr. Malella would have to be the true owner of the land. He can only be the true owner of the land if he has a valid

adverse possession claim to the disputed property. That, of course, is the legal question that the trial court had to decide. It is therefore subject to *de novo*” review as any other conclusion of law.

The trial court made a similar finding concerning Kris Leonard in Finding of Fact No. 12.8. Mr. Leonard believed that he had permission from Mrs. Keist to be on the property. (CP 43, FF 25.3) In Finding of Fact No. 12.8, the trial court stated that he was a “trespasser.” Whether Mr. Leonard is a trespasser depends on whether Mr. Malella should be considered to be the owner of the disputed area at the time Mr. Leonard came onto it. That, of course, is a legal conclusion for *de novo* review by this Court.

Finally, in Finding of Fact No. 28.2, the trial court found “Plaintiff proved his adverse possession claim” to a portion of the disputed area. That is also a legal conclusion subject to *de novo* review.

c. Mrs. Keist Told Mr. Phillips That the Garage He Was Building Was on Her Property.

In Finding of Fact No. 10.2, the trial court found that Jack Phillips built a garage on the premises and that “no one told him that (the garage he was building) was on the Keist property.” (CP 29) Substantial evidence does not support that finding.

When questioned about communication concerning discussions about the encroachment of the garage, Mr. Phillips testified as follows:

Q: When you built the garage, do you remember having a conversation with Harold and Lona Elkins — actually it wouldn't have been — it would have been Lona Keist and Bill Keist — standing on the bridge, looking over at you when you were building the garage, and then saying something like that looks awful close to the property line what do you think?

A: I won't answer yes or no.

Q: Okay.

A: No I do not. I don't say it didn't happen, I don't remember.

Q: Okay. You don't remember —

A: I don't recall —

Q: Them saying anything to you about your garage being close to —

A: I don't remember, no.

(RP 67-68) By contrast, and in her testimony, Mrs. Keist clearly recalls communicating with Mr. Phillips that his garage may have encroached onto her property but that she was not going to tell him to move the garage or take it down. (CP 64-65, Deposition of Lona Keist, pps. 74-5)

In this situation, we have one party — Mrs. Keist — who specifically remembers a conversation with Mr. Phillips concerning the encroachment of his garage onto her property. The other party to the conversation — Mr. Phillips — does not recall the conversation but does not deny that it occurred. In other words, he can give no testimony whether the conversation occurred or not as he specifically stated. When one party specifically remembers that an event occurred and the other party to that event will not deny that the event occurred, a rational and fair-minded person reviewing the evidence would conclude that the event had in fact occurred. Conversely, no rational and fair-minded person would conclude that the event did not occur.

The trial court's finding is particularly troubling when viewed in light of the findings of fact it made prior to the remand. As the Court noted in *Malella v. Keist*, No. 31681-1-II, the trial court made a contrary finding of fact in the first Findings of Fact it entered. Specifically, prior Finding of Fact No. 18.6 read as follows:

Lona Keist and her husband told Jack Phillips they felt the garage was on their property line but never told any subsequent owners of Plaintiff's property that garage was encroaching on her property or that the springhead located on the downriver side of the bridge was on her property.

(Slip Opinion, p. 7) The evidence has obviously not changed. If this Finding of Fact was made before the first appeal, there should be no reason to change it. From the Slip Opinion, it appears that no error was assigned to this finding of fact. That means it became the law of the case. *Beggs v. City of Pasco*, 93 Wn.2d 682, 685, 611 P.2d 1252 (1980).

A rational and fair-minded person would not have concluded that Mrs. Keist did not tell Mr. Phillips about the encroachment and, to the contrary, would have concluded that she did. The trial court found that the conversation had occurred when it made findings of fact in 2003. The finding became law of the case as it was not appealed. Therefore the trial court erred in making Finding of Fact 10.2 and furthermore in not finding that Mrs. Keist had in fact advised Mr. Phillips of the encroachment.

II. Assignments of Error 12-17.

a. Introduction.

In order to establish a claim of adverse possession, the claimant must show possession of land that is (1) open and notorious; (2) actual and uninterrupted; (3) exclusive; and (4) hostile. *Chaplin v. Sanders, supra; ITT Rayonier, Inc. v. Bell*, 112 Wn.2d 754, 757, 774 P.2d 6 (1989). Possession of the property must exist for the statutorily proscribed period of ten years. RCW 4.16.020; *ITT Rayonier, Inc. v. Bell, supra*. The

adverse possession claimant must prove that his or her possession is adverse to the holder of title to the land. *Muench v. Oxley*, 90 Wn.2d 637, 642, 584 P.2d 939 (1978).

Obviously, the claimant must first demonstrate sufficient possession to make out an adverse possession claim. The sufficiency of possession is typically a factual question. *Stoebuck & Weaver Real Estate: Property Law* 17 Wash.Prac. §810 (2004). In rural settings, building a fence and cultivating up to that fence is sufficient to establish possession. *Faubion v. Elder*, 49 Wn.2d 300, 301 P.2d 153 (1956). By contrast, erecting sign boards and mailbox and plowing up weeds is not sufficient. *Slater v. Murphy*, 55 Wn.2d 892, 339 P.2d 457 (1959).

Possession is considered to be open and notorious when the title holder has actual notice of the adverse use throughout the statutory period of ten years or the claimant uses the land in such a way that any reasonable person would assume that the claimant is the owner. In other words, the claimant must show that the true owner knew, or should have known, that the claimant's occupancy constituted an ownership claim. *Chaplin v. Sanders, supra*, 100 Wn.2d at 863.

The "hostility" element of adverse possession requires only that the claimant treat the land as his or her own as against the world throughout the statutory period. The nature of claimant's possession will

be determined solely on the basis that the manner in which claimant treats the property. The claimant's subjective belief regarding his or her true interest in the land and his or her intent to dispossess or not dispossess the true title owner is irrelevant to this determination. In this context, "hostile possession" is the opposite of permissive possession. If the claimant goes into possession with the permission of the title holder, the element of hostility is absent. *Chaplin v. Sanders, supra*, 100 Wn.2d at 860-862; *ITT Rayonier, Inc. v. Bell, supra*. Furthermore, the use of the property is presumed to be permissive at its inception. *Petersen v. Port of Seattle*, 94 Wn.2d 479, 486, 618 P.2d 67 (1980). The use is presumed to remain permissive until proof exists of a change in use beyond that which is permitted. *Miller v. Anderson*, 91 Wn.2d 822, 824, 964 P.2d 365 (1998).

Exclusive possession means that the adverse possessor may not share possession of the land with the true owner or with third persons. *Scott v. Slater*, 42 Wn.2d 366, 255 P.2d 377 (1953); *ITT Rayonier, Inc. v. Bell, supra*.

The evidence in this case shows that several different uses have been made of several different portions of the disputed property. Different considerations apply to each. Therefore, each will be discussed separately. Suffice it to say that the findings of fact that the trial court

made to not support its conclusion that title to the disputed property should be quieted in Mr. Malella.

b. The Facts the Trial Court Found Do Not Support Its Conclusion that Mr. Malella Was Entitled to the Disputed Area by Adverse Possession.

i. The Encroaching Garage.

The first area in question is the garage. It encroaches onto the disputed area in a triangular fashion. The southeast corner of the garage is approximately 9.4 feet east of the property line. (CP 60) The garage has been there for more than ten years.

All elements of adverse possession would be present for this encroachment with the exception of hostility. The substantial evidence in this case is that Mrs. Keist permitted the encroaching garage when Mr. Phillips was first building it. As noted above, she recalls the conversation. While Mr. Phillips does not recall it, he certainly does not deny that it occurred. Since the possession was permissive, it was never hostile. Adverse possession is therefore absent for this encroachment.

The absence of adverse possession does not mean that Mr. Malella has to move his garage. On remand of this matter, the trial court will have to consider whether he will have to buy the property on which the garage sits and for what price. *Proctor v. Huntington*,

___ Wn.2d ___, ___ P.3d ___, 2010 W.L. 3261137 (Supreme Court No. 82326-0, decided August 19, 2010).

ii. The Area Adjacent to the Garage.

The next area in question is directly to the east of the garage and near Washougal River Road. At some point in time, Don Bryden put some fill into this area in 1991 and deposited some gravel in 1995. (CP 35, FF 13.1 and 13.2)

The Findings of Fact omit the following critical details:

1. What did this area look like before Mr. Bryden deposited the fill? Was it a precipitous drop or a more gradual slope? What are the dimensions of the area in which the fill was deposited?
2. While the Findings of Fact state that the fill was placed in 1991, when exactly during the year did Mr. Byden do his work?
3. What use has been made of the area since that time? Do cars park there? If so, how often?

The failure of the trial court to make an express finding on a material fact requires that the fact be deemed to have been found against the party having the burden of proof. *Crites v. Koch*, 49 Wn.App. 171, 741 P.2d 1005 (1987); *Pacific Northwest Life Insurance Company v. Turnbull*, 51

Wn.App. 692, 754 P.2d 1262 (1988); *Car Wash Enterprises, Inc. v. Kampanos*, 74 Wn.App. 537, 874 P.2d 868 (1994). The matters the trial court did not decide are material as will be discussed below. The absence of findings on these issues means that Mr. Malella cannot claim this area on the basis of adverse possession.

The most critical of these factual issues is exactly when Mr. Bryden placed the fill. If we assume that his doing so is sufficient to make out open and notorious adverse possession, that possession must have lasted for ten years. The findings of fact that trial court made do not establish that it did.

The ten year period required for adverse possession claims is based on RCW 4.16.020. That statute is a statute of limitation. It reads as follows in pertinent part:

The period prescribed for the commencement of actions shall be as follows:

Within ten years:

- (1) For actions for the recovery of real property, or for the recovery of the possession thereof;

Mrs. Keist's filing of her counterclaim for ejectment and to quiet title tolled the statute of limitations for the recovery of her property. If a counterclaim is not barred by the applicable statute of limitations at the

commencement of the suit, it does not become barred even though the statutory period expires during the pendency of the action. *J.R. Simplot Co. v. Vogt*, 93 Wn.2d 122, 126, 605 P.2d 1267 (1980). Mr. Keist's counterclaim is therefore treated as if it were filed on August 31, 2001. It amounts to her effort to reclaim property used by others and is effective as to all property for which a valid adverse possession claim had not been established by that date.

To prevail on his adverse possession of this piece of the property, Mr. Malella has to show actual, open and notorious, exclusive and hostile possession of this area for a period of ten years. If the possession is made out by the placement of the fill, it would have had to occur before August 31, 1991, in order for the possession to last for ten years. The absence of a finding that the work was done before August 31, 1991, must be interpreted against Mr. Malella since he has the burden of proof. It therefore must be construed as a finding that the fill was placed in 1991 but after August 31. Therefore, the ten year period has not been established for the placement of the fill.

The trial court's findings of fact also do demonstrate that the possession claimed was open and notorious. For a use to be sufficiently open and notorious, it must be sufficiently visible to put the true owner of the property on notice that another party is claiming

ownership of the land. For example, in *Maier v. Giske*, 154 Wn.App. 6, 223 P.3d 1265 (2010), the claimant did not, according to the trial court, maintain certain vegetation that she had planted in the disputed area in such a way that a reasonable person would understand that the property belonged to the claimant. On that basis, the Court upheld the trial court's decision that adverse possession had not been made out as to the area in question.

The placement of fill would only put Mrs. Keist on notice if it was sufficiently visible to be noteworthy. That would depend on what the area looked like before the fill was placed and how big an area the fill covered. Did he fill a precipitous drop or a more gradual slope? Did he fill a relatively large area or a small area? Once again, the absence of specific findings on this issue must be resolved against Mr. Malella. The Court must conclude that the change in the area presented by the placement of the fill was not significant enough to put Mrs. Keist on notice that Mr. Malella was claiming an ownership interest in the property.

While the trial court referred to this area as a "parking area" in Finding of Fact No. 13.1, it entered no findings as to how often cars actually used this area to park. An occasional use of this area for parking cannot amount to a claim of ownership. It is best viewed as a "neighborly accommodation" that an owner would make to his or her

neighbor in this setting. *Lilly v. Lynch*, 88 Wn.App. 306, 945 P.2d 727 (1997). The absence of a specific finding that the area was regularly used for parking means that the trial court did not find such a regular use. In the absence of such as use, there can be no conclusion that the parking amounted to an actual use that was open and notorious.

iii. The Water Source.

Mr. Malella also claims adverse possession based on a water source to his property within the disputed area; conveyance facilities from this source to the house; and a trail from the house to the water source. The adverse use in this context amounts to the use of the water source and conveyance facilities for household purposes and use of the trail from the house to the water source for access and maintenance.

Based on similar facts, the Court held that the user of the water source was entitled to an easement allowing him or her the right to take water from the spring; the right to use the equipment necessary to convey the water from the spring to the house; and an easement for ingress and egress over and along the path from the house to the water source to maintain the water source and the facilities necessary for its conveyance to the house. *Malnati v. Ramstead*, 50 Wn.2d 105, 309 P.2d 754 (1957). The Court did not hold, however, that this use entitled

the user to claim title to the land on which the water source, conveyance facilities, and trail were located.

Based on the trial court's Findings of Fact and *Malnati v. Ramstead, supra*, Mrs. Keist must concede that Mr. Malella is entitled to a prescriptive easement for use of the spring and conveyance equipment and over the path to the water source for maintenance. The use is not one that entitles Mr. Malella to claim title to the entirety of the disputed area.

iv. The Remainder of the Disputed Property.

Mr. Malella also claims the entirety of the disputed area. The trial court's Findings of Fact do not support a conclusion of adverse possession for this area.

The remainder of the disputed area consists of a cliff overgrown with blackberries from the road down to the Washougal River. (CP 29, FF 10.4) The area is steep and treacherous. There is no safe path to the river without slipping and sliding. (CP 38, FF 17.4) The use made of this area by Mr. Malella or his predecessors has been limited to maintaining trails from the house to the river; collecting litter left by trespassers; and posting "No Trespassing" signs. The area is not subject to being maintained in any other way. As Jack Phillips candidly testified:

Q: Now, did you maintain the property between the bridge and your house — well let me ask you this: What - -

A: Ya' ever try to maintain a cliff?

Q: I was just going to — okay, very good. I was just going to ask you that. Can you describe that from let's say the edge of the garage, whatever, from the river that part, river bank, up to the bridge, is it —

A: That's pretty — steep — and it's full of blackberries and whatever.

Q: Okay, so that's not something you would typically be maintaining or crawling up and down?

A: I've tried to maintain a trail down — from behind my garage down to my water source so I could get back and forth and clean it out or whatever.

Q: Okay.

A: But other than that.

Q: The other part though that's pretty —

A: And part was rock. I mean, there at the — it was just kind of rock natural way of goin' down ya' didn't, ya' know, just solid rock.

(RP 61-62) In other words, there was no reasonable use to be made of the area. If Mr. Malella and his predecessors were not using the disputed area, the elements of actual, open, and notorious use are not satisfied.

The maintenance and use of trails and picking up litter is not sufficient to amount to an actual use that is open and notorious. The Supreme Court of Alaska so held in *Nome 2000 v. Fagerstrom*, 799 P.2d 304 (Alaska, 1990). In that case, the Fagerstroms took possession of a 7.5 acre parcel owned by Nome 2000. They built a picnic area on the north end of the parcel and placed a camper trailer there as well. They also built an outhouse and a fish rack in this area and planted trees. Later, they built a shelter and pen for reindeer. They were present in the area “every other weekend or so.” 799 P.2d at 308. They did not improve the southern portion of the disputed area. They did, however, walk through the trails on the southern portion of the property and picked up litter left by other campers. The Court held that this was not sufficiently and notorious possession to provide Nome 2000 with notice of their claim. It stated:

The Fagerstroms' use of the trails and picking up of litter, although perhaps indicative of adverse use, would not provide the reasonably diligent owner with visible evidence of another's exercise of dominion and control. . .

799 P.2d at 311. The Court of Appeals of Illinois came to a similar conclusion in *Estate of Welliver v. Alberts*, 278 Ill.App.3d 1028, 663

N.E.2d 1094 (1996). The claimant used trails on land belonging to the titled owner for recreational purposes and gave permission to a motorcycle group to use the trails once a year. The claimant also maintained the trails by moving encroaching vegetation. Following the Court's decision in *Nome 2000 v. Fagerstrom, supra*, it held that the claimant's use of the trails did not provide the title owner with sufficient evidence of the claimant's exercise of dominion and control. Our case is no different than these. Using and maintaining trails on rural property and picking up litter left by campers or trespassers is simply not sufficient to establish open and notorious use.

The use of the trail could rise to a prescriptive easement. The Court concluded as much in *Anderson v. Secret Harbor Farms*, 47 Wn.2d 490, 288 P.2d 252 (1955). In that case, the Court found one party was entitled to a prescriptive easement for use of a trail or path to access their property from a boat dock. The prescriptive easement can be denied if the use of the path is a "neighborly accommodation" and the use is therefore not deemed to be hostile. *Roediger v. Cullen*, 26 Wn.2d 690, 175 P.2d 669 (1946). The point here is that while right to use a trail might ripen into a prescriptive easement, it does not entitle the user to claim title by adverse possession to the land over which the path runs.

The trial court's Findings of Fact also show that the use made by Mr. Malella and his predecessors was not exclusive. Mr. Phillips, Mr. and Mrs. Manwaring, and Mr. Malella all posted "No Trespassing" signs. But so did Mrs. Keist and her family as the trial court specifically found. Stated another way, the Findings of Fact that the Court made do not clearly set out any consecutive period of ten years prior to the filing of this action when Mr. Malella or his predecessors were posting "No Trespassing" signs to keep out trespassers and Mrs. Keist and her family were not engaging in the same activity. Specifically, it found that George Elkins was posting "No Trespassing" signs on the property beginning in 1963. (CP 43, FF 24.6) More to the point, keeping trespassers out of the area was an exercise engaged in by the entire community. While Mr. Phillips owned the property, the trial court found that a neighbor, Mr. Stetler, helped him in the effort. The Manwarings sought and obtained the help of Lee Walker. Mr. Malella has engaged his neighbors, Susan Stouffer and Cynthia Howell, to attempt to keep trespassers out of the area.

The trial court found that Mr. Malella and the Manwarings, but not Jack Phillips, cleared litter off the property. But so did Marc Elkins, Mrs. Keist's grandson. (CP 41, FF 23.4) If policing the area includes picking up litter, the trial court found that Lee Walker also

helped. (CP 30-31, FF 11.2) The Manwarings also maintained a trail from the house to the river. George Elkins cleared brush off a trail in the 1980's until Marc Elkins became friends with the Manwarings. Then in 2000-01, he also worked at the head of the trail using a chainsaw to cut down trees to clear the trails. (CP 42-43, FF 24.3-24.6) Generally speaking, shared use negates the element of exclusive possession. If people on both sides of the boundary line are using the property in similar ways, the element of exclusivity is not satisfied. *Thompson v. Schlittenhart*, 47 Wn.App. 209, 734 P.2d 48 (1987).

v. Posting of "No Trespassing" Signs and Telling Trespassers to Leave Was Not Adverse to Mrs. Keist.

The posting of "No Trespassing" signs and the eviction of predecessors cannot be considered adverse to Mrs. Keist's interest in the property. The trespassers of concern were fishermen and swimmers who no one in the area knew. There might be as many as thirty to forty in this group. They would create a nuisance with noise, consumption of alcoholic beverage and deposit of litter. As the trial court found, Mrs. Keist did not open the disputed area generally to the public. (CP 44, FF 26.1-26.2) Therefore, the posting of "No Trespassing" signs sought also to preserve Mrs. Keist's right to possession of the disputed property. Stated another way, Mr. Malella and his predecessors shared a

common interest with Mrs. Keist—keeping trespassers off the disputed property.

The trial court did find that Mr. Malella had ejected or attempted to evict Mrs. Keist and her licensees. This is not sufficient to establish his claim for adverse possession because all events found by the trial court occurred within ten years of the filing of this suit. For example, Kris Leonard believed he could be on the premises because of his relationship with Mrs. Keist. He was confronted by “Plaintiff’s agents” in 1996 and told to leave. (CP 43, FF 25.1, 25.3) John Thomas believed he had permission from Mrs. Keist to be on the property in December of 2000. He was confronted by “Plaintiff’s agents” and told to leave. (CP 41, FF 21.1) Steve Koch had a written agreement with Mrs. Keist to be on the property. When we came onto the property in December of 2000 and April of 2001, he was told to leave. (CP 40, FF 20.1- 20.2) Members of the Keist family were told to leave the premises in 2000 and 2001. (CP 30, FF 15.2; CP 39, FF 18.5)

c. There Was No “Neighborly Accommodation.”

In Conclusion of Law No. 34.1, the trial court concluded that any use of the disputed area “was incidental and of a nature that the true owner would have permitted as a neighborly accommodation and will

not defeat Plaintiff's adverse possession of the same." The trial court's findings of fact do not support this conclusion and in fact contradict it.

A person's use of property is not deemed to be hostile if it amounts to a "neighborly accommodation" or a "neighborly courtesy." The Court made this clear in *Roediger v. Cullen, supra*. In that case, it dismissed plaintiff's claim for a prescriptive easement over a path over many lots in a beach community and used by all residents without any claim of right and as of a beach community because the alleged adverse use of the path was deemed permissive as a "neighborly accommodation."

A "neighborly accommodation" is present only if there is evidence of some relationship that would allow for the inference of permission to use. *Drake v. Smersh*, 122 Wn.App. 147, 154-55, 89 P.3d 726 (2004). It can be implied from the use of the property in question by neighbors as in *Roediger v. Cullen, supra*. It can also arise out of a close family relationship between adjoining landowners as in *Granston v. Callahan*, 52 Wn.App. 288, 759 P.2d 462 (1988). Finally, it stem from mutual use of a piece of property such as a driveway as in *Miller v. Jarman*, 2 Wn.App. 994, 471 P.2d 704 (1970) Conversely, when there is adversity between neighbors, there can be no "neighborly accommodation." *Lingval v. Bartmess*, 97 Wn.App. 245, 982 P.2d 690 (1994) Minimal use by the true owner amounting to a neighborly

courtesy—occasional parking of farm equipment and crossing the land to get to other fields—will not eliminate a plaintiff’s adverse possession claim. *Crites v. Koch, supra*.

There is nothing in the finding of facts that would justify the conclusion of “neighborly accommodation” as to Mrs. Keist, her family, or her friends. The findings of fact do not suggest in any way that Mr. Malella or his predecessors permitted Mrs. Keist or her family and friends onto the disputed property because of some “neighborliness.” There is no family relationship between Mrs. Keist on the one hand and Mr. Malella or any of his predecessors on the other. The findings of fact do not mention any sort of direct interaction between Mrs. Keist and the Manwarings or Mr. Malella. The Manwarings allowed Marc Elkins on the property because of his friendship with their son, not out of any accommodation open to all neighbors. (CP 31, FF 11.4) There is no finding consistent with the notion that Mr. Malella allowed Mrs. Keist to be on the property. In fact, the trial court found that Mr. Malella denied access to the disputed property to Steven Koch, John Thomas, and Kris Leonard, persons to whom Mrs. Keist had given permission to fish in the river. (CP 40, FF 20.1, 20.2; CP 41, FF 21.1; CP 43, FF 25.3) Entry was also denied to her son, George Elkins in 2000-2001. (CP 42, FF 24.2)

In short, there is no support in the findings of fact for the conclusion the trial reached in Conclusion of No. 34.1, that any use of the disputed property made by Mrs. Keist and her family and friends amounted to neighborly accommodation.

III. The Trial Court's Findings of Fact Do Not Justify the Conclusion That Plaintiff Is Entitled to the Entirety of the Disputed Area.

In the first appeal of this matter, the Court of Appeals specifically directed the trial court "to award Malella by adverse possession only such property as the trial court finds he specifically used adversely to Keist's interests for the requisite period." (Slip Opinion, p. 13) After remand, the trial court concluded that Mr. Malella was entitled to all property north of the Washougal River from the property line between the two parcels to the bridge over the Washougal River in Conclusions of Law Nos. 31.1, 33.1, and XXXV. It then entered the Order Quieting Title to Real Property on Remand quieting title that property in Mr. Malella. Assuming that Mr. Malella is entitled to anything on his adverse possession claim, the trial court's Findings of Fact do not support the award of property that it made.

Simply summarized, the use of the disputed property made by Mr. Malella and his predecessors is limited to the encroachment of a portion of the garage; the fill placed for the parking area just to the east of the

garage; a trail from the house to the water source—a use partially on the Malella property and partially on the disputed property; and a trail to the river. The predecessors also cleaned up some level of litter left by trespassers on the trail and near the river. These uses are over a very small proportion of the disputed area. The use of the trail to the water source and, conceivably, the trail to the river could justify at most a prescriptive easement over the property. Most of the disputed area, as Jack Phillips testified and the trial court found, was a steep cliff covered with blackberries that no one could or did use or maintain. Nonetheless, the trial court awarded all of the disputed area to Mr. Malella. Assuming that Mr. Malella has satisfied all elements of an adverse possession claim for the uses in question, he is not entitled to the area that he did not use at all because he did not adversely possess that area.

Mr. Malella may attempt to defend this award by relying on Conclusion of Law No. 33.1. In pertinent part, that conclusion stated that title to the northern portion of the disputed property should be quieted in Mr. Malella because it “describes the reasonable and logical lines to mark the property adversely possessed by Plaintiff.” The conclusion then cites the Court’s opinion in *Lloyd v. Montecucco, supra*. Any reliance on that case is misplaced.

In *Lloyd v. Montecucco*, *supra*, the parties owned two adjoining lots on Eld Inlet. The Montecuccos, the owners of the southern lot, constructed a bulkhead to protect their bank from erosion and a cyclone fence that ran east southeasterly along the border with the lot owned by the Lloyds. Both the bulkhead and the fence encroached onto the northern lot—the lot owned by the Lloyds—by about eleven feet. The fence enclosed an area where the Montecuccos had planted and harvested trees for more than ten years and another area that the Montecuccos maintained down the bank to the bulkhead. They had also mowed the area around the perimeter of the fence and had planted a garden in the area at one time. The trial court found that the Montecuccos were entitled to the disputed area by adverse possession. It then awarded the property enclosed by a line drawn between the northern boundary of the bulkhead and the cyclone fence. The Lloyds appealed and took issue with the boundary drawn by the trial court was error because “the boundary is straight while the Montecuccos’ actual possession would be more fairly represented by a jagged line.” 83 Wn.App. at 853. The Court observed that courts can create “a penumbra of ground around areas actually possessed when reasonably necessary to carry out the objective of settling boundary disputes.” 83 Wn.App. at 853-54. It found no error in the line because the

Montecuccos had planted and harvested trees in a heavily wooded and steep area that did not easily permit clear demarcation.

Our case is a far cry from the facts in *Lloyd v. Montecucco, supra*. In that case, the Montecuccos were using virtually the entire disputed area. In our case, Mr. Malella and his predecessors are using very little of the disputed area. This should come as no surprise—most of the disputed area is not usable.

For this reason, and assuming that Mr. Malella is entitled to an order quieting title to him in any land, the judgment should be reversed with directions to limit the grant to the area the Mr. Malella and his predecessors have actually used.

IV. Conclusion.

In Conclusion of Law No. 31.1, the trial court concluded that Mr. Malella had satisfied the elements of adverse possession for the disputed property north of the Washougal River. In Conclusion of Law No. 33.1, it ruled that title to that property should be quieted in Mr. Malella. In Conclusion of Law No. 34.1, it stated that any use of the property by Mrs. Keist and her family amounted to “neighborly accommodation.” In Conclusion of Law No. XXXV, it stated that all persons other than Mr. Malella should be barred from asserting any claim to that property. It then

entered the Order Quieting Title in Real Property on Remand. Each of these decisions amounted to error for the reasons stated above.

CONCLUSION

The trial court's Findings of Fact were not supported by substantial evidence. The Findings of Fact that trial did make did not support its Conclusions of Law or the Order Quieting Title in Real Property on Remand. For that reason, the Court should reverse the trial court's judgment and remand with directions to enter an order granting Mr. Malella a prescriptive easement over property set out in a specific legal description that allows him use of the water source, conveyance facilities, and trail from the house to the water source. It should also remand for consideration of remedies related to the garage based on *Proctor v. Huntington, supra*.

DATED this 1 day of Sept, 2010.

BEN SHAFTON, WSB #6280
Of Attorneys for Lona Keist

APPENDIX

I. Finding of Fact No. 10.1.

Jack Phillips and his wife purchased the Malella property from his father-in-law, Jim Davis, in 1963 with the understanding and belief that he owned the property in question just about to the edge of the bridge. Jack Phillips based his belief on what his wife (who had lived on the property of several years with her parents) believed and that it was just “understood.” To the exclusion of all others, Jack Phillips and his wife exercised dominion and control of the disputed property to the western edge of the bridge except for any such property lying to the south of the middle of the Washougal River during their ownership of the property.

II. Finding of Fact No. 10.2.

During his ownership of the property, Jack Phillips maintained a water source close to the bridge, applied for water rights in 1973, attempted to keep the public off the property, posted no trespassing signs and built a garage on the premises. He began the project in 1964. No one told him it was on Keist property.

III. Finding of Fact No. 10.4.

No one other than Jack Phillips did anything to maintain or use the path from the garage to the water source located on the disputed property.

IV. Finding of Fact No. 11.2.

During their ownership, to the exclusion of all others, Roger Dean and Maynette Manwaring maintained the property up to the bridge by clearing blackberries, pieces of trees and shrubs, cutting back the path across the tip of the island and picking up trash quite often in the summer months, and plastic and junk in the winter months when it got stuck in the trees due to high water, maintained the water source close to the bridge, constructed the path between the garage and the house to the river, kept the public off their property by telling people they could not go on the property and only giving permission to people they wanted to and calling the police if they wouldn't leave, posted not trespassing signs at the top of the path between the garage and the house and at the edge of the bridge, as well as paying to have reward signs put up for anyone caught snagging fish, fished both sides of the river and engaged the assistance of neighbors, Howell and Stauffer, to keep people off the property and hired neighbor, Lee Walker to police the area in the Manwarings' absence.

V. Finding of Fact No. 11.3.

Roger Dean Manwaring understood that he owned the property in question all the way to the bridge with the exception of maybe a small sliver of property near the bridge. To the exclusion of all others, Roger Dean Manwaring and Maynette Manwaring exercised dominion and control of the disputed property to the western edge of the bridge except for any such property lying to the south of the middle of the Washougal River during their ownership of the property.

VI. Finding of Fact No. 11.4.

Marc Elkins, who was a friend of the Manwarings' son, was allowed to use the property without asking permission and others who were on the property without permission were trespassers. No one else maintained or used the disputed property during Roger Dean and Maynette Manwaring's ownership.

VII. Finding of Fact No. 12.5.

No other persons without the owners' permission maintained, used or exercised dominion and control over the disputed property other than plaintiff, his renters or agents. To the exclusion of all others, Anthony G. Malella exercised dominion and control of the disputed property to the western edge of the bridge except for any such property lying to the south

of the middle of the Washougal River during their ownership of the property.

VIII. Finding of Fact No. 12.6.

Ms. Keist's act of placing her property, including the disputed property, in a timber bank did not establish her maintenance, usage or dominion and control over the Disputed property. Defendant attempted to allow recreational use of the disputed property but these attempts were challenged by plaintiff. Defendant put her property, purporting to include the disputed property, in the timber bank in 1992.

IX. Finding of Fact No. 12.7.

Anyone who wanted to go on the disputed property intending to fish or swim had to first obtain the permission of plaintiff or his agents. Except that Kris Leonard did not believe that he had to have plaintiff's permission, having received written permission from defendant. Also, John Thomas was allowed by defendant to fish on the property. These individuals were confronted by plaintiff or his agents and directed to leave the property.

X. Finding of Fact No. 12.8.

Kris Leonard believed he did not need permission from anyone to go on the property and was a trespasser.

XI. Finding of Fact No. 28.2.

Plaintiff proved his adverse possession claim to that portion of the disputed property as legally described in Exhibit E attached hereto and incorporated herein by reference.

XII. Conclusion of Law No. 31.1.

Plaintiff, and his predecessors in interest have been in actual, uninterrupted, open, notorious, hostile and exclusive possession of the north portion of the disputed property described in Exhibit E under claim of right made in good faith for well in excess of ten (10) years.

XIII. Conclusion of Law No. 32.1.

Any claims by Keist as to ownership of the disputed property as described in Exhibit E were rebuffed by the owners and agents of plaintiff's property.

XIV. Conclusion of Law No. 33.1.

Title to the northerly portion of the disputed property described in Exhibit E should be quieted and established in plaintiff, which describes the reasonable and logical lines to mark the property adversely possessed by plaintiff. *Lloyd v. Montecucco, supra.*

XV. Conclusion of Law No. XXXV.

Each and every other person claiming any right, title, estate, lien or interest whatsoever in the Disputed property as described in Exhibit E, including the defendants named herein, be and hereby are forever barred from having or asserting any right, title, estate, lien or interest in the property or any part thereof adverse to plaintiff's except as specifically set forth herein.

NO. 40500-8-II
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

ANTHONY MALELLA,

Plaintiff/Respondent,

v.

LONA KEIST, individually and as Trustee of the LONA POULSEN REVOCABLE LIVING TRUST; STEVEN D. KOCH and JANE DOE KOCH, husband and wife; JOHN E THOMAS and JANE DOE THOMAS, husband and wife; GEORGE R. ELKINS and JANE DOE ELKINS, husband and wife; MARC ELKINS, SR., and JANE DOE ELKINS, husband and wife; MARC ELKINS, JR., and JANE DOE ELKINS, husband and wife; and MEREDITH ELKINS and JOHN DOE ELKINS, husband and wife,

Defendant/Appellant

APPEAL FROM THE SUPERIOR COURT

HONORABLE EDWIN POYFAIR

AFFIDAVIT OF SERVICE

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