FILED

SEP 07 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

90291-7

No. 308260-III

IN THE COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

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

Plaintiffs/Respondents,

v.

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

Defendants/Appellants.

APPEAL FROM THE SUPERIOR COURT FOR YAKIMA COUNTY
THE HONORABLE RODNEY NELSON, JUDGE PRO TEMPORE,
PRESIDING

APPELLANTS' OPENING BRIEF

Christopher M. Constantine
WSBA 11650
Of Counsel, Inc., P. S.
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III. ASSIGNMENTS OF ERROR

1. The trial court erred in the judgment by awarding respondents a prescriptive easement over appellants' real property.

2. The trial court erred in the judgment by awarding respondents an easement that included portions of appellants' land outside the road in which respondents claim a prescriptive easement.

3. The trial court erred in Finding of Fact 4 wherein it found respondents' use of the road to be continuous.

4. The trial court erred in Finding of Fact 5 by reciting respondents' good faith belief that they owned the land on which the disputed roadway was situated.

5. The trial court erred in Finding of Fact 5 by finding that the shop doors of respondents' garage could only be accessed by vehicles from the disputed roadway.

6. Finding of Fact 5 does not support the trial court's Conclusions 2, 3, 4 or 5.

7. The trial court erred in Finding of Fact 6 by reciting respondents' sincere belief that they owned the roadway.

8. Finding of Fact 6, wherein the trial court found that the Gamboas bladed the road and one time applied gravel, is insufficient to support the trial court's Conclusions of Law 2, 3, 4, 5, 7, 8.

9. The trial court's Finding of Fact 8, that the parties both used the road and were aware of each other's use of the road, but neither objected to the other's use until a dispute arose in 2008, negates the trial court's Conclusion of Law 2, 3, 4, 5, 7 and 8.

10. The trial court erred in Finding of Fact 15, wherein it found that a claimant's use is adverse unless the property owner can show that the use was permissive.

11. The trial court erred in Finding of Fact 15 wherein it found that appellant did not give respondents express or implied permission to use the road, and therefor the respondents' use of the road was adverse.

12. The trial court erred in Finding of Fact 16 wherein it awarded respondents a prescriptive easement and included in the legal description of the easement to be awarded portions of appellants land outside the road in question.

13. The trial court erred in Conclusion of Law 2 wherein it concluded that respondents had made open, notorious, continuous, uninterrupted use of the roadway as a true owner for 10 years, and that respondents' use of the road was adverse to appellants.

14. The trial court erred in Conclusion of Law 3 wherein it concluded that respondents have met all of the elements of an easement by

prescription and were entitled to a limited nonexclusive prescriptive easement for residential access to and from their residence and shop.

15. The trial court erred in Conclusion of Law 4 by recognizing the Gamboas' primary right to use the roadway.

16. The trial court erred in Conclusion of Law 5 wherein it included in the legal description of the easement to be awarded portions of appellants land outside the road in question.

17. The trial court erred in Conclusion of Law 7, wherein it concluded that since respondents prevailed on their claim of a prescriptive easement, there was no basis to award appellants prevailing party attorney fees or costs under RCW Chapter 7.48.

18. The trial court erred in Conclusion of Law 8 by concluding that the Gamboas are entitled to a judgment consistent with its Conclusions of Law.

19. The trial court erred in entering judgment for respondents for costs.

20. The trial court erred in awarding respondents a statutory attorney fee of $200.00.

21. The trial court erred in awarding respondents judgment for costs in the amount of $1,583.55.

22. The trial court erred in denying petitioner's request for attorney fees and costs under RCW 7.48.315.

IV. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did respondents establish a prescriptive easement in the road on appellants' real property? (Pertains to Assignments of Error 1-22).

2. Was respondents' entry on the road presumptively permissive? (Pertains to Assignments of Error 1-22).

3. Does the mutual use of the road by respondents and appellants support an inference of permissive use because it is assumed that the owner is permitting the neighbor's use as a neighborly accommodation? (Pertains to Assignments of Error 1-22).

4. Did the appellants allow the respondents to use the road as a matter of neighborly accommodation? (Pertains to Assignments of Error 1-20).

5. Did respondents' prescriptive use of the road commence in 2008? (Pertains to Assignments of Error 1-22).

6. Is respondents' subjective belief that they owned the real property on which the road is situated relevant to their claim of a prescriptive easement in the road? (Pertains to Assignments of Error 4, 7).

7. Are respondents' actions in blading the road and applying gravel to the road on one occasion sufficient to support the trial court's conclusions of law that respondents have a prescriptive easement in the road? (Pertains to Assignments of Error 8, 13, 14, 17, 18).

8. Did the trial court's Finding of Fact 8, that the parties used the road without disputes until 2008, negate the trial court's Conclusions of Law 2, 3, 4, 5, 7 and 8? (Pertains to Assignments of Error 1-22).

9. Is the trial court's ruling in Finding of Fact 15 that a claimant's use is adverse unless the property owner can show the use was permissive contrary to the presumption that the respondents' entry onto the road was permissive? (Pertains to Assignment of Error 10).

10. Is the trial court's finding in Finding of Fact 15 that appellant John Clark did not give implied permission to respondents contrary to the presumption that the respondents' entry onto the road was permissive? (Pertains to Assignments of Error 1-22).

11. Is the trial court's finding in Finding of Fact 15, that appellant John Clark did not give implied permission to respondents to use the road, contrary to the inference that the respondents' use of the road was permitted by neighborly sufferance or accommodation? (Pertains to Assignments of Error 1-22).

12. Did the trial court err in Finding of Fact 16 and Conclusion of Law 5 by awarding respondents more of appellants' land than the respondents had acquired by prescription? (Pertains to Assignments of Error 12, 16)

13. Did the trial court err in Conclusion 2 in concluding that respondents' use of the road was continuous for more than 10 years, when

respondents' prescriptive use, if any, of the road did not commence until 2008? (Pertains to Assignments of Error 1-22).

14. Did the trial court err in Conclusion 3 by concluding that respondents have met all of the requirements for an easement by prescription when respondents' prescriptive use, if any, of the road did not commence until 2008? (Pertains to Assignments of Error 1-22).

15. Did the trial court err in Conclusion 3 by concluding that respondents have met all of the requirements for an easement by prescription when the mutual use of a road by the parties supports an inference of permissive use, as it is assumed the appellants permitting respondents to use the road as a neighborly accommodation? (Pertains to Assignments of Error 1-22).

16. Did the trial court err in Conclusion 3 by concluding that respondents have met all of the requirements for an easement by prescription, as respondents' use of the road was permitted by appellants as a matter of neighborly sufferance or accommodation? (Pertains to Assignments of Error 1-22).

17. Did the trial court err in Conclusion of Law 4 by recognizing respondents' primary right to use the roadway, as respondents failed to establish that their use of the roadway was continuous for 10

years and also failed to establish that their use of the roadway was adverse, and not permissive? (Pertains to Assignments of Error 1-22).

18. Did the trial court err in Conclusion of Law 5 by awarding respondents a prescriptive easement of any size in the road, as the respondents failed to establish continuous use for 10 years and also failed to establish that their use of the road was adverse, and not permissive?

19. Did the trial court err in Conclusion of Law 7, that since respondents prevailed on their claim of a prescriptive easement, that appellants were not entitled to attorney fees or costs under RCW Chapter 7.48? (Pertains to Assignments of Error 1-22).

20. Did the trial court err in Conclusion of Law 8 by concluding that respondents are entitled to a judgment consistent with its Conclusions of Law, as respondents failed to establish continuous use for 10 years, failed to establish that their use of the road was adverse, and not permissive, and by awarding respondents appellants' more land than respondents had acquired by prescription? (Pertains to Assignments of Error 1-22).

21. Did the trial court err in awarding respondents costs of $410.00 for copes of aerial photographs? (Pertains to Assignment of Error 21).

V. STATEMENT OF THE CASE

A. FACTS

Appellants, John and Deborah Clark (Clarks), are husband and wife residing in Sunnyside in Yakima County. CP 23, 31. Plaintiffs, Magdaleno and Mary Gamboa (Gamboas), are husband and wife and also reside in Sunnyside in Yakima. CP 23, 30. The Gamboas own a parcel of real property of approximately 17 acres located at 703 East Allen Road. The Clarks own a parcel of real property located at 831 East Allen Road of approximately 23 acres adjoining the Gamboa's property to the East. CP 23, 31. The Gamboas use their property primarily for residential purposes, but also grow alfalfa thereon. CP 213; App. 1. The Clarks are licensed as farmers, and have used their property primarily to farm concord grapes and as a residence. EX 32; CP 213; App. 1.

The two parcels of the Clarks and the Gamboas were created on February 19, 1964, when the original approximately 42-acre parent parcel was divided by its then common owners, the Padghams and the McConnells. CP 213; App. 1. The Padghams and the McConnells retained the western 17-acre parcel. The eastern parcel, which included the road that is the central issue in this case, was sold on a land contract to Ralph and Pauline Sloulin. RP II p. 181-82; EX 13; CP 213; App. 1.

The Sloulins retained the eastern parcel for 31 years until they sold it to the Clarks on April 1, 1995. RP I p. 139. An old orchard road was located on the eastern parcel sold to the Sloulins, running northerly in the vicinity of the boundary line with the western parcel. CP 213.

Contemporaneously with the sale of the eastern parcel to the Sloulins, the Padghams and the McConnells reserved to themselves for the benefit of the western parcel retained by them an easement for a water pipeline and a 10-foot road across the northern boundary of the eastern parcel. RP II p. 190; EX 12; CP 66.

As of the date that it was divided, there was no residence on the western parcel. RP II p. 184. Thereafter, the McConnells constructed a residence on that parcel, which was finished in 1965. RP II p. 183; CP 66.

After the parcel was divided, the McConnells also constructed a driveway located on their western parcel. That driveway ran south in the vicinity of the eastern boundary of their western parcel, ending at East Allen Road. RP II p. p. 184; EX 3.The McConnells' new driveway generally ran parallel to the old orchard road located to the east of the McConnell/Sloulin property line. EX 3. The McConnells' new driveway ran directly from the garage in their basement of their new home directly south to East Allen Road. RP II p. 185; RP I p. 105. The McConnells used

their new driveway to access their new residence, and did not have need of the old orchard road. RP II p. 184-85.

The western parcel retained by the McConnells was sold to Hill, then to Barnes, then to Lius, and finally to the Gamboas. EX 14, 15, 16, 17, 18. At some point, with the exception of the southern terminus at East Allen Road, the use of the McConnells' new driveway was discontinued by the subsequent owners, who began using the Sloulins' old orchard road to access what is now the Gamboas' residence. RP I p. 106. From 1992 to 1995, while the Sloulins still owned the eastern parcel, Mr. Gamboa used the old orchard road that had since become connected to the southern terminus. RP I p. 43.

Ownership and use of the southern terminus is not in dispute here. The disputed and undisputed portions of the road are show in the Bell Survey diagram. EX 70.

In 1990, while they owned the western parcel, the Gamboas' predecessors. Dr. Liu and Mrs. Liu surveyed and short-platted it into two short plats. EX 10, 11. Dr. Liu's short plats contain an access easement running north from East Allen Road, terminating in a cul de sac near the Gamboa residence on the property. EX 10, 11. The Gamboas purchased all five lots in the two short plats from Dr. Liu in November and December, 1992. RP I p. 20; EX 17, 18. The Gamboas' purchase of those

lots came only two years after the western parcel had been comprehensively surveyed and the corners of all five lots had been set with durable metal 18 inch-long pins topped with yellow plastic surveyor identification caps. EX 10, 11.

Neither the disputed nor the undisputed sections of the farm road are shown on either of Dr. Liu's short plats. EX 10,11. The disputed section of the farm road is physically located within that portion of the plat drawings labeled "*Grapes*", which, at the time of the Gamboa purchases, was owned by the Sloulins. Dr. Liu's plats also show 654 feet of unencumbered frontage onto East Allen Road, thereby providing the Gamboas a wide array of alternate routes entirely across their property to access East Allen Road. EX 10, 11. Mr. Gamboa acknowledges that he was provided with the short plat drawings at the time of his purchases. RP I p. 49.

The Gamboas have an additional route presently available to them from East Allen Road to their residence. An access way in the Gamboas' alfalfa field roughly overlays the driveway built by the McConnells in 1964, but is used by farm machinery in harvesting the Gamboas' alfalfa crop. RP I p. 50; EX 7-7E. The additional access way is accessible from East Allen Road. RP I p. 50. The Gamboas could access their property via that route. RP I p. 51; EX 7-7E. The additional access way is located

entirely upon the Gamboas' property. RP I p. 58-60; EX 7-7E. Mr. Gamboas' sprinklers near that access way are supplied by above-ground portable aluminum pipe, which can be readily relocated to accommodate travel on that way. EX 7A-E.

Before he purchased the property from the Lius, Mr. Gamboa claims to have located the southeast corner pin of his property between the first and second rows of the Sloulins' grapes. RP I p. 26-27. The southeast corner pin of Mr. Gamboa's property was clearly marked on the two plats prepared for Dr. Liu by Centaur Land Surveying and recorded in 1990. EX 10, 11. The pin location is not within that area labeled "*Grapes*" on the short plat. EX 10, 11.

John Clark is a former naval officer with training in the engineering profession. RP I p. 131. Mr. Clark's 50-year work history includes installation of agricultural irrigation systems and heavy nuclear facility construction, as well as work for the federal government. RP I p. 131. From 1983 to 1995, the Clarks raised apples in Grandview. RP 1 p. 131. In 1995, the Clarks decided to grow Concord grapes. RP I p. 131-32. After retirement in 2004, Mr. Clark devoted more time to farming. RP I p. 131. Income from farming now represents half of the Clarks' income. RP I P. 131.

The Sloulins' property came to the Clarks' attention. RP I p. 135. Mr. Clark reviewed a packet of information on the property given to him by a realtor. RP I p. 135. Thereafter, on March 15, 1995, the Clarks inspected the Sloulins' property. RP I P. 135, 139. The Clarks inspected the grape vines on the property. RP I P. 136. Mr. Clark was unsure of the property boundaries, so he looked for the survey pins. RP I p. 137. Even though the pins were 5 years old, Mr. Clark found the north pin at the dogleg after searching underneath trees in Mr. Gamboa's backyard. RP I p. 137. Concerned with the proximity of the road to Mr. Gamboa's property, Mr. Clark inquired of the realtors and Mr. Gamboa whether the proximity of the road was going to present a problem, and was assured by the realtors and Mr. Gamboa that the road was not a problem. RP I p. 137-38. Mr. Clark then walked down the road and located the southeast pin. RP I p. 138. Mr. Clark knew from the realtor packet that the property line was a straight line between the two pins and he noted that there was enough space between the property line and the grapes to allow him to farm and irrigate the grapes without trespassing on Mr. Gamboa's property. RP I p. 138. Mr. Clark was not informed that Dr. Liu had short platted the property. RP I p. 139. Mr. Clark did not discover the pins from Dr. Liu's short plat until 2009. RP I p. 139. At the end of his walk around the property, and after discussions with the parties involved, Mr.

Clark noted that the property line was parallel to the grapes, which led credence to his conclusion that the north and south pins were in the right place. RP II p. 162. The Clarks signed the purchase and sale agreement for the property on April 1, 1995. RP I p. 139. After the Clarks purchased the property, Mr. Clark again met with Mr. Gamboa and advised him that he would extend the courtesy of continued use of the road provided that Mr. Gamboa's use did not interfere with the Clarks' farming activities. RP II p. 167. Mr. Gamboa kept his part of the bargain, and there was no interference of any significance between 1995 and 2008. CP 214.

Mr. Clark uses the road to farm. RP II p. 164. Mr. Clark uses the road year-round. RP II p. 164. Mr. Clark has used the road continually since 1995. RP II p. 164. Mr. Clark drives his truck, tractor and spraying equipment up and down the road. RP II p. 165; EX 47, 48. Mr. Clark uses the road about every two weeks when operating his irrigation system. RP II p. 164; RP II p. 239. Mr. Clark also uses the road in the wintertime when he prunes his grapes, and in the springtime when he is replacing posts, or spraying herbicide sprays or foliar feeds. RP II p. 164,165; EX 47, 48. Mr. Clark also needs the road to access a piece of vacant farm ground on his property. RP II p. 164. Mr. Clark can't farm his property without access to the road. RP II p. 164-65. If the Clarks lost their use of the road, it would require them to change their sprinkler patterns at

horrendous cost. RP II p. 214. Since 1995, Mr. Gamboa has seen Mr. Clark driving his pickup and farming equipment up and down the road. RP I p. 36, 52. In 2010, Mr. Clark installed tall, distinctive metal stakes to mark the ground-level survey pins marking the common property line near the road. RP II p. 166-67; 47, EX 48.

The Clarks use a system of sprinklers to irrigate their grapes on the west side of their property near the road. RP II p. 211. The Clarks employ part-circle sprinkler heads for control oc the spray pattern and carefully set the arc of their part circle sprinkler to avoid sending irrigation water onto the road. RP II p. 210-12; EX 65, 67. Mr. Clark checks the settings of the sprinkler at the start of every irrigation. RP II p. 211-12. The Gamboas suffered no loss to their property as a result of the Clarks' irrigation operations. RP II p. 176.

Mr. Gamboa also uses the road more than once a day to go to his wife's daycare where he works. RP I p. 20-21, 49. Mr. Gamboa has used the road since 1992 to get to his house. RP I p. 49. The Gamboas have three cars and a van, their son who lives with them has another car, and the Gamboas' daughter has a car. RP I p. 50. Between 1999 and 2001, the Gamboas constructed a garage/shop. RP I p. 24. The garage/shop measures 40 feet by 60 feet, and is made of metal. RP I p. 23, 119. The garage/shop is located adjacent to the road. RP I p. 23. The garage doors

are located on the east side of the building. RP I p. 80. Mr. Gamboa acknowledges that it would be possible to reach his garage either from the road or by traveling up behind and around the garage. RP I p. 81; EX 52. The Gamboas' construction of their garage and shop did not impact the Clarks' farming operations. RP II p. 228.

The Clarks and the Gamboas had a very friendly neighborly relationship for years. RP II p. 168. Mr. Gamboa would talk to Mrs. Clark about grapes. RP I p. 25. Mr. Gamboa noted that water from Mr. Clark's irrigation would splash on the road. RP I p. 2-25. Mr. Gamboa acknowledged that since he moved onto a farm, he might have to put up with farming activities, including spray from sprinklers. RP I p. 51-52. Mr. Gamboa made no complaint about the water on the road for 14 years because he wanted to be a good neighbor. RP I p. 52-53, p. 76-77; EX46. During construction of their garage and shop, the Gamboas' construction activities would block the road on weekends, yet the Clarks did not complain. RP I p. 24. The Clarks also did not object to cars parked along the road when the Gamboas would host family gatherings of 50 to 60 people at their house. RP I p. 34. The Gamboas did not have any arguments with the Clarks prior to 2008. RP I p. 28; CP 214. The Gamboas did not object to the Clarks use of the road for their farm equipment. RP I p. 36.

On one occasion, Mr. Clark placed a notice on Mr. Gamboa's vehicle insisting that he move his pickup off the farm road, as it was obstructing Mr. Clark's farming operations. RP II p. 169-70; RP I p. 33; RP II p. 219; EX 37. Mr. Clark placed the notice on Mr. Gamboa's pick up upon the recommendation of his attorney. RP II p. 219. Mr. Clark also contacted Mrs. Gamboa by telephone requesting that the Gamboas' truck be moved. RP II p. 170. Mr. Gamboa moved his truck. RP II p. 170. Mr. Gamboa acknowledges that when Mr. Clark was about to irrigate his grapes, he would ask Mr. Gamboa to move his vehicles and Mr. Gamboa moved his vehicles. RP I p. 44, 52. Mr. Gamboa did not want to interfere with Mr. Clark's farming operations and he also wanted to be a good neighbor. RP I p. 75. With one exception in September, 2008, Mr. Gamboa always cooperated with Mr. Clark's requests for Gamboa to move his vehicles. RP II p. 220.

Mr. Gamboa claims that he maintained the road by blading it. RP I p. 24, 34. Mr. Clark does not recall seeing Mr. Gamboa blade the road, but if he had, he would have considered it a neighborly gesture in return for the Clarks' extension of road use, and would not have objected to it. RP II p. 170. Mr. Gamboa would also mow grass alongside and in the road. RP I p. 35. One of the reasons that the Clarks allowed the Gamboas' to use the road is the fact that the Gamboas' vehicle traffic

keeps the weeds down on the road, thus lessening the need for Mr. Clark to mow the weeds. Mr. Gamboa has seen Mr. Clark spray weeds on the road. RP II p. 241. Mr. Gamboa also acknowledges that there may have been times when Mr. Clark improved or maintained the road and Mr. Gamboa did not see it. RP II p. 243. In 1993, Mr. Gamboa claims to have placed three dump truck loads of gravel on the road. RP I p. 40-41. Mr. Clark asked to see Mr. Gamboa's receipts for the gravel, but Mr. Gamboa did not provide any such receipts. RP II p. 174-75.

In 1995, when the Clarks purchased their property, they did not have a problem with the Gamboas' dogs. RP II p. 224-25. Over time, the Gamboas acquired new dogs. *Ibid.* By September, 2008, that situation had changed, and Mr. Clark was confronted with the Gamboas' dogs running in a pack over the Clarks' property. RP I p. 214; EX 23. In a letter dated September 25, 2008, Mr. Clark confronted the issue of the Gamboas' dogs running in a pack, trespassing over the Clarks' property. RP II p. 214; EX 23. Therein, Mr. Clark called the Gamboas' attention to the increasingly aggressive nature of the dogs, Mr. Clark's prior conversations with Mr. Gamboa regarding the escalating nature of the problem, the need for Mr. Clark to fire his shotgun to get the pack of dogs out of his back yard, and the menace posed by the dogs to the Clarks' workers. *Ibid.* Mr. Clark demanded that the Gamboas start immediately

to keep their dogs permanently off the Clarks' property. *Id.* Mr. Gamboas controlled their dogs after Mr. Clark's letter of September 25, 2008. RP II p. 220.

In September, 2008, following his letter, Mr. Clark telephoned Mr. Gamboa to inform him of the Clarks' impending harvest dates and the need for Mr. Gamboa to move his truck off the farm road prior to harvest. Mr. Gamboa responded by threatening to install a fence on his property, in order to control his dogs. RP II p. 220. Mr. Gamboa agreed to have a survey of the property line performed prior to installing the fence. The Gamboas did not follow through on either the survey or that threat. *Ibid.*

Mr. Gamboa responded to the Clarks' letter in a letter dated October 29, 2008. RP I p. 28-29; EX 24. Therein, for the first time, Mr. Gamboa voiced his complaint about the alleged actions of the Clarks' son in operating a four wheeled vehicle up the Clarks' farm road near the Gamboas' house, thereby antagonizing the Gamboas' dogs. *Ibid.* The Gamboas also complained about the Clarks' dogs eating out of the Gamboas' dog dish, the actions of the Clarks' son in shooting a gun at birds eating the Clarks' cherries, water stains on the Gamboas' vehicles from the Clarks' irrigation spray, and ruts in the road from the Clarks' irrigation water runoff. *Id.* Mr. Gamboa also demanded that the Clarks

keep their irrigation water in their vineyard and off the Gamboas' "*driveway*" and vehicles. *Id.*

Mr. Clark responded in a letter dated December 3, 2008. RP II p. 217; RP I p, 29; EX 25. Therein, Mr. Clark took issue with Mr. Gamboa's mischaracterization of the road as his driveway. *Ibid.* Mr. Clark also urged Mr. Gamboa to conduct a survey to determine which, if any encroachments were occurring. *Id.* M. Clark also noted that Mr. Gamboa's letter of October 29, 2008 represented the first time in 13 years that the Gamboas had asserted a claim to the road. *Id.*

In a subsequent letter to the Gamboas dated February 4, 2009, the Clarks' attorney, Daniel Peterson demanded that the Gamboas either abandon their claim to erect a boundary fence or proceed with establishing an accurate and legal boundary prior to erecting such a fence. RP I p. 29; EX 26. Mr. Gamboa responded in a letter dated February 11, 2009, in which he stated that he did not presently intend to have the property line surveyed, but that he may wish to do so in the future. RP I p. 29-30; EX 27. Mr. Gamboa's letter also stated that he did not intend to fence the boundary line merely to hinder the Clark's farming efforts. *Ibid.* Mr. Gamboa also indicating that even if the true boundary line passed through a line of grapes, his willingness to allow the Clarks to continue to farm as long as they owned the property, provided that if the true line crossed

through his "driveway", the Clarks would allow him the right to continue to use it. *Id.*

In a subsequent letter dated March 19, 2009, Mr. Peterson suggested that the parties share the cost of a survey of the parties' boundary line. RP I p. 30; EX 28. The Gamboas agreed to that proposal. RP I p. 30.

Pursuant to the parties' agreement, a survey of the boundary line was undertaken by a professional land surveyor, Craig Sundquist. RP II p. 144; EX 35. Mr. Sundquist located the northern and southern pins along the common boundary between the Gamboas and the Clarks and found that the pins were where they were supposed to be and were consistent with the short plat. RP II p. 145. Mr. Sundquist did not find any pins on the Gamboas' property... RP II p. 146. Mr. Sundquist found the southernmost pin to be where it was supposed to be, but it was bent down under the surface. RP II p. 146-47; EX 68. Mr. Clark had hit that pin while rotovating his property, possibly in the fall of 1995. RP II p. 196. Mr. Sundquist replaced that pin because it was bent. RP II p. 149; EX 35. Mr. Sundquist's survey drawing did not show the road in question because as far as he was concerned, it was not in dispute. RP II p. 151. Mr. Sundquist had not been asked to do anything other than identify the property boundary. RP II p. 154. Mr. Sundquist no had to reason to believe that

any of the previously set pins had been set in error. RP II p. 154. Gamboas reimbursed the Clarks for one-half of the cost of the Sundquist survey. RP I p. 30.

On March 26, 2009, Mr. Peterson again wrote a letter to the Gamboas in which he presented an offer that the Clarks would enter into a long term lease to the Gamboas of two strips of land, one about 10 feet wide and approximately 800 feet long and another strip about 12 feet wide and 70 feet long. Any rental would be nominal and roughly consistent with the income that the Clarks could derive from an additional row of grapes. RP II p. 215; RP I p. 32; EX 36. The Gamboas did not respond to Mr. Peterson's letter. RP I p. 60-61. The Clarks prepared a lease for the two strips of lan, for an annual payment of $365.00 ($1.00 per day) and sent it by June 15, 2009 to the Gamboas for their acceptance. RP I p. 32; EX 67. Finally, The Gamboas' attorney, Craig Smith, sent Mr. Peterson a letter dated June 30, 2009, in which he informed that he believed that the Gamboas had an easement by prescription, and would not be signing a lease for something that they already have. RP I p. 32-33; EX 30. Thereafter, Mr. Clark told the Gamboas that they were trespassing as of July15, 2009. RP II p. 226.

The Gamboas hired a surveyor, Jim Bell, to conduct a survey showing the roadway where it crossed to property boundary. RP I p. 36;

EX 9. Mr. Bell's survey confirmed the Sundquist survey, and located the intermediate lot corner pins along the common boundary line. RP II p. 163; EX 9.

B. PROCEDURE

The Gamboas commenced this action in September 2009. CP 1-9. The Clarks filed an answer in October, 2009. CP 12-14. In July, 2010, the Gamboas filed an amended complaint. CP 22-27. In October, 2010, the Clarks filed an answer and counterclaim. CP 30-42. In their counterclaim, the Clarks sought a declaratory judgment declaring that the Clarks were entitled to an equal share of pipeline and water therefrom as defined in the express easement. CP 40-42.

The parties stipulated to a hearing before a judge pro tempore. CP 47. Trial was conducted on September 12 and 14, 2011. VRP I & II. The parties presented closing arguments on October 27, 2011. VRP III. Also on October 27, the trial court issued its oral decision. VRP III at 280-89. Therein, the trial court found that "[*t*]*here wasn't really any dispute between the parties and everything seemed to work okay until about 2008.*" VRP III at 281. The trial court also noted Mr. Gamboa's subjective belief that the roadway was his. VRP III at 283. The trial court further found that respondents' use was adverse unless appellants showed that it was permissive. VRP III at 285.

Regarding express permission, the trial court concluded from an exchange of letters between the parties in 2008[1], that because Mr. Clark's letters did not reference his earlier statements to Mr. Gamboa in the 1990s regarding permission to use the road and because MR. Clark's letters did not reference permission, that therefore no permission was given. RP III at 285. The trial court did not address implied permission in its oral ruling.

On March 10, 2012, the Gamboas filed an amended cost bill in which they sought costs for $410.00 for aerial photographs, $112.50 for one-half the cost of a survey, $600.00 for the cost of another survey, and$140 for the cost of preparing a legal description of the easement area. CP 208.

The trial court entered findings of fact and conclusions of law on March 22, 2012. CP 212-218; App. 1. In Finding of Fact 5, the trial court recited respondents' good faith belief that they owned the land on which the disputed roadway was situated. CP 213; App. 1. Also in Finding of Fact 5, the trial court found that the shop doors of respondents' garage could only be accessed by vehicles from the disputed roadway. CP 213; App. 1. In Finding of Fact 6, the trial court again recited respondents' sincere belief that they owned the roadway. CP 214; App. 1.

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[1] EX 23-25.

In Finding of Fact 8, the trial court found that the parties both used the road and were aware of each other's use of the road, but neither objected to the other's use until a dispute arose in 2008. CP 214; App. 1.

In Finding of Fact 11, the trial court recited the Gamboas' three alternative theories for relief: an easement by prescription; an easement by implication; and a new boundary line by mutual acquiescence. CP 215; App. 1. The trial court made no finding whether the Gamboas had established either of the latter two theories.[2]

In Finding of Fact 15, the trial court found that a claimant's use is adverse unless the property owner can show that the use was permissive. CP 216; App. 1. . Further in Finding of Fact 15, the trial court found that Mr. Clark did not give the Gamboas express or implied permission to use the road. CP 216; App. 1. .

In Finding of Fact 16, the trial court included in the legal description of the easement to be awarded to the Gamboas land belong to the Clarks that was located outside the roadway. CP 216; . App. 1.

In Conclusion of Law 2, the trial court concluded that respondents had made open, notorious, continuous, uninterrupted use of the roadway

[2] The trial court's failure to enter a finding on either an implied easement or mutual recognition results in an implied negative finding against the Gamboas on those two theories. *Crites v. Koch*, 49 Wn. App. 171, 176-77, 741 P.2d 1005 (1987).

as a true owner for 10 years, and that respondents' use of the road was adverse to appellants. CP 216; App. 1. .

In Conclusion of Law 3, the trial court concluded that respondents have met all of the elements of an easement by prescription and were entitled to a limited nonexclusive prescriptive easement for residential access to and from their residence and shop. CP 217; App. 1. .

In Conclusion of Law 5, the trial court included in the legal description of the easement to be awarded to the Gamboas land belong to the Clarks that was located outside the roadway. CP 217; App. 1. .

In Conclusion of Law 7, the trial court concluded that since the Gamboas prevailed on their claim of adverse possession, there was no basis to award costs to the Clarks prevailing party attorney fees or costs under Chapter 7.48. CP 218; App. 1. .

In Conclusion of Law 8, the trial court concluded that the Gamboas are entitled to a judgment consistent with its conclusions, as well as statutory costs. CP 218; App. 1. .

On April 3, 2012, the trial court entered judgment in favor of the Gamboas. CP 220-25; App. 2. Therein, the trial court included in the easement awarded to the Gamboas land belonging to the Clarks outside the roadway. CP 221-222; App. 2. Also therein, the trial court awarded the Gamboas a judgment for costs in the amount of $1,783.55, including

the amounts for aerial photographs, surveys and legal description requested in the Gamboas' amended cost bill. CP 224; App. 2.

On April 19, 2012, the Clarks filed a notice of appeal of the trial curt's findings of fact, conclusions of law and judgment. CP __.

VI. ARGUMENT

A. STANDARDS OF REVIEW

The trial court's findings on prescriptive use involve mixed questions of law and fact. *Imrie v. Kelley*, 160 Wn. App. 1, 7, 250 P. 3d 1045 , *review denied*, 171 Wash.2d 1029 (2011); 810 *Properties v. Jump*, 141 Wn. App. 688, 700, 170 P. 3d 1209 (2007).

An appellate court reviews findings and conclusions to determine whether the trial court's findings of fact are supported by substantial evidence, and if so, whether those findings support the trial court's conclusions of law. *810 Properties v. Jump*, 141 Wn. App. 695. The trial court's findings are reviewed for substantial evidence, *i.e.,* evidence of sufficient quantum to persuade a fair-minded person of the truth of the finding. *Harris v. Urell*, 133 Wn. App. 130, 137, 135 P. 3d 530 (2006). If the trial court's findings are supported by substantial evidence, the court inquires whether the findings support the trial court's conclusions of law and judgment. *Ibid.* Questions of law and conclusions of law are reviewed *de novo. Cogdell v. 1999 O'Ravez Family LLC,* 153Wn. App.

384, 390, 220 P. 3d 1259, 1262 (2009). Whether the facts as found by the trial court constitute a prescriptive easement is a question of law reviewable *de novo*. *Lee v. Lozier*, 88 Wn. App. 176, 181, 945 P. 2d 214 (1997).

The requirements to establish a prescriptive easement are the same as those to establish adverse possession. The claimant must prove use of the servient land that is: (1) open and notorious; (2) over a uniform route; (3) continuous and uninterrupted for 10 years; (4) adverse to the owner of the land sought to be subjected; and (5) with the knowledge of such owner at a time when he was able in law to assert and enforce his rights. *Kunkel v. Fisher*, 106 Wn. App. 599, 602, 23 P. 3d 1128 (2001)

The trial court's decision to award or deny attorney fees is reviewed for abuse of discretion. *Humphrey Industries, Ltd v. Clay Street Associates, LLC,* 170 Wn. 2d 495, 506, 242 P. 3d 846 (2010). The trial court's decision is reviewed if it is manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons, with the last category including errors of law. *Ibid.*

B. THE TRIAL COURT ERRED IN AWARDING THE GAMBOAS A PRESCIPTIVE EASEMENT IN THE ROAD ON THE CLARKS' REAL PROPERTY.

The Clarks assign error to Findings of Fact 4, 5, 6, 15, and 16, to Conclusions of Law 2, 3, 4, 5, and 8, and to the Judgment. CP 213, 214, 216, 217, 218; CP 220-225; App. 1, 2.

In Finding of Fact 4, the trial court erred in finding that the Gamboas' alleged prescriptive use of the road was continuous. CP 213; App. 1. The Gamboas' entry onto the road was presumptively permissive. *Kunkel v. Fisher*, 106 Wn. App. 599, 603 n. 13, 23 P. 3d 1128 (2001); *Roediger v. Cullen*, 26 Wn. 2d 690, 706, 175 P. 2d 669 (1946); *State ex rel. Shorett v. Blue Ridge Club, Inc.,* 22 Wn. 2d 487, 494-95, 156 P. 2d 667 (1945); *Northwest Cities Gas Co. v. Western Fuel Co.,* 13 Wn. 2d 75, 84, 123 Wn. 2d 771 (1942); *Peoples Savings Bank v. Bufford*, 90 Wash. 204, 207, 155 P. 1068 (1916).

The presumption of permissive use is more than an ordinary presumption. It is a property right. *Peoples Savings Bank v. Bufford*, 90 Wash. 207 ("*The presumption that one entering upon the property of another does so in subordination to the title of the real owner is a valuable right of property*."). Thus, by failing to recognize the presumption that the Gamboas use of the road was permissive, the trial court deprived the Clarks of a valuable property right.

As the Gamboas' use of the road was permissive, it did not ripen into adverse use merely by the passage of time. *Ormiston v. Boast*, 68 Wn. 2d 548, 551, 413 P. 2d 969 (1966). Instead, as their use of the road was permissive, the period of Gamboas' prescriptive use could not commence until their use became adverse. The Gamboas' use of the road could become adverse only if they made a distinct, positive assertion of a right adverse to the property owner. *Kunkel v. Fisher*, 106 Wn. App. 604 n. 14; *Roediger v. Cullen*, 26 Wn. 2d 706; *Northwest Cities Gas Co. v. Western Fuel Co.,* 13 Wn. 2d 84. As found in unchallenged Finding of Fact 8, no such positive assertion was made by the Gamboas until 2008. CP 214; App. 1. Therefore, the Gamboas' prescriptive use, if any, of the road did not commence until 2008. The trial court's finding of continuous use of the road in Finding 4 therefore is not supported by substantial evidence, and must be reversed. *Green v. Hooper*, 149 Wn. App. 627, 641, 205 P. 3d 134 (2009).

For the same reasons, as it found that neither party objected to the other's use of the roadway until 2008, the trial court's unchallenged Finding of Fact 8 does not support Conclusions of Law 2, 3, 4, 5, 7 or 8. CP 214, 2-6-18; App. 1. *Kunkel v. Fisher*, 106 Wn. App. 604.

In Finding 5, the trial court found that the Gamboas in good faith sincerely believed that they owned the land on which the roadway was

situated. CP 213; App. 1. In a prescriptive easement case, the adverse claimant's subjective intent is irrelevant. Instead, adversity is governed by an objective standard, that is, by the objectively observable actions of the adverse user and the rightful owner. *Dunbar v. Heinrich*, 95 Wn. 2d 20, 27, 622 P. 2d 812 (1980). The trial court thereby erred in relying upon the Gamboas' subjective belief.

The trial court repeated its error in Finding of Fact 6, wherein it again relied upon the Gamboas' "*sincere belief*" that they owned the roadway. Under *Dunbar v. Heinrich*, the Gamboas' subjective belief that they owned the road is irrelevant.

In the last sentence of Finding of Fact 5, the trial court also found that the doors of the Gamboas' shop could only be accessed by vehicles from the disputed roadway. CP 213; App. 1. Mr. Gamboa testified to the contrary, that it was possible to access to doors of his garage/shop by coming from underneath or up behind and around. RP I p. 81. The last sentence of Finding 5 therefore is not supported by substantial evidence, and must be reversed. *Green v. Hooper*, 149 Wn. App. 641.

Further, Finding of Fact 6's finding that the Gamboas bladed the road and applied gravel one time is insufficient by itself to support the trial court's Conclusions of Law 2, 3, 4, 5, 7, or 8. In *Imrie v. Kelley*, the adverse claimant's isolated act of sharing the cost with the property owner

of graveling the road was insufficient to establish adverse use. 160 Wn. App. 11. Similarly, in *Kunkel v. Fisher*, the court held that the adverse claimant's isolated act in assisting a tenant spread some gravel on the property in question was insufficient to overcome the presumption of permissive use. 106 Wn. App. 604-05. Here, as in *Imrie* and *Kunkel*, the Gamboas' actions in blading the road and spreading gravel on one occasion are insufficient to overcome the presumption of permission. Finding 6 therefore does not support Conclusions of Law 2, 3, 4, 5, 7, or 8.

Mutual use of a road by neighbors supports an inference of permissive use because it is assumed the owner is permitting his or her neighbor to use the road as a neighborly accommodation. *Cuillier v. Coffin*, 57 Wn. 2d 624, 627, 358 P. 2d 958 (1961); *Imrie v. Kelley*, 160 Wn. App. 9-10; *Miller v. Jarman*, 2 Wn. App. 994, 998, 471 P. 2d 704, *review denied*, 78 Wn. 2d 995 (1970). The road dates from the 1960s, if not before then. CP 214; App. 1. The Gamboas did not purchase their parcels until 1992. CP 213; App. 1. Therefore, as in *Cuillier v. Coffin* and *Imrie v. Kelley,* the Gamboas used a road built by someone else. As in *Cuillier v. Coffin, Imrie v. Kelley*, and *Miller v. Jarman,* the Gamboas' use of the road built by someone else supports an inference that the Sloulins, and later the Clarks, allowed the Gamboas use of the road as a neighborly accommodation.

In Finding of Fact 14, the trial court found that Mr. Clark's failure to mention in his December 3, 2008 letter to the Gamboas that he had previously given permission to the Gamboas to use the road contradicted Mr. Clark's testimony that he gave permission to the Gamboas to use the road. CP 215; EX 25. Finding of Fact 14 addresses only the issue of express permission. Finding 14 fails to mention either the presumption of permission upon the Gamboas' commencement of using the road or the inference of permission arising from the Gamboas' use of the road built by someone else, and does not find that either the presumption or the inference had been overcome by the Gamboas.

In Finding of Fact 15, the trial court found s that "[*a*] *claimant's use is adverse unless the property owner can show that the use was permissive.*" CP 216; App. 1. The trial court acknowledged that the first sentence of Finding 15 was a conclusion of law. "*That's the conclusion—that's sort of a statement of the law, that's correct, but it clarifies the Court's finding there...*" RP 10/14/11 p. 21. The first sentence of Finding 15 is a conclusion of law and should therefore be reviewed *de novo. Keever & Associates, Inc. v. Randall*, 129 Wn. App. 733, 738, 119 P. 3d 926 (2005).

The first sentence of Finding 15 is an erroneous statement of the law. Finding 15 is contrary to the presumption that the Gamboas' entry

onto the road was permissive. *Kunkel v. Fisher, supra.* Finding 15 also impermissibly cast the burden of proof upon the Clarks. *Northwest Cities Gas Co. v. Western Fuel Co.,* 13 Wn. 2d 84.

In *Northwest Cities Gas Co.*, the court recognized a presumption of adverse use arising from proof that the use by one of another's land has been open, notorious, continuous, uninterrupted, and for the required time, thereby casting the burden of proving permissive use upon the owner of the land. 13 Wn. 2d 85.

In *Cuillier v. Coffin*, however, the court departed from that presumption and recognized an inference:

> We think, however, a more accurate statement, based on the results and holdings in all of our cases, would be that such unchallenged use for the prescriptive period is a circumstance from which an inference may be drawn that the use was adverse. Such unchallenged use is but one circumstance, and there may well be a combination of circumstances from which the trier of the facts could determine that such use was permitted as neighborly courtesy and was not adverse. (Citations omitted).

57 Wn. 2d 627.

In light of *Cuillier v. Coffin*, the first sentence of Finding 15 is an erroneous statement of the law, and should therefore be reversed.

Even if the presumption of adverse use recognized in *Northwest Cities Gas Co.* were otherwise to apply here, that presumption required proof of the other elements of a prescriptive easement, including continuous use for the required time. As indicated above, the Gamboas' prescriptive use did not commence until 2008. Thus, the presumption recognized in *Northwest Cities Gas Co.* would not apply here in any event.

The trial court also erred in the second sentence of Finding 15: "*The Court finds that Mr. Clark did not give the Gamboas express or implied permission to use the road, and therefore the use of the road by the Gamboas was adverse*." CP 216; App. 1. Finding 15 is contrary to the presumption that the Gamboas' entry onto the road was permissive. *Kunkel v. Fisher, supra.*

The second sentence of Finding 15 is also contrary to the inference that the Gamboas use of the road was permitted by neighborly sufferance or accommodation. *Imrie v. Kelley*, 160 Wn. App. 7. ("*Now, in developed land cases like this one, an inference of permissive use applies when a court can reasonably infer that the use was permitted by neighborly sufferance or accommodation.* Citation omitted)"). *See also, Kunkel v. Fisher*, 106 Wn. App. 602 n. 7; *Crites v. Koch*, 49 Wn. App. 171, 177, 741 P. 2d 1005 (1987); *Miller v. Jarman*, 2 Wn. App. 997.

Here, the record is replete with evidence that the Clarks allowed the Gamboas to use the road as a matter of neighborly accommodation. Mr. Gamboa and Mrs. Clark had discussions about growing grapes. RP I p. 25.-26. Until 2008, Mr. Clark never voiced any objection to the Gamboas use of the road. RP I p. 26. Prior to 2008, the Gamboas had no arguments with the Clarks. RP I p. 28. Mr. Gamboa observed Mr. Clark using the road with his farming equipment. RP I p. 36. Mr. Gamboa has seen Mr. Clark using the road since 1995. RP I p. 52. When Mr. Clark asked Mr. Gamboa to move his vehicles from the road, Mr. Gamboa complied. RP I p. 44. Mr. Gamboa complied with Mr. Clark's request to move his vehicles, as Mr. Gamboa did not want to interfere with Mr. Clark's farming and Mr. Gamboa wanted to be a good neighbor. RP I p. 75. The Clarks did not exclude the Gamboas from using the road. RP II p. 168. The Clarks and the Gamboas had a friendly relationship for years. RP II p. 168. The Clarks decided not to charge the Gamboas rent to use the road. RP II p. 169. Mr. Clark has not seen Mr. Gamboa blade the road, but if he had he would not have objected, and he would have interpreted such an act as a neighborly gesture. RP II p. 170. In 2001, during a dry spell, Mr. Gamboa loaned his tractor with a front loader. RP II p. 242. Mr. Gamboa tried to be as neighborly as he could. RP II p. 242.

Here, as in *Imrie, Kunkel, Crites* and *Miller,* the foregoing evidence does not support adverse use, but instead supports an inference of neighborly accommodation. The second sentence of Finding of Fact 15 is therefore not supported by substantial evidence, and should therefore be reversed. *Green v. Hooper*, 149 Wn. App. 641.

In Finding of Fact 16, the trial court erred by including in the legal description of the prescriptive easement land outside the road. CP 216; App. 1. The Gamboas requested inclusion in the legal description of the road a parcel of land west of the road between the road and the Gamboas' property line. RP 12/14/2011 p. 28-30. The parcel in question was 4.12 feet at its widest. RP 12/14/2011 p. 30. The trial court agreed and ordered that the Clarks' land west of the road and between the road and the Gamboas' property line be included in the prescriptive easement. RP 12/14/2011 p. 43-44. The trial court therefore erred in Finding of Fact 16 by awarding the Gamboas more of the Clarks' land than the Gamboas had acquired by prescription. *Northwest Cities Gas Co.,* 13 Wn. 2d 92.

In Finding of Fact 4, the trial court found that the Gamboas' use of the road was open, notorious, continuous and uninterrupted for a period of 16 years. CP 213; App.1 The trial court, however made no similar finding with regard to the Gamboas' use, if any, of the Clarks' parcel between the road and the Gamboas' property line. Nor is there any evidence as to

what, if anything, the Gamboas did on that parcel, or when they did it, or for how long they did it. Therefore, there is no substantial evidence for the inclusion in Finding 16 of that parcel in the legal description of the prescriptive easement. The trial court could not award to the Gamboas more of the Clarks' land than the Gamboas had acquired by prescription. *Northwest Cities Gas Co.,* 13 Wn. 2d 92. That portion of Finding 16 should therefore be reversed. *Green v. Hooper*, 149 Wn. App. 641.

The trial court erred in entering Conclusion of Law 2. Because the Gamboas' prescriptive use, if any, of the road did not commence until 2008, the trial court erred in concluding that the Gamboas' use of the road was continuous for more than a ten-year period. *Roediger v. Cullen*, 26 Wn. 2d 701-02.

The trial court erred in entering Conclusion of Law 3. CP 217; App. 1. The Gamboas were required to make a distinct, positive assertion of a right adverse to the Clarks 2008. *Kunkel v. Fisher*, 106 Wn. App. 604 n. 14; *Roediger v. Cullen*, 26 Wn. 2d 706; *Northwest Cities Gas Co. v. Western Fuel Co.,* 13 Wn. 2d 84. No such assertion was made until 2008. CP 214; App. 1. Therefore, the Gamboas' prescriptive use, if any, of the road did not commence until 2008.

The trial court erred in Conclusion 3 because the mutual use of a road by the Gamboas and the Clarks supports an inference of permissive

use, as it is assumed the owner is permitting his or her neighbor to use the road as a neighborly accommodation. *Cuillier v. Coffin*, 57 Wn. 2d 627; *Imrie v. Kelley*, 160 Wn. App. 9-10. A use is not hostile if it is permissive. *Crites v. Koch*, 49 Wn. App. 177.

The trial court erred in Conclusion 3 because the Gamboas' use of the road was permitted by the Clarks as a matter of neighborly sufferance or accommodation. *Imrie v. Kelley*, 160 Wn. App. 7; *Kunkel v. Fisher*, 106 Wn. App. 602 n. 7; *Crites v. Koch*, 49 Wn. App. 177; *Miller v. Jarman*, 2 Wn. App. 997.

The trial court also erred in Conclusion 3 wherein it concluded that the Gamboas have met all of the requirements for a prescriptive easement for access to and from their shop. In Finding of Fact 5, the trial court found that in 2001, the Gamboas began building their garage/shop. CP 213; App. 1. The Gamboas filed their action in 2009, less than 10 years after their garage/shop was constructed. CP 1. The Gamboas thereby failed to meet the requirement of continuous use for 10 years. *Roediger v. Cullen*, 26 Wn. 2d 701-02. The Gamboas therefore have failed to meet all of the requirements for a prescriptive easement to their garage/shop.

The trial court erred in Conclusion of Law 4 by recognizing the Gamboas' primary right to use the roadway. CP 217: App. 1. The Gamboas have no primary right to use the roadway, as they failed to

establish that their use of the roadway was continuous for 10 years. *Roediger v. Cullen*, 26 Wn. 2d 701-02. The Gamboas also failed to establish that their use of the roadway was adverse, and not permissive. *Imrie v. Kelley*, 160 Wn. App. 7; *Kunkel v. Fisher*, 106 Wn. App. 602 n. 7; *Crites v. Koch*, 49 Wn. App. 178.

The trial court erred in Conclusion of Law 5 by awarding the Gamboas more of the Clarks' land than the Gamboas had acquired by prescription. *Northwest Cities Gas Co.,* 13 Wn. 2d 92.

The trial court further erred in Conclusion of Law 5 by awarding the Gamboas a prescriptive easement of any size in the road, as the Gamboas failed to establish continuous use for 10 years. *Roediger v. Cullen*, 26 Wn. 2d 701-02. The Gamboas also failed to establish that their use of the road was adverse, and not permissive. *Imrie v. Kelley*, 160 Wn. App. 7; *Kunkel v. Fisher*, 106 Wn. App. 602 n. 7; *Crites v. Koch*, 49 Wn. App. 178; *Miller v. Jarman*, 2 Wn. App. 997.

The trial court erred in Conclusion of Law 8 by concluding that the Gamboas are entitled to a judgment consistent with its Conclusions of Law. CP 218; App. 1. The Gamboas failed to establish continuous use for 10 years. *Roediger v. Cullen*, 26 Wn. 2d 701-02. The Gamboas also failed to establish that their use of the road was adverse, and not permissive. *Imrie v. Kelley*, 160 Wn. App. 7; *Kunkel v. Fisher*, 106 Wn.

App. 602 n. 7; *Crites v. Koch*, 49 Wn. App. 178; *Miller v. Jarman*, 2 Wn. App. 997 . The trial court also erred by awarding the Gamboas more of the Clarks' land than the Gamboas had acquired by prescription. *Northwest Cities Gas Co.,* 13 Wn. 2d 92. For the same reasons, the trial court also erred in entering awarding the Gamboas their statutory costs.

The trial court erred in entering judgment for the Gamboas. CP 220-225; App. 2. The Gamboas failed to establish continuous use for 10 years. *Roediger v. Cullen*, 26 Wn. 2d 701-02. The Gamboas also failed to establish that their use of the road was adverse, and not permissive. *Imrie v. Kelley*, 160 Wn. App. 7; *Kunkel v. Fisher*, 106 Wn. App. 602 n. 7; *Crites v. Koch*, 49 Wn. App. 178; *Miller v. Jarman*, 2 Wn. App. 997. The trial court also erred by awarding the Gamboas more of the Clarks' land than the Gamboas had acquired by prescription. *Northwest Cities Gas Co.,* 13 Wn. 2d 92. For the same reasons, the trial court also erred in entering awarding the Gamboas their statutory costs.

The trial court erred in awarding the Gamboas attorney fees of $200.00 and other costs in the amount of $1,583.55. CP 221. 224; App. 2. The trial court erred in awarding the Gamboas attorney fees, as the Gamboas failed to establish continuous use for 10 years. *Roediger v. Cullen*, 26 Wn. 2d 701-02. The Gamboas also failed to establish that their use of the road was adverse, and not permissive. *Imrie v. Kelley*, 160 Wn.

App. 7; *Kunkel v. Fisher*, 106 Wn. App. 602 n. 7; *Crites v. Koch*, 49 Wn. App. 178; *Miller v. Jarman*, 2 Wn. App. 997. The award of $410.00 for aerial photos is not authorized, as photocopying costs are not awardable costs under RCW 4.84.410. *Estep v. Hamilton*, 148 Wn. App. 246, 263, 201 P. 3d 331 (2009); *Marriage of Van Camp*. 82 Wn. App. 339, 343, 918 P. 2d 509 (1996).

C. THE TRIAL COURT ERRED IN DENYING THE CLARKS' REQUEST FOR RELIEF UNDER RCW CH. 7.48.

The Clarks assign error to the trial court's Conclusion of Law 7. CP 218; App. 1. The only reason given by the trial court for its denial of the Clarks' request for relief under RCW Ch. 7.48 was its erroneous conclusion that the Gamboas had prevailed on their claim for a prescriptive easement. *Ibid.* As indicated by the arguments and authorities in Paragraph B above, the trial court erred in that conclusion.

The Clarks were entitled to relief under RCW CH. 7.48 from the trial court. The Clarks requested relief under RCW 7.48.315, including exemplary damages under RCW 7.48.315 (4). CP 120-21. The Gamboas amended complaint included a claim for an injunction against the Clarks'overspray of the road with their irrigation water. CP 25. The Gamboas also testified that when they drove their vehicles, they would be hit by water from the Clarks' sprinklers. RP I p. 76. The Gamboas also

complained that water from the Clarks' sprinklers would flood the road. RP I p. 76-77; EX 46. The Clarks' operation of their irrigation sprinklers is an "*agricultural activity*" under RCW 7.48.310 (1). The Clarks' property is a "*farm*" under RCW 7.48.310 (2).

The Gamboas' allegations that the Clarks' irrigation water hit their cars and flooded the road involve a nuisance under RCW 7.48.010: "... *[W]hatever is injurious to health or indecent or offensive to the senses, or an obstruction to the free use of property, so as to essentially interfere with the comfortable enjoyment of the life and property, is a nuisance and the subject of an action for damages and other and further relief.*"

The trial court denied the Gamboas' claim for an injunction against the Clarks' overspray. "*[M]y ruling here is that Mr. Clark does have the right to farm that land and that if there was a little bit of water that gets on the roadway, that's going to be part of that.*" RP 03/22/2012 p. 54. The Clarks thus clearly prevailed on the Gamboas' claim that the Clarks' irrigation of their farm land constituted a nuisance.

Therefore, in the event that the Court reverses the trial court's findings of fact and conclusions of law and judgment, the Clarks request the Court to award the Clarks damages and attorney fees and costs incurred in the trial court pursuant to RCW 7.48.315 (1), (2), (3), (4) or, in

the alternative, to remand their claim for relief under RCW Ch. 7.48 to the trial court.

D. THE CLARKS REQUEST AN AWARD OF ATTORNEY FEES AND COSTS ON APPEAL.

An award of attorney fees on appeal is appropriate under RCW 7.48.315 (1), (3):

> (1) A farmer who prevails in any action, claim, or counterclaim alleging that agricultural activity on a farm constitutes a nuisance may recover the full costs and expenses determined by a court to have been reasonably incurred by the farmer as a result of the action, claim, or counterclaim....
> (3) The costs and expenses that may be recovered according to subsection (1) or (2) of this section include actual damages and reasonable attorneys' fees and costs. For the purposes of this subsection, "actual damages" include lost revenue and the replacement value of crops or livestock damaged or unable to be harvested or sold as a result of the action, claim, or counterclaim

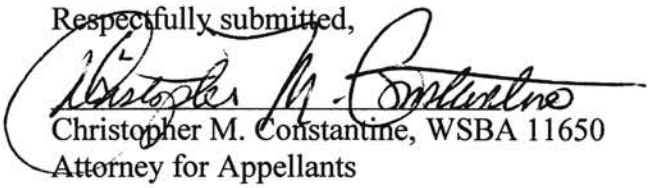
In the event that the Clarks prevail in this appeal, they request an award of attorney fees under RCW 7.48.315 (1), (3) andRAP 18.1, and costs under RAP 14.2.

VII. CONCLUSION

The Gamboas' use of the road was permissive until 2008. As their prescriptive use of the road therefore did not commence until 2008, the Gamboas fail to establish that their use of the road was continuous for 10

years. The Gamboas' entry onto the road was permissive at its inception, and remained so until 2008. The Gamboas' use of the road was a gesture of neighborly accommodation by the Sloulins and later by the Clarks. The trail court's findings of a prescriptive easement are not supported by substantial evidence and the findings do not support the trial court's conclusions of law. The trial court erred in concluding that the Gamboas had established a prescriptive easement in the road and erred in including land owned by the Clarks outside the roadway. Because the Gamboas did not prevail on claims, the trial court erred in denying the Clarks' request for damages and attorney fees under RCW 7.48.315 (1), (2), (3), (4). In the event that they prevail on appeal, the Clarks request an award of attorney fees under RCW 7.48.315 (1), (3).

Respectfully submitted,



Christopher M. Constantine, WSBA 11650
Attorney for Appellants

VIII. APPENDICES

1. Findings of Fact and Conclusions of Law

2. Judgment

RECEIVED
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Stokes Lawrence, P.S.

IN THE SUPERIOR COURT OF WASHINGTON
FOR YAKIMA COUNTY

MAGDALENO GAMBOA and MARY J. GAMBOA, husband and wife, Plaintiffs, v. JOHN M. CLARK and DEBORAH C. CLARK, husband and wife, Defendants	NO. 09-2-03594-5 FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter was tried to the Court sitting without a jury on Monday, September 12, and Wednesday, September 14, 2011, with closing arguments presented Thursday, October 27, 2011; the Honorable Judge Pro Tem Rodney K. Nelson presiding. The Court considered the testimony of the parties as well as that of five other witnesses and Exhibits 1-69, and also considered the arguments made by David A. Thompson as counsel for the Plaintiffs Gamboa, and by Sean A. Russel as counsel for the Defendants Clark.

After closing arguments were heard on Thursday, October 27, 2011, the Court took a short recess, and then uttered its decision from the bench. Having resolved all issues presented by the parties, the Court now makes the following findings based upon the evidence presented in this proceeding:

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(509) 853-3000

FINDINGS OF FACT

1. The parties are neighbors, owning adjoining parcels of land, each with a residence, but with most of the acreage under cultivation: the Plaintiffs' Gamboa use their property primarily for residential purposes, but also grow alfalfa on their approximately 17-acre parcel; and Defendants Clark have used their approximately 25-acre parcel primarily to farm Concord grapes and for a residence.

2. The two adjoining parcels of land were created in February, 1964 when the original approximately 42-acre parent parcel was divided by its then common owners, the Padghams and the McConnells, with the eastern portion of approximately 25 acres, the legal description of which included the disputed road, sold to Ralph and Pauline Sloulin, and with the westerly 17 acres or so retained by the Padghams and the McConnells. The two newly-created parcels were roughly separated by a dirt and gravel pre-existing farm roadway running northerly from East Allen Road on the south to the northern boundary of the original parent parcel.

3. The Plaintiffs Gamboa purchased the western parcel of approximately 17 acres in 1992; and the Defendants Clark purchased the eastern parcel of approximately 25 acres from the Sloulins in 1995.

4. Throughout their ownership of their parcel, the Plaintiffs Gamboa have used the disputed roadway as a driveway to gain access to their residence situated approximately three-quarters of the distance traversed by said roadway north from East Allen Road between the two parcels in question. Plaintiffs have also used said disputed roadway for access to their acreage under cultivation. The Plaintiffs' said use was open, notorious, continuous, and uninterrupted for a period of approximately 16 years until a dispute arose between the parties in late 2008.

5. Plaintiffs in good faith sincerely believed that they owned the land on which the disputed roadway was situated. In 2001, they began building a 40' x 60' shop/garage near the eastern edge of their property. The shop doors of said garage could only be accessed by vehicles from the disputed roadway.

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6. Also as a consequence of Plaintiffs' sincere belief that they owned the roadway, they took steps to maintain said roadway by blading the road and on one occasion applying gravel to the road. They bladed the snow off the roadway in the wintertime.

7. The Defendants Clark used the disputed portion of the roadway to farm their most westerly row of grapes, to spray for weeds in the grapes and to maintain the road for farming purposes, and for all other uses made necessary due to ownership of the farm.

8. The Gamboas and the Clarks both used the roadway as described above without any disputes until 2008. Each party was aware of the other's use of the roadway, but ~~no one~~ neither objected to the other's use until a dispute arose in 2008. The dispute between the parties in late 2008 arose initially over Plaintiffs' dogs, then later over the Defendants' irrigation practices, but it eventually escalated into a dispute over which of them owned the land on which the roadway was situated.

9. Two surveys were performed in 2009 by licensed surveyors. They revealed that the true common boundary separates the road into the disputed and undisputed segments. The southerly, undisputed portion of the roadway connects with East Allen Road and is entirely on the Gamboa side of the common boundary. From East Allen Road ~~there~~, the road heads north and becomes disputed when it veers east across the common boundary onto the Defendant Clarks' property. As the roadway continues northward, it remains entirely upon the Defendant Clarks' side of the common boundary all of the way to the point northeast of the Gamboa residence where it merges with the southern terminus of the existing express easement, which was recorded in February, 1964, and is described in Exhibit 12.

10. It is apparent from the photograph admitted as Exhibit 47 that the roadway in dispute is a well-defined road The testimony of neighbor witness Joe Rollinger, a man of 51 years of age, confirmed that the roadway's placement and configuration is roughly the same now as it was in the 1960's. Mr. Rollinger testified that he saw the Gamboas use the road. He also testified that as a boy, he walked along

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the farm road in question. Mr. Rollinger further testified that Mr. Clark needs the road to farm his most-westerly row of grapes.

11. Plaintiffs Gamboa in this action seek equitable relief, such that they can continue to use the roadway as they have since 1992, even though it lies mostly on the land owned by the Defendants Clark. Plaintiffs assert three alternative theories justifying such relief: (1) an easement by prescription; (2) an easement by implication; and (3) the establishment of a new common boundary consistent with the existing roadway under the doctrine of mutual recognition and acquiescence between the parties for the requisite ten-year period.

12. The requisite elements for an easement by prescription are that the claimant's use must be adverse to the right of the owner of the servient parcel; that the use by the claimant be open, notorious, continuous, hostile and uninterrupted over the prescriptive period of ten years, and that the servient owner has knowledge of such use at the time when he or she would be able at law to assert and enforce his or her rights. Of those elements, the primary element in dispute between the parties here is whether the use by the Plaintiffs Gamboa was "adverse" to the rights of the Defendants Clark over a period of at least ten years.

13. The Defendant John Clark testified he gave Mr. Gamboa permission to use the road. The Plaintiff Mack Gamboa denies that Mr. Clark gave him permission.

14. Letters between Mr. Clark and Mr. Gamboa, in particular Exhibit 25, reference the joint-use of the road over a 13-year period, but do not reference any permissive use arrangement between Mr. Clark and Mr. Gamboa. At approximately the middle of page 2 of Exhibit 25 at the beginning of the new paragraph, Mr. Clark clearly indicates that there was never any discussion between the parties in the thirteen years that had then expired since his purchase of his parcel from the Sloulins in 1995 on the subject of who owned the land on which the driveway was situated. This contradicts Mr. Clarks' testimony that he gave permission to Mr. Gamboa to use the road in question.

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15. A claimant's use is adverse unless the property owner can show that the use was permissive. The Court finds that Mr. Clark did not give the Gamboas' express or implied permission to use the road, and therefore. the use of the road by the Gamboas' was adverse.

16. The parties have agreed that the legal description of the easement to be awarded as a result of the Plaintiffs' actions is as follows:

> AN EASEMENT FOR ACCESS OVER THAT PORTION OF THE SOUTHWEST QUARTER OF THE NORTHEAST QUARTER OF SECTION 32, TOWNSHIP 10 NORTH, RANGE 23 EAST, W.M., DESCRIBED AS FOLLOWS:
>
> BEGINNING AT A POINT ON THE EAST BOUNDARY OF LOT 2, SHORT PLAT NO. 90-147, RECORDS OF YAKIMA COUNTY, WASHINGTON, NORTH 3° 41' 30" EAST 78.00 FEET FROM THE SOUTHEAST CORNER OF SAID LOT 2,
> THEN NORTH 6° 03' 00" EAST 343.15 FEET,
> THEN NORTH 3° 00' 00" EAST 128.50 FEET,
> THEN NORTH 3° 51' 00" EAST 463.00 FEET,
> THEN NORTH 86° 50' 00" WEST 13.84 FEET TO THE EAST BOUNDARY OF LOT 3 OF SHORT PLAT NO. 90-148, RECORDS OF YAKIMA COUNTY, WASHINGTON, THEN SOUTH 3° 41' 30" WEST ALONG THE EAST BOUNDARY OF SAID LOT 3 AND THE EAST BOUNDARY OF LOTS 1 AND 2 OF SAID SHORT PLAT NO. 90-147 934.23 FEET TO THE POINT OF BEGINNING.

From the foregoing Findings of Fact, the Court hereby makes the following conclusions:

CONCLUSIONS OF LAW

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

2. In view of the fact that the use made of the roadway in dispute by the Plaintiffs Gamboa was "open, notorious, continuous, uninterrupted, and in a fashion that a true owner would use his own land, all for more than a ten-year period, said use by the Plaintiffs Gamboa was adverse to the Defendants Clark. Northwest Cities Gas Co. v. Western Fuel Co., 13 Wn.2d 75, 123 P.2d 771 (1942); Roediger et al. v. Cullen, 26 Wn.2d 690, 175 P.2d 669 (1946); Todd v. Sterling, 45 Wn.2d 40, 273 P.2d 245 (1954); and The Mountaineers v. Wymer, 56 Wn.2d 721, 355 P.2d 341 (1960).

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3. The Plaintiffs Gamboa have thus met all of the requirements for an easement by prescription. and are entitled to have a limited non-exclusive prescriptive easement for residential access to and from their residence and shop. as set forth in the legal description. as well as for purposes of farming their parcel. The easement is non-exclusive and limited in that Plaintiffs Gamboa shall not interfere with Defendant Clarks' use of the roadway ~~for farming activities~~. The Gamboas' easement is not for any additional residences or other development that could occur in the future in any of the other 4 lots in the Gamboas' two short plats.

Except that it Clark's use of the roadway increases beyond his current use of the roadway for farming activities for their vineyard, then Clark shall share equitably in the maintenance of said roadway.

4. Consistent with their primary right to utilize the roadway, the Plaintiffs Gamboa have a duty to maintain the roadway more or less in its present condition. No improvements that could interfere with the Clarks' of their vineyard cultivation or substantially increase the County, Assessors value, such as paving or curbing, shall be initiated without the express written consent of Defendant's Clark.

placed on the Clark ~~property~~ parcel

5. The legal description of the easements awarded as a result of the Plaintiffs' actions, which benefits the plaintiff Gamboa's ~~parcel~~ & burdens the defendant Clark's parcel is as follows:

AN EASEMENT FOR ACCESS OVER THAT PORTION OF THE SOUTHWEST QUARTER OF THE NORTHEAST QUARTER OF SECTION 32, TOWNSHIP 10 NORTH, RANGE 23 EAST, W.M., DESCRIBED AS FOLLOWS:

BEGINNING AT A POINT ON THE EAST BOUNDARY OF LOT 2, SHORT PLAT NO. 90-147, RECORDS OF YAKIMA COUNTY, WASHINGTON, NORTH 3° 41' 30" EAST 78.00 FEET FROM THE SOUTHEAST CORNER OF SAID LOT 2,
THEN NORTH 6° 03' 00" EAST 343.15 FEET,
THEN NORTH 3° 00' 00" EAST 128.50 FEET,
THEN NORTH 3° 51' 00" EAST 463.00 FEET,
THEN NORTH 86° 50' 00" WEST 13.84 FEET TO THE EAST BOUNDARY OF LOT 3 OF SHORT PLAT NO. 90-148, RECORDS OF YAKIMA COUNTY, WASHINGTON, THEN SOUTH 3° 41' 30" WEST ALONG THE EAST BOUNDARY OF SAID LOT 3 AND THE EAST BOUNDARY OF LOTS 1 AND 2 OF SAID SHORT PLAT NO. 90-147 934.23 FEET TO THE POINT OF BEGINNING.

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6. With no evidence presented to establish that the February 19. 1964 Express Easement is invalid. the Court concludes that said Express Easement recorded February 14, 1964 as Auditor's File No. 1984788 remains valid.

7. Since the Gamboas prevailed on their claim for a prescriptive easement. the Court concludes that there is no basis to award the Clarks prevailing party attorney's fees or costs under RCW Chapter 7.48.

8. The Plaintiffs are entitled to entry of a Judgment against the Defendants consistent with these Conclusions of Law, and as the prevailing parties in this matter. the Plaintiffs are also entitled to recover their statutory costs.

DATED: March 22. 2012.

RODNEY K. NELSON
Judge Pro Tem

Jointly Presented By:

DAVID A. THOMPSON (WSBA 13336)
Attorney for Plaintiffs

Presented by:

STOKES LAWRENCE
VELIKANJE, MOORE & SHORE

SEAN A. RUSSEL (WSBA 34915)
Attorneys for Defendants

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FILED

APR 3 2012

KIM M. EATON YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF WASHINGTON
FOR YAKIMA COUNTY

MAGDALENO GAMBOA and MARY J. GAMBOA, husband and wife, Plaintiffs, v. JOHN M. CLARK and DEBORAH C. CLARK, husband and wife, Defendants	NO. 09-2-03594-5 SUMMARY OF JUDGMENT AND JUDGMENT

SUMMARY OF JUDGMENT

JUDGMENT CREDITORS:	MAGDALENO GAMBOA & MARY J. GAMBOA 703 East Allen Road Sunnyside, WA 98944
ATTORNEY FOR JUDGMENT CREDITORS:	DAVID A. THOMPSON P.O. Box 797 105 N. 3rd Street Yakima, WA 98907 (509) 575-8322
JUDGMENT DEBTORS:	JOHN M. CLARK & DEBORAH C. CLARK 831 E. Allen Road Sunnyside, WA 98944

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ATTORNEY FOR JUDGMENT DEBTORS:	SEAN A. RUSSEL 120 N. Naches Avenue Yakima, WA 98901-2757 (509) 853-3000

PRINCIPAL AMOUNT OF JUDGMENT:	$ 0.00
ATTORNEY'S FEES (STATUTORY ONLY)	$200.00
OTHER COSTS (PER COST BILL):	$1,583.55
TOTAL MONETARY JUDGMENT:	$1783.55

JUDGMENT

This matter was tried to the Court sitting without a jury on Monday, September 12, and Wednesday, September 14, 2011, with closing arguments presented Thursday, October 27, 2011; the Honorable Judge Pro Tem Rodney K. Nelson presiding. The Court considered the testimony of the parties as well as that of five other witnesses and Exhibits 1-69, and also considered the arguments made by David A. Thompson as counsel for the Plaintiffs Gamboa, and by Sean A. Russel as counsel for the Defendants Clark before uttering its decision from the bench on October 27, 2011. Hearings were conducted regarding proposed forms of Findings of Fact and Conclusions of Law on December 14, 2011 and on March 22, 2012, when Exhibit 70 was admitted in evidence by stipulation. Having now made Findings of Fact and Conclusions of Law, it is hereby

ORDERED, ADJUDGED and DECREED that the Plaintiffs are hereby awarded a limited non-exclusive prescriptive easement affecting the legal descriptions of the parties' respective parcels as follows:

1. Plaintiffs' Legal Description With Easement

The legal description for Yakima County Assessor's Parcel Nos. ("APN") 231032-13401, -13402, -13403, -13404 & -13405 currently owned by the Plaintiffs Gamboa shall henceforth be legally described as follows:

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Lots 1 and 2 of Short Plat Number 90-147 recorded under Auditor's File Number 2910166, records of Yakima county, Washington, and Lots 1, 2 & 3 of Short Plat Number 90-148, recorded under Auditor's File Number 2910167, records of Yakima County, Washington.

TOGETHER WITH a limited, non-exclusive easement appurtenant over a portion of the Southwest quarter of the Northeast quarter of Section 32, Township 10 North, Range 23 East, W.M. for residential access from East Allen Road to Lot 3 of Short Plat 90-148 for a single residence and associated out-buildings situated thereon, and for access to the other four lots described above for reasonable farming practices conducted thereon, which easement is legally described as follows:

Beginning at a point on the East boundary of Lot 2, Short Plat No. 90-147, records of Yakima County, Washington, North 3°41'30" East 78.00 feet from the Southeast corner of said Lot 2, then North 6°03'00" East 343.15 feet, then North 3°00'00" East 128.50 feet, then North 3°51'00" East 463.00 feet, then North 86° 50' 00" West 13.84 feet to the East boundary of Lot 3 of Short Plat No. 90-148, records of Yakima County, Washington, then South 3°41'30" West along the East boundary of said Lot 3 and the East boundary of Lots 1 and 2 of said Short Plat No. 90-147 934.23 feet to the point of beginning.

2. Defendants' Legal Description with Easement

The legal description for APN 231032-13003 currently owned by the defendants Clark shall henceforth be legally described as follows:

That portion of the Southwest quarter of the Northeast quarter of Section 32, Township 10 North, Range 23, E.W.M., described as follows:

Beginning at the point on the South line of said subdivision 654.5 feet East of the Southwest corner thereof; thence North 3°42' East 1,042.3 feet; thence North 56°23' West 70.0 feet; thence North 0°49' East 270.4 feet to the North line of said subdivision; thence East along said North line 654.8 feet to the Northeast corner of said subdivision; thence South along the East line of said subdivision 1,352 feet to the Southeast corner thereof; thence West along the South line to the point of beginning.

EXCEPT right of way for road along the South line thereof,

AND

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That portion of the Northwest quarter of the Northeast quarter of Section 32, Township 10 North, Range 23, E.W.M., described as follows:
Beginning at the Northwest corner of said subdivision; thence South 86°55' East along the North line of said subdivision 776.3 feet; thence South 0°07' West 746 feet; thence South 31°09' East 309.1 feet to the true point of beginning; thence South 1°42' West 40.6 feet; thence South 38°35' West 214 feet; thence South 0°17' West 139.8 feet to the South line of said subdivision; thence South 86°33' East along said South line 521.5 feet to the Southeast corner of said subdivision; thence North 0°03' West along the East line of said subdivision 304.4 feet; thence North 74°36' West 251.1 feet; thence Westerly to the true point of beginning.

EXCEPT from the above described property the following:
That portion of the Southwest quarter of the Northeast Quarter of Section 32, Township 10 North, Range 23, E.W.M., described as follows:
Commencing at the Southeast corner of said Northeast quarter;
thence North 86°50'00" West along the South line thereof 1324.34 feet to the Southeast corner of the Southwest quarter of the Northeast quarter;
thence North 00°07'30" West along the East line of said subdivision 626.95 feet to the point of beginning;
thence continuing North 00°07'30" West, 409.64 feet;
thence North 86°12'36" West, 166.62 feet;
thence South 3°50'18" West, 230.80 feet;
thence South 43°48'24" East, 263.79 feet to the point of beginning;
together with access in utility easement over and across the South 626.95 feet of the East 20 feet of the above released property.

SUBJECT TO a limited, non-exclusive easement way thereover for the benefit of and appurtenant to the adjoining and other nearby parcels to the west, for residential access from East Allen Road to Lot 3 of Short Plat No. 90-148 recorded under Auditor's File No. 2910167 for a single residence and associated outbuildings situated thereon, and for access to Lots 1 and 2 of Short Plat No. 90-147 recorded under Auditor's File No. 2910166 and to Lots 1 and 2 of Short No. 90-148 recorded under Auditor's File No. 2910167, records of Yakima County, for reasonable farming practices conducted thereon, which easement is legally described as follows:

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Beginning at a point on the East boundary of Lot 2, Short Plat No. 90-147, records of Yakima County, Washington, North 3°41'30" East 78.00 feet from the Southeast corner of said Lot 2, then North 6°03'00" East 343.15 feet, then North 3°00'00" East 128.50 feet, then North 3°51'00" East 463.00 feet, then North 86°50'00" West 13.84 feet to the East boundary of Lot 3 of Short Plat No. 90-148, records of Yakima County, Washington, then South 3°41'30" West along the East boundary of said Lot 3 and the East boundary of Lots 1 and 2 of said Short Plat No. 90-147 934.23 feet to the point of beginning.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the use of said easement way by the Plaintiffs Gamboa and their successors in interest shall not interfere with the reasonable use of same by the Defendants Clark and their successors in interest. Furthermore, the Plaintiffs Gamboa and their successors in interest shall have the responsibility of maintaining the easement way more or less in its present condition, with the exception that if the use of the easement way by the Defendants Clark or their successors in interest increases beyond its current use for the Clarks' farming activities in connection with their vineyard, then the Defendants Clark and their successors in interest shall share equitably in the responsibility for maintenance of said easement way. In addition, the Plaintiffs Gamboa and their successors in interest shall make no improvements to the easement way that would interfere with the Clarks' cultivation of their land or which would substantially increase the Yakima County Assessor's valuation of the Clarks' parcel, such as paving or curbing, without first obtaining the written consent of the Defendants Clark or their successors in interest.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the express easement recorded February 14, 1964 as Auditor's File No. 1984788 remains valid.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that Plaintiffs Gamboa are hereby awarded a money judgment against the Defendants Clark for their statutory attorney fees in the sum $200, plus Plaintiffs' other costs of suit in the sum $1,583.55 for a total money judgment in the amount $1,783.55, together with interest thereon at the rate of 12% per annum from date of entry of this Judgment until same is fully paid.

STOKES LAWRENCE
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YAKIMA, WASHINGTON 98901-2757
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DONE IN OPEN COURT this 2 day of ~~March,~~ April 2012.

RODNEY K. NELSON
Judge Pro Tem

Jointly Presented by:

3-29-12

DAVID A. THOMPSON (WSBA 13336)
Attorney for Plaintiffs

STOKES LAWRENCE
VELIKANJE, MOORE & SHORE

SEAN A. RUSSEL (WSBA 34915)
Attorneys for Defendants

STOKES LAWRENCE
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(509) 853-3000

IX. CERTIFICATE OF MAILING

The undersigned does hereby certify that on September 5, 2012, he served a copy of the Brief of Appellants upon Respondents, by depositing the same in the United States mail, first class postage prepaid, addressed to the following:

David A. Thompson
105 N. 3rd St.
P. O. Box 797
Yakima, WA 98907

Dated this 5th day of September, 2012 at Tacoma, WA.