IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

ANTHONY G. MALELLA, as his separate estate, 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, Defendants/Appellants, and LONA KEIST, individually and as Trustee of the LONA POULSEN REVOCABLE LIVING TRUST, Counter-claimant and Cross Claimant.	No. 40500-8-II UNPUBLISHED OPINION

Worswick, A.C.J. — Anthony Malella and Lona Keist[1] own abutting land in

[1] The Lona Poulsen Revocable Trust, of which Keist is trustee, holds title to the Keist property. Keist and her former husband, Harold Elkins, first acquired the property in 1952. In 1978, Keist transferred the property to her children and grandchildren (Steve, George, Meredith, and Marc Elkins) who transferred it to Edwin Hoffman, who transferred it back to Keist, all within one day.

Skamania County on the Washougal River near the Salmon Falls Road bridge. Keist's property lies generally to the east of the bridge, while Malella's property lies to the west of the bridge. A portion of the land titled in Keist lies to the west of the bridge, abutting the eastern boundary of Malella's land (the disputed property). Keist appeals the trial court's ruling that Malella or his predecessors acquired the disputed property by adverse possession and its order quieting title in Malella. Keist argues that Malella and his predecessors did not acquire title by adverse possession, or in the alternative, they did not adversely possess the entire disputed property. Because the findings of fact establish that, between 1963 and 1980, former owners Jack and Johanna Phillips obtained title to the disputed property by adverse possession, we affirm.

FACTS

Keist holds title to the disputed property which spans the Washougal River. The disputed property goes from the western edge of the bridge to the eastern boundary of Malella's property. To the south, the disputed property includes land on both the north and south banks of the Washougal River.

Malella purchased his land abutting the disputed property from Roger Dean Manwaring and Maynette Manwaring in 1990. The Manwarings purchased the land from William Crisman and Kimberly Bryan in 1981. Crisman and Bryan purchased the land from Jack and Johanna Phillips in 1980. And the Phillipses purchased the land from Jim Davis in 1963.

Keist transferred the property to the Lona Poulsen Revocable Living Trust in 1996. For simplicity, this opinion refers to the defendants collectively as "Keist."

When Jack Phillips purchased the Malella property, he believed he was purchasing the disputed property as well. Jack Phillips attempted to keep the public off the disputed property, posted "No Trespassing" signs, and began building a garage that encroached on the disputed property in 1964. There is a water source on the disputed property and Jack Phillips maintained both the water source and a path to reach it. He applied for water rights to this water source in 1973. The remainder of the disputed property was steep and covered with blackberries. Jack Phillips did not use this area, except to maintain a trail down the slope to the river. Though Jack Phillips considered it "an exercise in futility" to keep trespassers off the disputed property, he would chase them away or call the sherriff if they caused "trouble." Clerk's Papers (CP) at 29-30.

Beginning in 1963, George Elkins, Keist's son, posted some "No Trespassing" signs on the disputed property. This was the only use that Keist's family made of the property during the Phillipses' ownership. When the Manwarings acquired the property from Crisman and Bryan, they continued to treat the disputed property as their own. When Malella acquired it from the Manwarings, he also treated the disputed property as his own, and even ejected Keist and her licensees on several occasions.

Malella sued Keist and her codefendants to quiet title to the disputed property. Keist counterclaimed, seeking to quiet title in her name and to eject Malella. Following a bench trial, the trial court issued findings of fact and conclusions of law, awarding all of the disputed property to Malella under the doctrine of adverse possession. *Malella v Keist*, noted at 128 Wn. App. 1033, 2005 WL 1594375, at *2. But the trial court granted a prescriptive easement to Keist and

her successors, allowing Keist to access and to use the disputed property for fishing. *Malella*, 2005 WL 1594375, at *2. Malella appealed, Keist cross-appealed, and we reversed in an unpublished opinion. *Malella*, 2005 WL 1594375, at *3, *6.

We vacated the trial court's findings of fact, holding that they were insufficient to resolve the disputed facts and legal issues and did not justify awarding the entire parcel to Malella based on adverse possession. *Malella*, 2005 WL 1594375, at *6. We directed the trial court to enter new findings of fact (1) resolving the disputed facts and legal issues, (2) articulating the facts supporting a finding of adverse possession by Malella, and (3) delineating a legal description of any adversely possessed land. *Malella*, 2005 WL 1594375, at *6.

The trial court issued amended findings of fact and conclusions of law in March 2010. The trial court concluded that Malella and his predecessors obtained title to the disputed property by adverse possession and awarded Malella title to the disputed property west of the bridge and north of the center line of the Washougal River. Keist appeals.

ANALYSIS

I. Standard of Review

"To establish a claim of adverse possession, a party must show that her possession of the claimed property was (1) for ten years, (2) exclusive, (3) actual and uninterrupted, (4) open and notorious, and (5) hostile." *Harris v. Urell*, 133 Wn. App. 130, 136, 135 P.3d 530 (2006). The party claiming adverse possession bears the burden of establishing the existence of each element. *ITT Rayonier, Inc. v. Bell*, 112 Wn.2d 754, 757, 774 P.2d 6 (1989). "The trial court's findings

on the elements of adverse possession are mixed questions of law and fact. We review whether substantial evidence supports the trial court's challenged findings and, if so, whether the findings in turn support the trial court's conclusions of law and judgment." *Harris*, 133 Wn. App. at 137 (citation omitted).

Substantial evidence is evidence sufficient to persuade a fair-minded, rational person that a finding is true. *In re Estates of Palmer*, 145 Wn. App. 249, 265-66, 187 P.3d 758 (2008). We view the evidence in the light most favorable to the prevailing party and defer to the trial court regarding witness credibility and conflicting testimony. *Hegwine v. Longview Fibre Co.*, 132 Wn. App. 546, 556, 132 P.3d 789 (2006). "Unchallenged findings of fact are verities on appeal." *Merriman v. Cokeley*, 168 Wn.2d 627, 631, 230 P.3d 162 (2010).

Interpretation or construction of a trial court's findings of fact is a question of law. *In re Marriage of Stern*, 57 Wn. App. 707, 712, 789 P.2d 807 (1990) (citing *Callan v. Callan*, 2 Wn. App. 446, 448, 468 P.2d 456 (1970)). When the trial court's findings are susceptible of two constructions, one that supports the conclusions of law and one that does not, "the findings of fact must be construed in a manner which will support the trial court's conclusions of law." *Lincoln Shiloh Assoc., Ltd. v. Mukilteo Water Dist.*, 45 Wn. App. 123, 131, 724 P.2d 1083 (1986), 742 P.2d 177 (1987) (citing *Shockley v. Travelers Ins. Co.*, 17 Wn.2d 736, 743, 137 P.2d 117 (1943)). We do not read words or phrases from the findings and conclusions in isolation but, instead, read the findings and conclusions as a whole to ascertain their meanings. *See Callan*, 2 Wn. App. at 449. We read ambiguous findings in context with the trial court's other findings and

any oral ruling. *See Bennett Veneer Factors, Inc. v. Brewer*, 73 Wn.2d 849, 853, 441 P.2d 128 (1968).

We review questions of law and conclusions of law de novo. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003). We review conclusions of law erroneously labeled as findings of fact de novo. *Tae T. Choi v. Sung*, 154 Wn. App. 303, 313, 225 P.3d 425 (2010).

II. Elements of Adverse Possession

Keist argues that neither the Phillipses, the Manwarings, nor Malella obtained the disputed property by adverse possession. We hold that, because the Phillipses met the elements of adverse possession from 1963 until 1980, the Phillipses obtained title to the disputed property by adverse possession. Hence, it is not necessary to decide whether each subsequent possessor satisfied every element of adverse possession and we do not reach Keist's arguments relating to Malella and the Manwarings. *Hayden v. Mutual of Enumclaw Ins. Co.*, 141 Wn.2d 55, 68, 1 P.3d 1167 (2000) (quoting *State v. Peterson*, 133 Wn.2d 885, 894, 948 P.2d 381 (1997)) ("'Principles of judicial restraint dictate that if resolution of an issue effectively disposes of a case, we should resolve the case on that basis without reaching any other issues that might be presented.'"). Below, we address Keist's arguments as they relate to the Phillipses.

A. *Actual Possession*

Keist first argues that the Phillipses did not have actual possession of the disputed property. She argues that because the land leading down to the river is overgrown and impossible to use, the Phillipses did not actually possess it. She also argues that even if the Phillipses had actual possession of some of the disputed property, they did not actually possess the entire disputed property and that the trial court should have drawn boundaries conforming exactly to the areas they used. We disagree.

"It is well established in Washington case law that use must be such as an owner of the type of property in question would make." *Bryant v. Palmer Coking Coal Co.*, 86 Wn. App. 204, 210, 936 P.2d 1163 (1997). "What constitutes adverse possession of a particular tract of land depends on the nature, character and locality of that land, and the uses to which land of that type is ordinarily put." *Bryant*, 86 Wn. App. at 210.

Heriot v. Smith, 35 Wn. App. 496, 505, 668 P.2d 589 (1983), held that, considering the nature of the overgrown property at issue, "the one distinctive act of dominion and control that a true owner could assert . . . is to exclude others." In *Heriot*, because the claimant ejected the true owner each time he encroached on the disputed land, the claimant was in actual possession. 35 Wn. App. at 505.

1. *Actual Possession of the Land Leading to the River*

The Phillipses not only excluded others, but also maintained trails over the disputed property to access the river. Thus, while *Heriot* held that excluding others from overgrown land

was sufficient to demonstrate actual possession, the Phillipses did more than that. The Phillipses' use of the steep and overgrown portion of the property by maintaining trails and excluding others is precisely the use the true owner would have made. The Phillipses actually possessed the steep and overgrown portion of the property and Keist's argument on this point fails.

2. *Boundaries of Actually-Possessed Land*

Keist next argues that, even if the trial court properly found that the Phillipses adversely possessed the disputed property, the adversely possessed area should be limited to the areas they actually used: the encroaching portion of the garage, a filled parking area next to the garage (placed by Malella), a trail from the house to the water source, and a trail to the river. We disagree.

In awarding the entire disputed area north of the center line of the river to Malella, the trial court relied on *Lloyd v. Montecucco*, 83 Wn. App. 846, 924 P.2d 927 (1996). *Lloyd* holds,

> Courts may create a penumbra of ground around areas actually possessed when reasonably necessary to carry out the objective of settling boundary disputes. . . . [C]ourts will project boundary lines between objects when reasonable and logical to do so. Courts are not required to find a blazed or manicured trail along the path of the disputed boundary; it is reasonable and logical to project a line between objects when the extent of the adverse possessor's claim is open and notorious as the character of the land and its use require and permit.

83 Wn. App. at 853-54 (citations omitted).

Keist argues that *Lloyd* does not apply because there the claimants used virtually the entire disputed area, but here they used only a small portion. But *Lloyd* holds that courts may consider "the character of the land" when deciding what boundary is "reasonable and logical." 83 Wn.

App. at 854.

Here, as Keist repeatedly argues, the steep, overgrown portion of the disputed property that leads down to the river has virtually no reasonable use. The Phillipses made as much use as possible of this land by maintaining trails and excluding others. This is the use that a true owner would have made of the steep, overgrown area. Because the Phillipses were in actual possession of the entire disputed area, the trial court properly concluded that the Phillipses satisfied this element of adverse possession.

B. *Open and Notorious Possession*

Keist next argues that the trial court's findings do not support the conclusion that the Phillipses had open and notorious possession of the steep, overgrown land leading down to the river. We disagree.

Possession is open and notorious when (1) the true owner has actual notice of the adverse use throughout the statutory period or (2) the claimant and/or his predecessors use the land in such a way that any reasonable person would assume the claimant to be the owner. *Shelton v. Strickland*, 106 Wn. App. 45, 51-52, 21 P.3d 1179 (2001). "In other words, the claimant must show that the true owner knew, or should have known, that the occupancy constituted an ownership claim." *Anderson v. Hudak*, 80 Wn. App. 398, 405, 907 P.2d 305 (1995).

The Phillipses made the same use of the steep and overgrown portion of the disputed property that the true owner would have made. This included maintaining trails for accessing the river and excluding trespassers. Under these facts, Keist should have known that the Phillipses

were exerting ownership over the land.

Keist cites *Nome 2000 v. Fagerstrom*, 799 P.2d 304 (Alaska 1990), to support her argument that the Phillipses did not make open and notorious use of the disputed property. In *Nome 2000*, the Supreme Court of Alaska held that the claimant's using trails and picking up litter on the disputed property was insufficient to establish adverse possession because such activity was not open and notorious. 799 P.2d at 311. Here, in contrast, the Phillipses maintained a trail to the river, rather than simply using it, in addition to posting "No Trespassing" signs and keeping others off the property. Thus, *Nome 2000* is distinguishable and unpersuasive.

Keist also cites *In re Estate of Welliver v. Alberts*, 278 Ill. App. 3d 1028, 663 N.E.2d 1094 (Ill. App. Ct. 1996), to support her argument that the Phillipses' possession was not open and notorious. In *Estate of Welliver*, the Illinois Appellate Court held that the claimant had not adversely possessed wooded land by clearing, using, and maintaining trails on the land. 278 Ill. App. 3d at 1037. However, in holding that the claimant's possession was not open and notorious, *Estate of Welliver* relied on the fact that the claimant had not fenced the property or built any improvements, or excluded others. 278 Ill. App. 3d at 1037. It also relied on the rule that use of vacant or wild and undeveloped land is presumed permissive in Illinois. *Estate of Welliver*, 278 Ill. App. 3d at 1037. Washington law does not require a claimant to fence or build improvements on wild land to establish open and notorious possession. A party need only make such use of the land as a true owner would, such that the true owner knows or should know of the adverse claim. And in adverse possession cases, Washington does not presume adverse use to be permissive

unless it was permissive at its inception. *Miller v. Anderson*, 91 Wn. App. 822, 825, 964 P.2d 365 (1998). Also, unlike the claimant in *Estate of Welliver*, the Phillipses excluded others from the disputed property. As such, *Estate of Welliver* is unpersuasive.

Keist cites no applicable law demonstrating that the Phillipses' possession of the land leading to the river was not open and notorious. We hold that the trial court properly concluded that the Phillipses met this element of adverse possession.

C. *Hostile Possession*

Keist further argues that the Phillipses' possession of the disputed property was not hostile. She first argues that the Phillipses built the encroaching garage with permission, negating the hostility element. She also argues that the Phillipses kept others off the disputed property in support of Keist's ownership, not hostile to it. We disagree.

Hostility in the context of adverse possession means that the claimant possesses the land as an owner, not in recognition of or subordination to the true owner. *Chaplin v. Sanders*, 100 Wn.2d 853, 857-58, 676 P.2d 431 (1984) (quoting *King v. Bassindale*, 127 Wash. 189, 192, 220 P. 777 (1923)). Permission from the true owner to occupy the land negates the element of hostility. *Miller*, 91 Wn. App. at 828 (quoting *Chaplin*, 100 Wn.2d at 861-62).[2]

To argue that the Phillipses had permission to build the encroaching garage, Keist

[2] Keist argues that "the use of property, at its inception, is presumed to be permissive." Br. of Appellant at 25 (quoting *Petersen v. Port of Seattle*, 94 Wn.2d 479, 486, 618 P.2d 67 (1980)). But this rule from *Petersen* applies to prescriptive easements, not adverse possession. In adverse possession, permission is presumed only where the initial use was permissive. *Miller*, 91 Wn. App. at 825.

challenges finding of fact 10.2, where the trial court found that no one told Jack Phillips that his garage encroached on Keist's property. At trial, on direct examination, Jack Phillips testified that nobody told him the garage was on Keist's property. On cross-examination, Keist's attorney asked Jack Phillips whether he remembered having a conversation where Keist and her husband said something like, "[T]hat looks awful close to the property line, what do you think?" Report of Proceedings (RP) at 67-68. Jack Phillips testified that he did not remember whether any such conversation occurred.

Keist points to evidence that she told Jack Phillips his garage was partly on her property but gave him permission to build there. But we defer to the trier of fact to resolve conflicting testimony. The trial court resolved the conflicting testimony in Malella's favor. Substantial evidence supports finding of fact 10.2 and Keist's argument on this point fails.[3]

Keist next argues that the Phillipses' posting "No Trespassing" signs and keeping others off the land was not hostile, because it supported Keist's ownership of the land. But the findings of fact show that the Phillipses treated the disputed property as their own. They did not post "No Trespassing" signs and police the disputed property on Keist's behalf. Rather, they did so to

[3] Keist also argues that finding 10.2 regarding the garage is invalid under the law of the case doctrine. Keist points to the trial court's original findings of fact, which found that Keist told Phillips that the garage encroached on her property. Keist argues that because this finding was not challenged in the first appeal, this became the law of the case, citing *Beggs v. City of Pasco*, 93 Wn.2d 682, 685, 611 P.2d 1252 (1980). But in the previous appeal, we vacated all findings of fact and instructed the trial court to issue new findings that resolved the disputed facts and legal issues. *Malella*, 2005 WL 1594375, at *6. Keist cites no authority for the proposition that vacated findings of fact can be the law of case, nor does she provide any compelling argument why we should treat vacated findings of fact as verities on appeal.

assert ownership of the disputed property, which they showed by using the disputed property as a true owner would have. Their posting of "No Trespassing" signs and policing the property was hostile to, not supportive of Keist's ownership of the disputed property. Lacking any basis in law or fact, Keist's argument on this point fails. We hold that the trial court properly concluded that the Phillipses satisfied the hostility element of adverse possession.

D. *Exclusive Possession*

Keist next argues that the Phillipses did not have exclusive possession of the disputed property. Keist first challenges the trial court's findings of fact regarding the Phillipses' exclusive possession. She then argues that the trial court's findings do not support the conclusion that the Phillipses had exclusive possession of the disputed property. We hold that the findings support the conclusion that the Phillipses had exclusive possession for at least 10 years.

The critical requirement of exclusivity is that the claimant not share possession with the true owner. 17 William B. Stoebuck, Washington Practice: Real Estate: Property Law § 8.19, at 541 (2d ed. 2004). Nor may the claimant share possession too much with third persons who are there without the claimant's consent. 17 Stoebuck, *supra*, § 8.19, at 541. However, "trifling encroachments" by the true owner are not sufficient to negate the exclusivity element. *Crites v. Koch*, 49 Wn. App. 171, 175, 741 P.2d 1005 (1987). Moreover, "[a]n occasional, transitory use by the true owner usually will not prevent adverse possession if the uses the adverse possessor permits are such as a true owner would permit a third person to do as a neighborly accommodation." *Lilly v. Lynch*, 88 Wn. App. 306, 313, 945 P.2d 727 (1997) (internal quotation

marks omitted) (quoting 17 William B. Stoebuck, Washington Practice: Real Estate: Property Law § 8.19, at 516 (1995)).

Keist argues that the Phillipses lacked exclusive possession because Mr. Stelter, a neighbor, also tried to control the disputed property and because Keist's son, George Elkins, posted "No Trespassing" signs on the disputed property. We disagree.

1. *Possession by Mr. Stelter*

Keist challenges finding of fact 10.2 where it reads, "During his ownership of the real property, to the exclusion of all others, Jack Phillips . . . attempted to keep the public off the property, [and] posted no trespassing signs . . . ." CP at 29. Keist asserts that unchallenged finding of fact 10.6 contradicts this finding to the extent that the trial court found that a neighbor, Mr. Stelter, "also tried to control the usage below the bridge." Br. of Appellant at 16. Substantial evidence supports finding of fact 10.2.

At trial, Malella's attorney asked Jack Phillips whether anyone else tried to control the disputed property. Jack Phillips's answer was unclear. He testified, "Not below the bridge. Uh, Stelter, down below the bridge, below me . . . I think he tried to control 'em a little bit." RP (Sept. 29, 2003) at 61. In finding of fact 10.6, the trial court did not find that Stelter tried to control the usage of the disputed property but, rather, that he tried to control the usage below the bridge. Thus, although Jack Phillips's testimony was somewhat contradictory, the trial court resolved this conflict by finding that Stelter tried to control land below the bridge, but not the disputed property itself. We defer to the trial court on conflicting evidence. Substantial evidence

supports finding of fact 10.2.

Keist argues that because Stelter also tried to control the property, the Phillipses did not have exclusive possession of the disputed property. But because substantial evidence supports finding of fact 10.2, and the trial court found that only the Phillipses attempted to keep the public off the property, Keist's argument on this point fails.

2. *"No Trespassing" Signs*

Keist also asserts that unchallenged finding of fact 24.6, contradicts finding of fact 10.2. "Beginning in 1963, George Elkins posted 'No Trespassing' signs both above and below the bridge; he does not know how many, they were torn down." CP at 43. The record reflects that George Elkins began posting "No Trespassing" signs on the disputed property in 1963. RP (Sept. 30, 2003) at 417. As such, substantial evidence does not support the finding that Jack Phillips posted "No Trespassing" signs on the disputed property "to the exclusion of all others."

Keist argues that because George Elkins posted "No Trespassing" signs during the Phillipses' ownership, the Phillipses did not have exclusive possession of the disputed property. But these signs never ejected the Phillipses, who continued to use the land as its true owner throughout their ownership. The Phillipses' exclusive possession might have been negated if Keist had used the property as its true owner and thus shared possession with the Phillipses, or if she had excluded others, especially the Phillipses. But the record reflects that Elkins's "No Trespassing" signs did not exclude anyone, least of all the Phillipses, and that Keist made no use of the disputed property during the Phillipses' ownership. Keist cites nothing to support her

argument that “No Trespassing” signs alone can negate the element of exclusive possession. Keist’s argument on this point fails.

ATTORNEY FEES

Malella requests attorney fees on appeal, but he cites no applicable law entitling him to such. RAP 18.1(b) requires a party to submit argument and citation to authority entitling it to attorney fees on appeal. *Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 493, 200 P.3d 683 (2009). We deny his request for attorney fees.

We hold that the Phillipses obtained title to the disputed property by adverse possession between 1963 and 1980. We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Worswick, A.C.J.

We concur:

Armstrong, J.

Quinn-Brintnall, J.