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SUPREME COURT
STATE OF WASHINGTON
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No. 101624-7

IN THE SUPREME COURT OF WASHINGTON

DAVID LARSON and TERESA LARSON,

Respondents,

v.

JASON H. WALTERS,

Petitioner.

PETITION FOR REVIEW

Seeking review of the Court of Appeals, Division III's Decision in No. 383601, unpublished, dated December 13, 2022.

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2. The Court of Appeals erred in failing to address the sufficiency of the evidence to support mutual acquiescence or adverse possession, notwithstanding CR 52(b) and RAP 2.5(a) which automatically preserved it for review, and which Petitioner raised. See *Merriman,* 168 Wn.2d at 631-32; CR 52(b); RAP 13.4(b)(1). 5

3. Rather than analyze the defense preserved on mutual acquiescence, the Court of Appeals wrote, "...Because we affirm the trial court's disposition as to adverse possession, we need not review this claim." This decision is in conflict with *Lilly v. Lynch,* 88 Wn. App. 306, 945 P.2d 727 (1997). See RAP 13.4(b)(2). 5

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I. IDENTITY OF PETITIONER

Petitioner Jason Walters seeks review of the decision described in Section II below.

II. COURT OF APPEALS DECISION

A copy of the Decision by Division III of the Court of Appeals, issued December 13, 2022, is attached to this Petition as an Appendix.

III. ISSUES PRESENTED FOR REVIEW

1. The Court of Appeals' decision conflicts with a decision of this Court by ignoring the elements of mutual recognition and acquiescence as set forth in *Merriman v. Cokeley,* 168 Wn.2d 627, 630 (2010). See RAP 13.4(b)(1).
2. The Court of Appeals erred in failing to address the sufficiency of the evidence to support mutual acquiescence or adverse possession, notwithstanding CR 52(b) and RAP 2.5(a) which automatically preserved it for review, and which Petitioner raised. See *Merriman,* 168 Wn.2d at 631-32; CR 52(b); RAP 13.4(b)(1).
3. Rather than analyze the defense preserved on mutual acquiescence, the Court of Appeals wrote, "...Because we affirm the trial court's disposition as to adverse

possession, we need not review this claim." This decision is in conflict with *Lilly v. Lynch*, 88 Wn. App. 306, 945 P.2d 727 (1997). See RAP 13.4(b)(2).

IV. STATEMENT OF THE CASE

A. Summary of the Case.

In 2012, Respondent recorded a professional survey showing, inter alia, that his property line ended where his neighbor's vegetation began. In 2016, Petitioner inherited from his father the property adjacent to Respondent. Several months after inheriting the property, Petitioner pruned the vegetation. Respondent then claimed, for the first time in writing, that the property and vegetation Petitioner inherited actually belonged to Respondent due to an undisclosed adverse possession, or undisclosed mutual acquiescence, alleged to have occurred in the early 1990s, with previous owners, notwithstanding the professional survey Respondent had commissioned and had recorded in 2012.

Relying on nothing more than hearsay testimony by Respondent that several now dead persons orally gave Respondent the property 20 years prior, and disregarding the

recorded survey commissioned by Respondent, the trial court found both adverse possession and timber trespass.

The evidence before the trial court was woefully inadequate to establish either an adverse possession taking 20 years before trial, or an entitlement to timber trespass treble damages, and the Court of Appeals erred in refusing to consider the lack of sufficiency pursuant to CR 52(b) and RAP 2.5(a), despite it being raised on review by Petitioner. See *Merriman*, 168 Wn.2d at 630-32 ("An appellate court reviews a trial court's findings of fact for substantial evidence in support of the findings."). Review should be granted pursuant to RAP 13.4(b)(1), as the Decision is in conflict with *Merriman*, *supra*. Sufficiency of the evidence to establish a private taking of private property was preserved by court rule, the evidence at trial was actually insufficient, and the Court of Appeals erred in refusing to evaluate whether the evidence was sufficient to support a private taking, and instead deferred without analysis or evaluation to the trial court.

B. Larson Commissioned A Professional Survey Which He Had Recorded In 2012, And Which Confirms The Original Property Lines.

In 2012, Larson commissioned and had recorded a professional survey, which provides:

> This survey was originally commenced in 1996 to pursue a boundary adjustment with the adjoiner to the south to resolve the discrepancy between the southerly fence and the property line along the south. At that time, all fence lines were accurately tied, and I produced a map that, since the boundary adjustment was never executed, was never filed. This survey repeats our work in 1996, and provides additional information and topographic ties.

(Ex 9, recorded November 2, 2012)

> The rebar and aluminum cap at the east 1/4 corner was set by us during a survey for Orchard in 1997. At the time of our prior work, we discovered an ancient stone, as Established by Zahner in 1876. In 1997 we replaced said stone with an iron monument. As such, the location of the east 1/4 corner, the point of commencement in the deed for Larson, is indisputable.
> **In this survey we have re-established the original boundaries as described in Larson's deed. As shown herein, the edge of the lawn along the east line of Larson's property, roughly follows the deed boundary.** There is no evidence of the prior fence along Larson's north line; however, for reference, I have shown its prior location on this survey, as [it] was tied in 1996.

(Id.) (emphasis added).

C. Jack Walters Obtained The Walters Property In 1999.

The Walters Property is an irregularly shaped 22.45-acre rural-residential lot located in Walla Walla County. (Ex 3, 5, and 7; see CP 70 – 71) Jack Walters obtained the property on July 21, 1999. (Ex 3; see CP 70)

D. Petitioner Jason H. Walters, Jack's Grandson, Inherited The Walters Property In 2016.

The Estate transferred the Walters Property to Jason H. Walters, individually, via a Personal Representative's Deed signed and recorded on July 26, 2016. (Id.)

E. Larson Commenced Suit On December 9, 2016, Claiming To Have Adversely Possessed A Portion Of Walters' Property Because A Fence Existed Years Ago On The Western Property Line.

On December 9, 2016, Larson commenced suit against Walters. (CP 3-13) The Complaint alleged that because a fence used to exist on the Walters – Larson property line, Larson was entitled to shift that property line 4 feet in his favor. (CP 4 – 6)

Walters' Answer, Affirmative Defenses, and Counterclaims was signed December 29, 2016, and filed *pro se* by Jason Walters. (CP 14 – 22) Walters' Answer notes that since 1999 when his family obtained the Walters Property, there had

never been a fence, nor evidence of a prior fence, at the location complained-of by Larson, and raised affirmative defenses including the statute of limitations. (Id.)

On October 31, 2017, Larson filed an Amended Complaint, which re-iterated the claim as to the western property line (called "disputed area 1" by Larson), and added a second claim, asserting for the first time that Larson had adversely possessed a portion of the Walters Property along the eastern property line (called "disputed area 2" by Larson). (CP 46 – 57)

The Answer to the Amended Complaint, in addition to incorporating by reference the prior Answer, Affirmative Defenses, and Counterclaims, asserts that the statute of limitations had run, and also that even if Larson's allegations were true, then Walters had adversely re-possessed the property back to the original property lines. (CP 58 – 63)

F. A Bench Trial Was Conducted On May 18 and 19, 2021.

1. Plaintiff Larson's Case in Chief.

Larson's case in chief was largely comprised of his own testimony concerning fifteen (15) proposed trial exhibits (RP Vol. I at p. 12 *l* 19 ~ 111 *l* 9), as well as testimony from his son

Nathan, his wife Teresa, their former attorney Jarad Hawkins, and non-party Wm. "Tex" Hunter. (See RP Vol. I at p. 3 *ll* 6 – 17)

Ex 5 is the July 26, 2016, deed transferring the property from the Estate to Jason H. Walters. (CP 70; RP Vol. I at p. 26 *l* 21 ~ 27 *l* 25, p. 209 *l* 15 ~ 211 *l* 8)

Ex 8, not a survey and not from 1996, was identified by Larson as "2009 Survey of Larson Property – Author: Unknown." (CP 71) It is an unsigned hand drawing, which appears to read "Copied 2/21/14" in the bottom right corner. It bears neither the stamp nor the signature of a Professional Land Surveyor. RCW 58.09.030, .080. The drawing by "Unknown" is not recorded and does not meet the requirements to be recorded. RCW 58.09.050.

Ex 9, identified as "2012 Survey of Larson Property," was recorded at the behest of Larson by Professional Land Surveyor Paul W.P. Tomkins on November 2, 2012. (CP 71)

Larson admitted that he and his son installed the stakes and string depicted in their photos from 2016, and not the surveyor. (RP Vol. I at p. 54 *l* 14 ~ 55 *l* 7; 109 *l* 21 ~ 111 *l* 9)

Larson further claimed that the survey was wrong, and that there was in fact a fence along Larson's east property line, not depicted in the survey. (RP Vol. I at p. 45 *l* 12 ~ 46 *l* 8) But, Larson claimed he removed that fence himself in 1996. (RP Vol. I at p. 81 *l* 22 ~ 82 *l* 24)

Larson also claimed that the survey is wrong, and that there were remnants of the fence on Larson's north property line still visible. (RP Vol. I at p. 53 *l* 10 ~ 54 *l* 1; 142 *l* 12 ~ 144 *l* 5)

Larson also testified, contrary to the survey, that his belief was he owned trees and vegetation along the east line of his property. (RP Vol. I at p. 62 *l* 3 ~ 62 *l* 13)

Larson testified that the "prior fence along Larson's north line" referenced in the Tomkins Survey was removed in 1999, was 'replaced partway' in 2007, and was "pushed over" in 2009. (RP Vol. I at p. 34 *l* 16 ~ 36 *l* 2; 38 *l* 17 ~ 38 *l* 25)

Larson claimed to have evidence showing Walters cutting down trees, shrubs, and other vegetation on the Larson Property, but when asked where it is, Larson testified "I don't know." (RP Vol. II at p. 267 *l* 12 ~ 268 *l* 12)

Ex 10, identified as "Diagram of Disputed Areas," was prepared by Larson's son, and merely represents Larson's opinion. (RP Vol. I at p. 57 *l* 21 ~ 58 *l* 11; 136 *l* 13 ~ 137 *l* 6)

Ex 11 and 12 are identified as "Legal Description of Disputed Area 1" and "Legal Description of Disputed Area 2", by author "Unknown," on date "Unknown." (CP 71) One of the legal descriptions was attached to Larson's December 2, 2016, Complaint. (CP 13) Larson claimed at trial that Ex 11 and 12 were prepared by "Skyline Surveying." (RP Vol. I at p. 58 *l* 12 ~ 59 *l* 17)

Ex 13 is a series of photographs taken by Larson and his son, beginning in 2016. (CP 71; RP Vol. I at p. 92 *l* 18 ~ 99 *l* 20; 101 *l* 11 ~ 109 *l* 4; 109 *l* 15 ~ 109 *l* 20) Larson and son admit to altering the photos with software, and that the property lines depicted are their personal opinions, and not the result of a professional survey. (RP Vol. I at p. 155 *l* 4 ~ 157 *l* 13) Walters testified as to each picture in Ex 13 and explained how they only depict Larson's desired property line, and not the line confirmed by the 2012 Tomkins Survey. (RP Vol. I at p. 169 *l* 14 ~ 176 *l* 16; 178 *l* 18 ~ 187 *l* 15)

Ex 14 are two pages of estimates from a landscaping company, for removing stumps and replacing trees, from 2018. (CP 71; RP Vol. I at p. 62 *l* 14 ~ 64 *l* 19) Larson testified that the trees he seeks damages for being removed, were removed in September and October of 2016. (RP Vol. I at p. 90 *l* 3 ~ 91 *l* 23)

2. *Defendant Walters' Case in Chief.*

Walters' case in chief was comprised of a series of 18 Exhibits (See CP 76 – 77; 222 – 23; RP Vol. I at p. 5 *l* 23 ~ 6 *l* 3; 168 *l* 13 ~ 169 *l* 13; 187 *l* 16 ~ 199 *l* 9), and testimony from himself, his wife Jennifer Ansorge, his aunt Deetta Walters-Clark, and Nora Parkhurst. (See CP 235 *ll* 11 – 19)

The Record provides that Walters' exhibits were offered and admitted as Ext 16, with 18 subparts (Tabs). (RP Vol. I at p. 5 *l* 23 ~ 6 *l* 3) However, the Index to Supplemental Clerk's Papers refers to the Trial Exhibit List as the "Memorandum of Missing Papers (Exhibit List)." (See CP 222 – 23) Fortunately, many of the tabs to Exhibit 16 had already been made part of the record. (Compare CP 76 – 77 [Def. Trial Exhibit List] with CP 39 – 42 [Tab 4]; CP 33 [Tab 6]; CP 34 – 37 [Tab 7]; CP 44 – 45 [Tab 8]; CP 26 [Tab 9]; and CP 28-31 [Tab 11])

Jason Walters testified that his father James began living at the Walters Property in 2005 or 2006, before his grandfather Jack died. (RP Vol. I at p. 199 *l* 10 ~ 200 *l* 11)

The Walters family has paid the taxes owed on the Walters Property, including the "disputed areas" since acquiring the property in 1999. (RP Vol. II at p. 247 *ll* 14 – 17)

When Walters first started visiting the property, it was very overgrown, and he and his father and grandfather had to do a lot of clearing in order to get their shop to the lot. (RP Vol. I at p. 200 *ll* 12 – 23)

From when he first started visiting in 2005, Walters had never seen a barbed wire fence along the property lines with Larson, nor did he remove one. (RP Vol. I at p. 205 *ll* 7 – 21) Walters testified that there had not been a definitive property line at Larson's north line at any time since he began visiting in 2005. (RP Vol. I at p. 202 *l* 18 ~ 203 *l* 2) The only time Walters remembers the Larson north line / disputed area 1 cleared out was in 2009, when James Walters used a backhoe to scrape out a pad for the propane tank. (RP Vol. I at p. 205 *ll* 11 – 18) Walters does not recall ever meeting the Larsons while James Walters was

living at the Walters Property. (RP Vol. I at p. 199 *l* 10 ~ 200 *l* 11) After Jack died in 2009, James owned the property until 2014. (Id.) James' estate transferred the property to Jason. (Id.) Walters testified that he has seen no visible actions by Larson concerning the vegetation, or lack of fencing along either property line since Walters first started visiting the property in 2005. (RP Vol. II at p. 246 *ll* 7 – 13)

Nora Parkhurst testified that the vegetation along the property lines in the two "disputed zones" is the natural growth of native plants, in particular black hawthorne. (RP Vol. II at p. 251 *l* 4 ~ 252 *l* 24, p. 253 *ll* 10 – 23)

Tab 6 is a receipt for removing a tree on November 8, 2016, which was on the Walter Property as described by the Tomkins Survey. (CP 76, 33) As testified by Walters, Larson did not allege there was a "disputed area" until a month later, when suit was commenced. (Compare CP 3 with RP Vol. I at p. 189 *l* 24 ~ 190 *l* 5)

Tab 7 is a series of photographs depicting the survey corner markers, and that the tree from Tab 6 is fully within

Walters' surveyed property line. (CP 76, 34 – 37; RP Vol. I at p. 190 *l* 6 ~ 191 *l* 22)

Tab 8 is a set of photographs depicting tree sections left by Larson on Walters' property. (CP 76, 44 – 45; RP Vol. I at p. 191 *l* 23 ~ 192 *l* 9)

Tab 9 is a copy of a work order from 2009, when the propane tank was installed on the Walters Property. (CP 76, 26; RP Vol. I at p. 192 *l* 15 ~ 192 *l* 20, p. 211 *ll* 9 – 22) Larson did not complain about the 2009 propane tank installation until August 29, 2016, when Larson's prior attorney wrote a letter to the gas company. (See CP 76; RP Vol. I at p. 192 *l* 21 ~ 192 *l* 24) Walters testified that he did not know there was a problem with the propane tank, or a "disputed area," until receiving the letter from Larson's counsel. (RP Vol. I at p. 201 *l* 8 – 18) The propane tank was relocated as a consequence. (RP Vol. I at p. 215 *l* 17 ~ 220 *l* 16) Furthermore, upon receiving the letter, Walters trimmed back the natural vegetation near the property line using a machete, to clear space for a string line between survey monuments. (RP Vol. I at p. 201 *l* 19 ~ 202 *l* 17; 203 *ll* 3 – 25)

Tab 11 is a set of four (4) photographs depicting the location of the propane tank relative to the survey marker, and the tank's relocation in 2016, upon the pre-litigation demand made by Larson. (CP 77, 28 – 31; RP Vol. I at 192 *l* 25 ~ 197 *l* 19)

3. The trial court's ruling and post-trial orders.

After taking the matter under advisement, the trial court issued a brief ruling from the bench in favor of Larson, as follows:

> So, first of all, it's my finding that based on adverse possession, plaintiffs are granted area 1 and area 2, quiet title to that. The next issue is with reference to treble damages, and I don't find that there are any mitigating circumstances to the trouble damages, and so from that aspect, the treble damages are granted. And if I did the math correctly, that would be $151,599.30. And plaintiffs did petition for reasonable attorney fees, which will be granted. I just don't have a dollar amount at this time, and that will have to be presented.

(RP Vol. III at p. 289 *ll* 11 – 22)

A Judgment and Decree Quieting Title, and Findings of Fact and Conclusions of Law, were both entered on June 21, 2021. (CP 276 – 87) Walters moved for reconsideration on June 29, 2021 (CP 294 – 300) which was denied on July 21, 2021. (CP

353) Notice of appeal was timely filed on August 2, 2021. (CP 357 – 77).

The Court of Appeals issued an unpublished Decision (Appendix hereto) on December 13, 2022. This Petition for Review is timely filed January 12, 2023.

V. ARGUMENT

A. Standard of Review.

RAP 13.4(b)(1) vests jurisdiction with the Supreme Court when a decision of the Court of Appeals conflicts with a decision of the Supreme Court. The Decision here conflicts with this Court's Decision in *Merriman,* 168 Wn.2d at 630-32, as it failed to evaluate the sufficiency of the factual findings regarding a taking in light of CR52(b) and RAP 2.5(a). This Court reviews bench trial findings of fact supporting a changed boundary through mutual acquiescence for sufficiency of the evidence in light of the clear, cogent, and convincing standard.

"Whether adverse possession has been established by the facts as found by the trial court is a question of law reviewed *de novo. Happy Bunch, LLC v. Grandview North, LLC,* 1142 Wn.

App. 81, 88, 173 P.3d 959 (2007) (citing *Bryant v. Palmer Coking Coal Co.,* 86 Wn. App. 204, 210, 936 P.2d 1163 (1997)).

B. The Court Of Appeals Erred In Declining To Review The Sufficiency Of The Evidence Supporting the Legal Conclusion to Relocate Parcel Boundaries.

This Court held in *Merriman* that, "the party claiming title to land by mutual recognition and acquiescence must prove: (1) that the boundary line between two properties was, certain, well defined, and in some fashion physically designated upon the ground, e.g., by monuments, roadways, fence lines, etc." (quoting *Lamm v. McTighe*, 72 Wn.2d 587,). Rather than follow *Merriman*, the Court of Appeals declined review of this issue entirely, effectively ignoring CR 52(b), CR 46, and RAP 2.5(a). Walters raised this issue at trial, assigned it as error, but this error was not addressed.

As this Court explained in *Merriman,* these elements must be proven by clear, cogent, and convincing evidence. To meet this standard of proof, the evidence must show the ultimate facts to be highly probable. *Merriman* at 630-31 (quoting *Douglas*

Nw., Inc. v. Bill O'Brien & Sons Constr. Inc., 64 Wn. App. 661, 678, 828 P.2d 565 (1992)).

C. The Court Of Appeals Erred In Declining To Review The Sufficiency Of The Evidence And The Legal Conclusions Regarding Mutual Acquiescence & Monuments.

Rather than analyze the defense preserved on mutual acquiescence, the Court of Appeals wrote, "...Because we affirm the trial court's disposition as to adverse possession, we need not review this claim." This decision is in conflict with Division II in the case of *Lilly v. Lynch*, 88 Wn. App. 306, 945 P.2d 727 (1997).

In the settlement of boundaries, the mutual recognition and acquiescence doctrine supplements adverse possession. *Lilly* at 316 (quoting *Lloyd v. Montecucco*, 83 Wn. App. 846, 855, 924 P.2d 927 (1996) (citing STOEBUCK, §8.21 at 519) (emphasis added)). The burden of proof is on the plaintiff to show, by clear, cogent, and convincing evidence, that both parties acquiesced in the line for the period required to establish adverse possession – 10 years. *Lilly* at 317.

At trial, Larson testified that a fence existed years ago on the disputed property and was, therefore, entitled to shift that property line four feet in his favor. (CP 4-6). As *Lilly* dictates, mutual acquiescence is intended to supplement adverse possession.

D. The Court Of Appeals Erred In Declining To Review The Sufficiency Of The Evidence And The Legal Conclusions Regarding Adverse Possession.

Conclusion 2 states that Larson acquired disputed area 1 in 1991. Notwithstanding the statute of limitations, Conclusion 2 is in error because the 2012 Survey, commissioned and recorded by Larson, expressly re-established the property lines as they were originally.

> In absence of an agreement to the effect that a fence between the properties shall be taken as a true boundary line, mere acquiescence in its existence is not sufficient to establish a claim of title to a disputed strip of ground...it is necessary that acquiescence must consist in recognition of the fence as a boundary line.

Lamm v. McTinghe, 72 Wn.2d 587, 592, 424 P.2d 565, 568 (1967).

Where the disputed area is overgrown, more than isolated markers are required to prove a clear and well-defined boundary.

A fence, a pathway, or some other object or combination of objects clearly dividing the two parcels must exist. *Id.* at 593; *Merriman v. Cokeley,* 168 Wn.2d at 631 (finding the three widely spaced markers in this case, set in a thicket of blackberry bushes, ivy, and weeds, did not constitute a clear and well-defined boundary).

When a party obtains prescriptive rights, they must bring their prescriptive claim within ten years of those rights' accrual. RCW 4.16.020. Since the trial court's Conclusions 2 and 3 provide that Larsons' prescriptive rights were acquired in either 1991 or 1995 as to disputed area 1, and the claim was not brought until 2016, Conclusions 2 and 3 are time barred and contrary to the law, and should be reversed.

Similarly, Conclusion 4 provides that Larson obtained prescriptive rights in disputed area 2, 'by 2006 at the latest', and because the claim as to disputed area 2 was not commenced until 2017, Conclusion 4 is time barred and contrary to the law, and should be reversed.

Moreover, Walters' deed is consistent with the 2012 Survey recorded by Larson, and Walters and his predecessors

have been resident at the premises continuously for seven (7) years, and have paid taxes for the property as depicted in the 2012 Survey for more than seven (7) years. Consequently, by statute Walters has adversely re-possessed the property in question, even if Larson obtained prescriptive rights in 1991, 1995, and/or 2006. See RCW 7.28.050; RCW 7.28.070. The trial court's Conclusions 2, 3, and 4 should be reversed.

An adverse possessor's dominion over the land must be as exclusive as the community would expect of an ordinary title owner under the circumstances, including the land's nature and location. *Crites v. Koch,* 49 Wn. App. 171, 174, 741 P.2d 1005 (1987). The Claimant must have actual possession of the property. *Ofusia v. Smurr,* 198 Wn. App. 133, 143, 392 P.3d 1148 (2017).

Notoriousness means activities or objects are known, or discoverable if not actually known, to the true owner. "Open and notorious element of adverse possession requires proof that (1) the true owner has actual notice of the adverse use throughout the statutory period, or (2) the claimant (and/or predecessors) uses land in way that any reasonable person would assume that

person to be true owner." *Chaplin v. Sanders,* 100 Wn.2d 853, 862, 676 P.2d 853 (1984); *Shelton v. Strickland,* 106 Wn. App. 45, 51, 21 P.3d 1179 (2001).

Planting of trees is not itself sufficient to satisfy the element of open and notorious. *Anderson v. Hudak,* 80 Wn. App. 398, 907 P.2d 305 (1995).

Here, particularly in light of the 2012 Survey, Larson's use of the land near the property lines was not open, exclusive, actual, or hostile. Any fences along the property lines had been removed many years before 2016, and had not been replaced; and the 2012 Survey describes the legal and the actual property lines as being the same. Conclusions 3, 4, 5 and 8 are erroneous.

E. The Only Survey In The Record Supports Appellant And Demonstrates The Insufficiency Of The Trial Court Testimony To Support Adverse Possession Or Mutual Acquiescence Legal Conclusions.

The requirements of a proper land survey are governed by RCW 58.09.030, RCW 58.09.050, and RCW 58.09.080. On appeal, the Court of Appeals declined to address the entirety of the assignment of error regarding the 1996 survey.

The survey should not have been admitted at the time of trial for failure to comply with statutes governing proper surveys. Id. The admitted evidence is not a survey and is not from 1996. It was identified at trial by Laron as "2009 Survey of Larson Property – Author: Unknown." (CP 71). It is an unsigned, hand drawing, which appears to read, "Copied 2/24/14" in the bottom right corner. It bears neither the stamp nor the signature of a Professional Land Surveyor. RCW 58.09.030, .080. The drawing is not recorded and does not meet nearly any of the requirements to be recorded. RCW 58.09.050. Yet, at trial, Larson testified that the unsigned hand drawing was actually a professional survey from 1996 conducted by Paul Tomkins.

Larson testified that James Walters 'yanked out' the survey stakes and Tomkins replace them. He further testified that he saw Jason Walters, in 2017, remove survey stakes "in disputed area 2." (RP Vol. I at p. 55 l 8 ~ 56 l 16; 144 l 22 ~ 146 l 8).

Under cross examination, Larson admitted that it was, in fact, he and his son installed the stakes and string depicted in their photos from 2016, and not the surveyor. (RP Vol. I at P. 54 l 14 ~ 55 l 7; 109 l 21 ~ 111 l 9).

Larson later changed his testimony to be a survey conducted by a "Skyline Surveying." (RP Vol. I at p. 58 l 12 ~ 59 l 17). A series of photographs were presented at trial that were taken by Larson and his son, beginning in 2016. (CP 71; RP Vol. I at p. 92 l 18 ~ 99 l 20; 101 l 11 ~ 109 l 4; 109 l 15 ~ 109 l 20). Larson and his son admitted to altering the photos using software. The boundary lines were only their opinion. Findings 42 and 43 and Conclusion 6 hold that Walters lacked "lawful authority" to trim and remove vegetation, and that there were no mitigating circumstances. However, the 2012 Survey Larson commissioner and recorded establishes the locations of his property line, and Walters was entitled to rely upon the Survey, which gave him 'probable cause' to believe that the land was his. See RCW 64.12.040. Consequently, the trial court's imposition of treble damages should be reversed.

The evidence of surveys presented at trial flagrantly ignores the requirements of the law. The Court of Appeals declined to enforce this law and is, therefore, in error.

F. The Award of Costs and Fees to Larson should be Reversed; Costs and Fees for Trial and on Appeal Should be Awarded to Walters.

"A party may recover attorney fees and costs on appeal when granted by applicable law." *Oregon Mut. Ins. Co. v. Barton,* 109 Wn. App. 405, 418, 36 P.3d 1065 (2001); RAP 18.1. RCW 7.28.083(3) provides a statutory basis for the award of attorney fees to the prevailing party of an adverse possession claim on appeal. *Workman v. Klinkenberg,* 6 Wn. App. 2d 291, 308-09, 430 P.3d 716 (2018).

The trial court erred in awarding fees to Larson initially as the trial court erred in holding that adverse possession was established and that Larson was the prevailing party. Walters requests that the Court reverse the costs and fees award, and award him the costs and fees incurred as part of this appeal, as well as his costs and fees from trial.

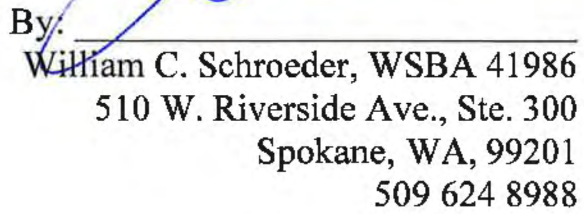
VI. CONCLUSION

For the foregoing reasons, Appellant requests that the Court accept review, and reverse the Decision of the Court of Appeals.

The foregoing has 4,817 allowable words, per RAP 18.17.

Submitted this 12th day of January, 2023.

KSB LITIGATION, P.S.



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APPENDIX

FILED
DECEMBER 13, 2022
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

DAVID LARSON and TERESA LARSON, husband and wife, Respondents, v. JASON H. WALTERS, a single individual, Appellant.	)	No. 38360-1-III UNPUBLISHED OPINION

PENNELL, J. — Jason Walters appeals a judgment quieting title in favor of David and Teresa Larson and awarding the Larsons treble damages for injury to trees, along with attorney fees and costs. We affirm the trial court's judgment as to the quiet title action and treble damages, but reverse and remand for findings on the attorney fee award.

FACTS

In 1981, David and Teresa Larson purchased property in Walla Walla County, Washington. The property was bordered to the north and east by property owned by Halford and Roberta Miller. At the time of their purchase, the Larsons' property was enclosed by a barbed wire fence. Soon after the Larsons purchased the property, they began making improvements to the land up to the northern fence by planting vegetation and installing above-ground irrigation.

In 1996, the Larsons commissioned a land survey revealing an inconsistency between the surveyed boundary and existing fence lines. On the northern fence line, in the area they had been maintaining, the fence line was approximately 4.5 feet to the north of the surveyed line, resulting in a gain to the Larson property (Area One). Once the Larsons realized the boundary was off, they informed Roberta Miller, who stated, "not to worry about it." Report of Proceedings (RP) (May 17, 2021) at 81. The 1996 survey also indicated the surveyed boundary line and the fence line on the eastern boundary were inconsistent, but the discrepancy favored the Millers. After informing the Millers, the Larsons removed the fence on the eastern side of their land. The Larsons then began planting trees and shrubs, spraying for weeds, and placing above-ground sprinklers in an area to the east of the removed fence line (Area Two). The Larsons' activities in Area One and Area Two were viewable from the Millers' property and the Millers did not object.

In 1999, Jason Walters's grandfather, Jack Walters, purchased the Millers' property. That same year, Jack removed most of the northern fence line. Jack Walters passed away in 2009, leaving his property to his son James Walters. James pushed over the remainder of the northern fence line in an attempt to prevent water from flooding his

property. During this period, no objections were made to the Larsons' activities in Area One or Area Two.

In 2012, Mr. Larson again commissioned a survey of the property. The survey identified the northern boundary of the Larson property consistent with that of the 1996 survey. The survey indicated where the fences had been in 1996, but noted that "there is no evidence of the prior fence along the Larson's north line." Clerk's Papers (CP) at 477 (some capitalization omitted). This survey was recorded.

James Walters died in 2014 and Jason Walters inherited the family property in 2016. The relationship between Jason Walters and the Larsons has been strained. The Larsons reported Jason to the authorities for illegal burning and discharge of firearms. They also alleged Jason trespassed onto their property and destroyed vegetation and trees.

In December 2016, the Larsons initiated an action in Walla Walla County Superior Court seeking to quiet title to Area One by reason of adverse possession and/or mutual acquiescence, and for trespass, ejectment, and damages. The Larsons later amended their complaint to include the claim they had adversely possessed Area Two. In his answer and affirmative defenses to the amended complaint, Jason Walters asserted the statute of limitations barred the Larsons' suit, denied knowledge of the northern fence, and sought

declaratory judgment acknowledging no such fence existed and that Jason Walters was the rightful owner of the two disputed areas.

Following a bench trial, the trial court quieted title in favor of the Larsons on alternate theories of mutual recognition and adverse possession. The court ejected Jason Walters from the property subject to the quiet title and found Mr. Walters wrongfully removed and damaged trees and other vegetation on the Larsons' property. The trial court awarded the Larsons treble damages in the amount of $151,599.30 and also granted the Larsons an award of attorney fees and costs.

Jason Walters has filed a timely appeal.

ANALYSIS

This case centers around a claim of adverse possession. We therefore provide a brief overview of Washington's law on adverse possession before addressing the parties' contentions.

"'Adverse possession . . . is a doctrine of repose; it says that at some point legal titles should be made to conform to appearances long maintained on the ground.'" *Campbell v. Reed*, 134 Wn. App. 349, 361, 139 P.3d 419 (2006) (*quoting* WILLIAM B. STOEBUCK & JOHN W. WEAVER, 17 WASHINGTON PRACTICE, REAL ESTATE: PROPERTY LAW § 8.1, at 504 (2d ed. 2004)). The doctrine permits "a party to acquire legal title to

another's land by possessing the property for at least 10 years in a manner that is '(1) open and notorious, (2) actual and uninterrupted, (3) exclusive, and (4) hostile.'" *Gorman v. City of Woodinville*, 175 Wn.2d 68, 71-72, 283 P.3d 1082 (2012) (quoting *ITT Rayonier, Inc. v. Bell*, 112 Wn.2d 754, 757, 774 P.2d 6 (1989)). "Hostile possession does not require the claimant to show enmity or ill-will only that [they have] possessed the land as owner, not as one who recognizes the true owner's rights." *Campbell*, 134 Wn. App. at 361.

"Title vests automatically in the adverse possessor if all the elements are fulfilled throughout the statutory period." *Gorman*, 175 Wn.2d at 72. "Once perfected, adverse possession title is legal title, though not paper title . . . . The adverse possessor may obtain paper title in the form of a court judgment that [they have] acquired title." 17 STOEBUCK & WEAVER, *supra*, § 8.6, at 514. "Because adverse possession is outside the recording acts, it does not need to be recorded: there is nothing to record." *Id.*

Statute of limitations

Jason Walters argues the Larsons' suit is time barred by the statute of limitations for adverse possession claims under RCW 4.16.020(1). Mr. Walters also argues that he adversely repossessed the areas in dispute under RCW 7.28.050 and RCW 7.28.070.

The Larsons raise legitimate concerns regarding whether Mr. Walters's arguments have been preserved for appeal. Nevertheless, Mr. Walters's contentions fail on the merits.

RCW 4.16.020(1)

RCW 4.16.020(1) is the principal statute of limitation governing adverse possession. This statute provides that an action for recovery of land adversely possessed by another must be commenced within 10 years from the date the adverse possession began. But once a 10-year period of adverse possession is complete, original title is extinguished and title automatically vests in the adverse possessor. *Ofuasia v. Smurr*, 198 Wn. App. 133, 148, 392 P.3d 1148 (2017). No legal action is necessary to perfect title. *Id.* A party acquiring land through adverse possession may file a quiet title action to obtain paper title, but quiet title actions are not subject to a statute of limitations. *Petersen v. Schafer*, 42 Wn. App. 281, 284, 709 P.2d 813 (1985).

Mr. Walters appears to claim that the Larsons cannot bring an adverse possession claim because they did not do so within 10 years from when the adverse possession began. This argument flips adverse possession on its head. The 10-year period for relief applies to the party challenging adverse possession (here, Mr. Walters), not to the adverse possessors (here, the Larsons). As found by the trial court, the Larsons acquired title to Area One and Area Two via adverse possession in 1995 and 2006, respectively. These

dates mark the end of the 10-year limitation for challenging the Larsons' adverse possession. Because neither Mr. Walters nor his predecessors in interest brought an action against the Larsons prior to 1995 and 2006, title automatically vested with the Larsons. The Larsons' quiet title action was not subject to a statute of limitations defense.

RCW 7.28.050 and RCW 7.28.070

Mr. Walters argues that regardless of whether the Larsons acquired Area One and Area Two by adverse possession, he re-obtained the property through his own actions of adverse possession pursuant to RCW 7.28.050 and RCW 7.28.070. We disagree.

RCW 7.28.050 and RCW 7.28.070 reduce the 10-year statute of limitation period to 7 years for an adverse possessor who possesses property under connected title or color of title and has paid applicable taxes. These two statutes do not operate independent of the four standard elements of adverse possession cited above in *Gorman*. 175 Wn.2d at 71-72. Neither statute entitles a claimant to adverse possession without also proving the four standard elements. *See Moon v. Tumwater Paper Mills Co.*, 157 Wash. 453, 455, 289 P. 24 (1930) ("A necessary element is actual, open, and notorious possession of the land for seven successive years.").

Mr. Walters and his predecessors may have paid taxes on the disputed properties and held colorable paper title. However, Mr. Walters has never asserted nor proved the

other necessary elements of adverse possession. Mr. Walters was not entitled to judgment in his favor under RCW 7.28.050 or RCW 7.28.070.

Evidentiary issues

Mr. Walters claims two evidentiary errors undermined the trial court's factual findings. First, Mr. Walters contends the trial court should not have admitted the 1996 land survey because it was not recorded. Second, he claims the trial court improperly relied on Ms. Miller's comment that Mr. Larson should not worry about the 1996 land survey and the parties' fence line.

We decline to review Mr. Walters's evidentiary claims as they are not properly preserved. *See* RAP 2.5(a). At trial, no objection was made to introduction of the 1996 land survey. And while there were some objections to Mrs. Miller's comments, Mr. Walters affirmatively introduced her statement during cross-examination of Mr. Larson. Given these circumstances, Mr. Walters waived review of any evidentiary error. *State v. Finch*, 137 Wn.2d 792, 819, 975 P.2d 967 (1999) (plurality opinion) (lack of evidentiary objection waives argument on appeal).

Sufficiency evidence

Mr. Walters appears to claim that the trial court's decision was not supported by substantial evidence because the Larsons' use of the disputed areas was not open and

notorious during the time that he lived on the property.

Mr. Walters's argument rests on a misunderstanding of the time period relevant to adverse possession. The trial court concluded the Larsons acquired title to Area One and Area Two via adverse possession in 1995 and 2006, respectively. This was before Jason Walters inherited the family property. Thus, it is irrelevant whether the Larsons met the requirements for adverse possession during the time period that Mr. Walters lived on the property. Sufficient evidence supports the trial court's findings with respect to adverse possession.

Treble damages

Part of the Larsons' requested relief in the quiet title action was treble damages under RCW 64.12.030 based on the removal of trees and shrubs from their land by Mr. Walters.

RCW 64.12.030 allows for treble damages in a timber trespass action "[w]henever any person shall cut down, girdle, or otherwise injure, or carry off any tree, . . . timber, or shrub on the land of another person . . . without lawful authority." Mitigating circumstances can reduce treble damages to single damages if the trespass "was casual or involuntary, or that the defendant had probable cause to believe the land on which such trespass was committed was his or her own." RCW 64.12.040.

Mr. Walters claims the trial court erroneously imposed treble damages because he reasonably believed he had ownership of the two disputed areas. Mr. Walters also denies that he ever went onto the Larsons' property beyond the two disputed areas in order to remove trees or vegetation.

Mr. Walters's challenges to the trial court's imposition of treble damages fail. The Larsons did not seek trespass damages for trees removed from the two disputed areas. During trial, the Larsons repeatedly clarified that they were seeking damages only for tree damage on their surveyed property. Furthermore, while the evidence at trial was contested, testimony from Mr. and Mrs. Larson indicated Mr. Walters had come onto the Larsons' surveyed property to remove trees and vegetation. The trial court was entitled to rely on this testimony. *See State v. Thomas,* 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004), *abrogated in part on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

While Mr. Walters has not articulated a valid objection to the trial court's award of treble damages, the Larsons' proof in support of the amount of treble damages is concerning. The Larsons submitted two invoices, documenting over $50,000 in repair costs to their property. Only one of the two invoices specified that the repair costs pertained to the Larsons' surveyed property—i.e., not the property within the two

disputed areas. In addition, the invoice that pertained to the Larsons' surveyed property included costs for items such as fencing that appear to be unrelated to a claim for trespass damage to timber under RCW 64.12.030. *See Nystrand v. O'Malley*, 60 Wn.2d 792, 796, 375 P.2d 863 (1962) (Treble damages are "strictly limited to damages resulting from the cutting or destruction of trees, timber or shrubs," not other property damage.). It appears that the Larsons' claim for trespass to timber may have been overstated. Nevertheless, Mr. Walters has not assigned error to this issue. The trial court's imposition of damages must therefore stand.

Mutual acquiescence

Mr. Walters challenges the trial court's alternate finding that the Larsons acquired ownership of Area One by reason of the doctrine of mutual recognition. Because we affirm the trial court's disposition as to adverse possession, we need not review this claim.

Attorney fee and cost award

RCW 7.28.083(3) allows for an award of attorney fees and costs in an adverse possession action. The trial court awarded fees and costs under this provision. On appeal, Mr. Walters claims the trial court's fee award was not supported by adequate findings. We review a fee award for abuse of discretion. *Chuong Van Pham v. Seattle City Light*,

159 Wn.2d 527, 538, 151 P.3d 976 (2007). We agree with Mr. Walters that the trial court abused its discretion in failing to justify its fee award.

The lodestar method is the applicable method for determining statutory attorney fees. *Mahler v. Szucs,* 135 Wn.2d 398, 433, 957 P.2d 632 (1998). This method involves analyzing the reasonableness of counsel's time spent in securing a successful recovery for the client. *Deep Water Brewing, LLC v. Fairway Res. Ltd.*, 152 Wn. App. 229, 282, 215 P.3d 990 (2009). "Courts must take an *active* role in assessing the reasonableness of fee awards" and "should not simply accept unquestioningly fee affidavits from counsel." *Mahler,* 135 Wn.2d at 434-35 (citing *Nordstrom, Inc. v. Tampourlos,* 107 Wn.2d 735, 744, 733 P.2d 208 (1987)). Findings of fact and conclusions of law are required to justify an attorney fee award under the lodestar method. *Mahler,* 135 Wn.2d at 435; *Bentzen v. Demmons,* 68 Wn. App. 339, 350, 842 P.2d 1015 (1993) (Specific findings of fact under the lodestar method are required to support a conclusion that the fees are reasonable.).

The trial court made the following two findings in support of its attorney fee and cost award:

> 49. Plaintiff's attorney's fees in the amount of $28,271.00 and costs in the amount of $758.43 charged by Hawkins Law, PLLC are found to be reasonable and are approved.
>
> 50. Plaintiff's attorney's fees in the amount of $12,800.00 and costs in the amount of $25.00 charged by Minnick-Hayner are found to be reasonable and are approved.

CP at 446.

The foregoing findings are inadequate. They are entirely conclusory, fail to acknowledge the lodestar methodology, and do not demonstrate an active and independent assessment of the reasonableness of the fees charged. This type of generalized fee award cannot be sustained on appeal. *See Deep Water Brewing*, 152 Wn. App. at 284-85. We reverse the fee award and remand for new findings. *Mahler*, 135 Wn.2d at 435; *see Chuong Van Pham*, 159 Wn.2d at 539-40.

Miscellaneous assignments of error

The table of contents to Mr. Walters's opening brief contains additional assignments of error. However, those assignments are not developed in the body of the brief and therefore do not merit consideration. *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992).

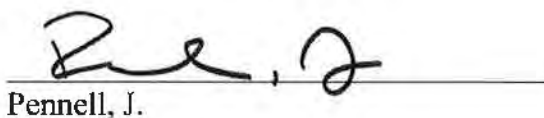
APPELLATE ATTORNEY FEES

Both parties request an award of attorney fees on appeal under RCW 7.28.083(3). We decline to award fees. Mr. Walters is not entitled to an award of fees as he has not prevailed on a claim of adverse possession. Although we have discretion to award fees to the Larsons, we decline to do so, particularly in light of the Larsons' sizeable treble damage award.

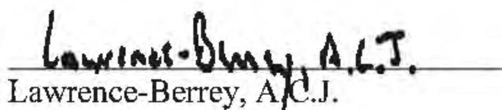
CONCLUSION

The trial court's award of attorney fees is reversed and remanded for findings and conclusions. The judgment is otherwise affirmed. Each party shall bear its own attorney fees on appeal.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.


Pennell, J.

WE CONCUR:


Lawrence-Berrey, A.C.J.

Staab, J.

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