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APPEAL NO. 68202-4-I

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

(Whatcom County Court Case No. 09-2-01773-1)

DAVID COTTINGHAM AND JOAN COTTINGHAM,

Appellants/Cross-Respondents,

vs.

RONALD MORGAN AND KAYE MORGAN,

Respondents/Cross-Appellants.

Respondent/Cross-Appellants' Opening Brief

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I – INTRODUCTION

David Cottingham and Joan Cottingham, husband and wife (Cottinghams), are residential neighbors of Ronald and Kaye Morgan, husband and wife (Morgans). In 1990, Cottinghams purchased Lot 10 of Nixon Beach Tracts on Lake Whatcom. They had previously purchased Lot 9. RP Vol. 1, pp. 153, 169. The south side of Cottinghams' Lot 10 abuts the north side of Lot 11. RP Vol. 2, p. 83.

In January of 2005, Morgans retained surveyor Larry Steele (Steele) to survey Lot 11 and place corner stakes in anticipation of purchasing Lot 11. RP Vol. 1, pp. 131-132; RP Vol. 2, p. 108. On January 11, 2006, Morgans acquired title to Lot 11 by statutory warranty deed. RP Vol. 2, p. 161; Ex. 3; Ex. 6.

In 2009, Cottinghams filed and served a Complaint that alleged they had acquired title to a portion of Morgans' Lot 11 by adverse possession and requested that the trial court quiet title to a portion of Morgans' Lot 11 in Cottinghams. Cottinghams further alleged that they owned a maintenance easement over a portion of Morgans' land by adverse possession. Cottinghams also sought

damages against Morgans for trespass, conversion, outrage and nuisance. Finally, Cottinghams asked for an injunction. CP 573. Morgans, by way of answer and counterclaim, asked the trial court to quiet title to all of Lot 11 in Morgans and asked the court to exercise its equitable powers in resolving the claims of the parties. CP 557.

In January of 2011, the trial court made and entered a partial summary judgment, which judgment quieted title to a pie shaped portion of Morgans' Lot 11 in Cottinghams. CP 389. Morgans moved for reconsideration of the trial court's partial summary judgment arguing, in part, that Cottinghams had not established adverse possession as a matter of law, and that all issues of equity, including the appropriate remedy or relief, should await trial. CP 373. Reconsideration of the partial summary judgment was denied in an Order wherein the trial court recommended that the neighbors continue their efforts to settle the matter through mediation. CP 714.

Trial was held beginning in December of 2011. At the conclusion of the trial the trial court made and entered findings of

fact and conclusions of law. Cottinghams' claims for a maintenance easement, injunctive relief, nuisance, and outrage were dismissed with prejudice. CP 117. The findings and conclusions quieted title in Lot 11 in Morgans upon the payment by Morgans to Cottinghams of $8,216.55. CP 112. Morgans were also ordered to pay Cottinghams $13,028.94 as treble damages for Morgans' removal of laurel bushes on Lot 11, valued at $4,342.98. CP 115; CP 105. Morgans delivered $21,245.49 to Cottinghams on January 9, 2012. CP 644. Cottinghams returned the check. CP 658. On January 17, 2012, Morgans deposited the $21,245.49 into the registry of the trial court. CP 657-59.

On January 30, 2012, Cottinghams began the process of asking this Court to review past and yet to be determined decisions of the trial court. CP 4. On or about July 16, 2012, Cottinghams filed an over length and improperly formatted Opening Brief. On or about August 6, 2012, Cottinghams filed their second Opening Brief. As with Cottinghams' numerous prior motions made to this Court, Morgans struggle to comprehend the issues raised in Cottinghams' Opening Brief. Cottinghams' Opening Brief often fails

to cite to the Clerk's Papers, the Report of Proceedings or identify the pleading for many of their assignments of error or factual arguments. Many of Cottinghams' legal arguments are advanced without authority. Therefore, it is nearly impossible to respond specifically to Cottinghams' assignments of error or arguments, as contained in their Opening Brief.

II – RESPONDENT/CROSS APPELLANT MORGANS' ASSIGNMENTS OF ERROR ON CROSS APPEAL

Morgans assign error to the following decisions of the trial court:

No. 1. The trial court erred when it entered an Order Granting Partial Summary Judgment on January 11, 2011 and made the following erroneous finding of fact or conclusion of law:

> 1. Decree should enter quieting title in plaintiffs to Nixon Beach Tracts Lot Ten including within the legal description of such lot all area south to and including the Maintenance Line from the Iron Pipe to the South Shoreland Alder according to Exhibit E (Dec. David C. Cottingham) designated therein as "Occupation and Maintenance Line as Per Cottingham (Request Dated 7/21/2008) S 59°04'35" W, 251.13", including area of the ten foot road found platted

within Nixon Beach Tracts plat where abutting such Lot Ten and south to such Maintenance Line between such decreed legal description and Burlington Northern Railroad Along Lake Whatcom Division One Lot Sixteen described as follows:

All that part of Tract 11 . . . .
Containing 703 Square Feet.

All Situate in Whatcom County, Washington." CP 390-391.

No. 2. The trial court erred when it entered an order granting Partial Summary Judgment on January 11, 2011 and made the following erroneous finding of fact or conclusion of law: "2. Decree should enter ejecting defendants, their heirs, successors assigns and agents from entry within the above property." CP 391.

No. 3. The trial court erred when it entered an order granting Partial Summary Judgment on January 11, 2011 and made the following erroneous finding of fact or conclusion of law: "4. Decree should enter ejecting and excluding defendants, their heirs, successors and assigns and improvements forever, from the above described area." CP 391.

No. 4. The trial court erred when it entered an order granting Partial Summary Judgment on January 11, 2011 and made the following erroneous finding of fact or conclusion of law:

> The Court notes Def's [sic] Motions to Strike. These are granted to the extent that the preferred declarations would violate either Hearsay or Deadman's Statute provisions of the ER's. The Defense has raised disputed legal conclusions, but no relevant issues of material fact. The adverse possession lasted well in excess of the statutory requirement. CP 392.

No. 5. The trial court erred, on December 30, 2011, when it made and entered Finding of Fact number 20: "Cottinghams have established that they adversely possessed 292.3 square feet of Lot 11." CP 112.

No. 6. Assuming this Court determines that Cottinghams did not establish adverse possession, the trial court erred, on December 30, 2011, when it made and entered Finding of Fact number 22: "Title in the disputed property, and all of Lot 11 should be quieted in Morgan upon the payment of $8,216.55 to Cottingham." CP 112.

No. 7. The trial court erred, in part, on December 30, 2011, when it made and entered Finding of Fact number 23; to wit, the court's finding that Cottinghams had acquired a portion of Lot 11 by adverse possession. CP 112.

No. 8. The trial court erred, on December 30, 2011, when it made and entered Finding of Fact number 27: "The laurel bushes removed by Morgans were clearly not theirs, regardless of their location or condition. Morgan committed the tort of conversion in taking them." CP 115.

No. 9. The trial court erred, on December 30, 2011, when it made and entered Finding of Fact number 28: "The fair market value to the replace the laurels is $4342.98." CP 115.

No. 10. The trial court erred, on December 30, 2011, when it made and entered Finding of Fact number 29: "The Morgans knew of the existence of a bona fide property line dispute but nonetheless intentionally removed the eight laurels in violation of R.C.W. 64.12.030. Therefore, damages should be trebled." CP 115.

No. 11. The trial court erred, on December 30, 2011, when it made and entered Conclusion of Law number 5: "The Cottinghams have established all elements of adverse possession by clear, cogent and convincing evidence as to the disputed area." CP 116.

No. 12. The trial court erred, on December 30, 2011, when it made and entered the following portions of Conclusion of Law number 7: "The actions of Morgans in removing the laurels constitute trespass and conversion. The Cottinghams shall have treble damages; the Court has no discretion in that regard. Maier v. Giske, 154 Wn.App. 6 (2010). . ." CP 116.

No. 13. If the trial court's Judgment of December 30, 2011 is deemed to include either findings or conclusions, the trial court erred in making and entering Order number 1: "For timber trespass waste under RCW 64.12.030, damages for which, at $4,342.98, are trebled for $13,028.94". CP 106.

No. 14. If the trial court's Judgment of December 30, 2011 is deemed to include either findings or conclusions, the trial court

erred in making and entering Order number 2: "For purchase of the 'disputed area' [for] $8,216.55." CP 106.

No. 15. The trial court erred, on February 1, 2012, when it failed to make and enter Morgans' proposed Amended Finding of Fact number 20: "Cottinghams have not established that they adversely possessed any portion of Lot 11." CP 637.

No. 16. The trial court erred, on February 1, 2012, when it failed to make and enter Morgan's proposed Amended Finding of Fact number 22: "Title in the disputed property, and all of Lot 11 should be quieted in Morgan." CP 637.

No. 17. The trial court erred, on February 1, 2012, when it failed to make and enter Morgan's proposed Amended Finding of Fact number 36: "Morgans returned possession of the Laurels to the Cottinghams." CP 638.

No. 18. The trial court erred, in part, on February 1, 2012, when it made and entered Conclusion of Law number 7: "The actions of Morgans in removing the five laurels constitute conversion." CP 638.

No. 19. If the trial court's Order Determining Finality entered on January 31, 2011 and filed on February 1, 2012, is deemed to include either findings or conclusions, the trial court erred in making and entering Orders numbered 1 and 2: "Now, therefore, It Is Ordered, Adjudged and Decreed that the court's January 3, 2012, Judgment, Finding and Conclusions, 1) Determine all claims and counterclaims and 2) Discontinue the action. . . ." CP 634.

III – ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did Cottinghams establish, at summary judgment, that it was undisputed by material facts that they had acquired title to, or any interest in, any portion of Lot 11 by adverse possession?

2. At trial, was there substantial evidence supporting any findings or conclusions that Cottinghams had acquired title to any part of Lot 11 by adverse possession?

3. If Cottinghams acquired a portion of Lot 11 by adverse possession, did the trial court appropriately apply equitable principles when it allowed Morgans to purchase back the disputed portion of Lot 11?

4. Assuming conversion of laurel bushes occurred, does Washington law provide for treble damages?

IV – STATEMENT OF FACTS

In 1990, Cottinghams purchased Lot 10. RP Vol. 1, pp. 153, 169. Sometime after 1990, Cottinghams planted laurel bushes on Lot 10, near the boundary line with Lot 11, after speaking with Gladys Cook. Cook was the owner of Lot 11 at that time. 12-7-11 RP, pp. 197-198. Cottinghams intentionally planted these bushes north of the lot line between Lots 10 and 11 to ensure that the bushes were located on Cottinghams' lot, Lot 10. 12-7-11 RP, pp. 197-198. David Cottingham took effort to make sure the bushes were on his lot because he did not want it to appear to Ms. Cook that he was attempting to take Ms. Cook's property. 12-7-11 RP, p. 195. In 1995, during the "growing season," Cottinghams planted more laurel bushes, which bushes were planted on Lot 11. CP 351, l. 21-24. These five bushes were the foundation of Cottinghams' adverse possession claim.

In 2004, Morgans first visited and inspected Lot 11 of the commonly known Nixon Beach Tracts in 2004. RP Vol. I, p. 78. At

summary judgment, Ron Morgan described ten visits to Lot 11 in 2004 and 2005 and declared that he "saw absolutely no evidence of any portion of Lot 11 having been maintained (including mowed) by anyone other than me." CP 465, ¶ 4.

In January of 2005, Morgans retained surveyor Larry Steele to survey Lot 11 and place corner stakes in anticipation of purchasing it. RP Vol. 1, pp. 131-132; RP Vol. 2, p. 108. Steele's 2005 survey depicted laurels planted in close proximity to the boundary line between Lot 10 and Lot 11, with the far east laurel bushes being located on Lot 11. Ex. 4; Ex. 15. In response to Cottinghams' summary judgment motion, Steele declared that in February 2005 the survey stakes were in place for anyone to see. CP 438. In his declaration Steele testified that:

> At no time between January 2005 and January of 2007, did I or anyone acting at my instruction and direction find any evidence of occupation by another, see evidence of any established boundary line, or witness or see evidence of any adverse occupation. Lot 11 was vacant, unoccupied and unimproved.

CP 437, 439, ¶5; RP Vol. 2, pp. 108, 111, 121-122.

After purchasing Lot 11 in January of 2005 for $285,000, Morgans spent more than $500,000 on improvements for a new home on Lot 11. 12-7-11 RP, pp. 164-165. At no time during the construction of Morgans' home or the north fence on the Steele survey line did Cottinghams suggest to Morgans that the Steele survey of the North line of Lot 11 was in error. 12-7-11 RP, p. 171. In the spring of 2007, Cottinghams informed Morgans that they did not agree with the survey markings that had been placed by surveyor Larry Steele in early 2005. RP Vol. I, p. 81.

In August 2007, Morgans began to have their septic system improved, utilizing the existing drain field. Dep. of Leo Day, pp. 12, 17. Cottinghams sent a series of letters to Whatcom County, complaining about Morgans' septic system. 12-7-11 RP, p. 158; Ex. 34. In 2011, several years after Morgans had constructed their home on Lot 11, Cottinghams sent several letters to Whatcom County regarding their allegations of setback violations on Lot 11. 12-7-11 RP, pp. 151-156; Ex. 32; Ex. 33. Again, Cottinghams did not make any complaints about any alleged setback violations at

the time Morgans were constructing their home in 2006-2007. 12-7-11 RP, p. 156.

Cottinghams' surveyor, Bruce Ayers (Ayers), agreed with the boundary line between Lots 10 and 11 as surveyed by Steele. RP Vol. 2, p. 83. Ayers' survey, which was generated at Cottinghams' request, was not intended to convey that the "occupation maintenance line" was being occupied or maintained by Cottinghams. RP Vol. 2, p. 91; Ex. 12. The "maintenance line" was labeled as such because it was a creation of the mind of Dave Cottingham. *Id.* Ayers does not establish property lines in his surveys based on the location of bushes. RP Vol. 2, p. 103.

In the fall of 2008, during the rainy season, Morgans noticed an odor and discoloration of water in the septic drain field. RP Vol. I, p. 18, 25. Morgans contacted Leo Day (Day) of Ultra Tank Services, the company who had installed the septic tanks and had done all of the testing of the existing septic field for compliance with the Health Department. RP Vol. I, p. 25. Day came out to Morgans' property to examine the septic drain field. RP Vol. I, pp. 26-27. During this examination, Day placed a pump in a hole he

dug and pumped out ground water onto the vacant lot south of Morgans' property owned by a third party. RP Vol. 1, pp. 32-33. Morgans, believing they were pumping ground water, briefly turned on the pump installed by Day, again pumping water onto the vacant lot south of Morgans' property. RP Vol. 1, p. 28-32. Thomas Pulver (Pulver), of Ultra Tank Services, ultimately determined that the drain field had failed because the original installation hadn't been installed deep enough and had missed the permeable layer by six inches. RP Vol. 1, p. 96. Pulver subsequently replaced the existing drain field once the wet weather had subsided in spring 2009. RP Vol. 1, pp. 94-95; Ex. 2.

In 2008, Steele again surveyed Lot 11 to locate the existing well, locate an old existing rebar, and to relocate the gravel driveway. RP Vol. 2, p. 112; Ex. 5. Steele's subsequent survey did not make any changes to the boundary line between Lots 10 and 11. *Id.*

In 2008, Morgans had eight (8) laurel bushes that were on Lot 11 removed with their root balls intact in order to allow Cottinghams a chance to replant the laurel bushes elsewhere on

Cottinghams' property. 12-7-11 RP, p. 177. Morgans notified Cottinghams, by letter, of the removal of the laurel bushes and their availability for replanting. 12-7-11 RP, p. 178; Ex. 28. After Morgans removed the bushes on Lot 11, to provide for adequate access to their house, Cottinghams sued Morgans. Ex. 28.

V – LEGAL ARGUMENT AND AUTHORITY

A. Partial Summary Judgment Was Entered Erroneously.

On appeal, a trial court's summary judgment is reviewed de novo. *Coppernoll v. Reed,* 155 Wn.2d 290, 296, 119 P.3d 318 (2005). Where the moving parties have failed to meet their burden of showing the absence of disputed material facts, summary judgment must be denied. *Safeco Ins. Co. v. Butler,* 118 Wn.2d 383, 823 P.2d 499 (1992). "A court must consider all facts and any reasonable inferences in the light most favorable to the nonmoving party." *Hubbard v. Spokane County,* 146 Wn.2d 699, 707, 50 P.3d 602 (2002).

> This court conducts de novo review to determine if the record before the superior court, with all facts and inferences considered in the light most favorable to ... the non-moving party, demonstrates that there is no

> genuine issue of material fact, and that ... [the moving party] is entitled to judgment as a matter of law. The motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion.

Cochran Elec. Co. v. Mahoney, 129 Wn.App. 687, 692, 121 P.3d 747 (Div. 1, 2005).

> A court will grant summary judgment only when there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *Wilson v. Steinbach,* 98 Wash.2d 434, 437, 656 P.2d 1030 (1982). The court must consider all facts submitted and all reasonable inferences from the facts in the light most favorable to the nonmoving party. *Wilson,* at 437, 656 P.2d 1030. The motion will be granted only if reasonable persons could reach only one conclusion from all of the evidence. *Wilson,* at 437, 656 P.2d 1030.

Hansen v. Friend, 118 Wn.2d 476, 485, 824 P.2d 483, 488 (1992).

The trial court summarily determined incorrectly that Cottinghams adversely possessed approximately 703 square feet of Morgans' Lot 11 along the boundary line between Lots 11 and 10 based on a row of young laurel bush planted by Cottinghams in 1995. CP 390-91. There were genuine issues of material fact regarding whether the laurel bush plantings were hostile, open, notorious, exclusive, and continuous. Even assuming the planting

of small bushes in 1995 was intended to be hostile, open, notorious and intended to exclude the owner of Lot 11 from occupying a portion of Lot 11, neither Morgans nor Steele were excluded from any portion of Lot 11 from their first entry in 2004. Cottingham did not, at summary judgment or at trial, provide evidence of occupation for ten years after the 1995 plantings.

B. Adverse Possession Was Not Established.

When reviewing the trial court's findings of fact and conclusions of law this Court first determines "whether substantial evidence in the record supports the findings of fact, and if so, whether those findings support the conclusions of law." *Tuyen Thanh Mai v. Am. Seafoods Co.,* 160 Wn.App. 528, 537-38, 249 P.3d 1030 (2011).

In Finding 20, the trial court erroneously found that "Cottinghams have established that they adversely possessed 292.3 square feet of Lot 11."[1] CP 112. This finding of adverse possession is not supported by substantial evidence. "Substantial

[1] Morgans do not dispute the square footage of 292.3, as found by the trial court.

evidence exists if a rational, fair-minded person would be convinced by it." *Id.*; *see also In re Estate of Palmer*, 145 Wn.App. 249, 265-66, 187 P.3d 758 (2008). In Conclusion of Law 5, the trial court erroneously concluded that "Cottinghams have established all elements of adverse possession by clear, cogent and convincing evidence as to the disputed area." CP 116.

To successfully establish an adverse possession claim, a party must show the possession was (1) open and notorious, (2) actual and uninterrupted, (3) exclusive, and (4) hostile for the statutory 10-year period. *Chaplin v. Sanders,* 100 Wn.2d 853, 857, 676 P.2d 431 (1984); RCW 4.16.020. Possession of the property with each of the necessary concurrent elements must exist for the statutorily prescribed period of 10 years. RCW 4.16.020. "[A]dversity is to be measured by an objective standard; that is, by the objectively observable acts of the user and the rightful owner." *Dunbar v. Heinrich*, 95 Wn.2d 20, 27, 622 P.2d 812 (1980).

The presumption of possession is in the holder of legal title. *Peeples v. Port of Bellingham,* 93 Wn.2d 766, 773, 613 P.2d 1128 (1980), *overruled on other grounds, Chaplin v. Sanders, supra.*

"[T]he party claiming ownership by adverse possession bears the burden of proving each element by clear, cogent and convincing evidence." *ITT Rayonier, Inc. v. Bell*, 112 Wn.2d 754, 757-58, 774 P.2d 6 (1989).

> But it is not every possession that will start the running of the statute. There is a presumption attending always, that one who enters into the possession of the property of another, enters with the permission of the true owner, and holds in subordination to his title. The statute begins to run from the date of possession, only when it is sustained by a hostile intent to claim adversely, or, where possession is taken by mistake, the intruder exercises such dominion over the property as to put the true owner upon notice of the hostile claim. As is said in the books: 'The disseisor 'must unfurl his flag on the land, and keep it flying, so that the owner may see, if he will, that an enemy has invaded his domains, and planted the standard of conquest." 1 R. C. L. 693.

People's Sav. Bank v. Bufford, 90 Wash. 204, 206, 155 P. 1068 (1916).

1. Hostile

A record owner's "neighborly sufferance or acquiescence" to his neighbor's reasonable use of his unenclosed land does not meet the requirement of hostile possession. *Roediger v. Cullen*, 26 Wn.2d 690, 707, 175 P.2d 669 (1946). "The law will presume that

the land belongs to the owner of the paper title, and that the use was by permission or silent acquiescence." *Id.* at 708.

2. Open and Notorious Possession

Adverse possession requires actions by the claimant that would serve to put a person of ordinary prudence on notice of a hostile claim. *Peters v. Skalman*, 27 Wn.App. 247, 254, 617 P.2d 448 (1980). In *Anderson v. Hudak*, 80 Wn.App. 398, 907 P.2d 305 (1995), the Court reversed a trial court that had found adverse possession by the planting of trees. The Court held that "there was insufficient evidence to support the trial court's finding that Anderson's possession was open and notorious." *Id.* at 405. The Court reasoned that the planting of trees alone was not a use that any reasonable person would assume was done under a claim of ownership and with the intent to exclude the actual owner. "[T]he claimant must show that the true owner knew, or should have known, that the occupancy constituted an ownership claim." *Id.*

Cottinghams' claim for adverse possession, based as it is upon the planting of eight young laurel bushes on a vacant lot is without merit. Cottinghams' expert witness, Ayers, admitted that

he would not establish a property line or make lot line decisions based upon bushes. RP Vol. 2, pp. 102-103.

3. Actual and Uninterrupted

Adverse possession is not established unless the exclusive possession "was actual and uninterrupted for the statutory period." *Curtis v. Zuck*, 65 Wn.App. 377, 383, 829 P.2d 187 (1992). A property right, such as an easement, may be abandoned by intent or nonuse. *Northern Pac. Ry. Co. v. Tacoma Junk Co.*, 138 Wash. 1, 244 P. 117 (1926). In this case it is undisputed that Cottinghams, while planting the young laurel bushes in 1995, did not possess, mow, or maintain the bushes in 2004, 2005 or 2006. To prove adverse possession, the alleged possessor must prove the possession was "actual and uninterrupted for the statutory period of 10 years." *Teel v. Stading*, 155 Wn.App. 390, 393 – 394, 228 P.3d 1293 (2010). Where the possession is interrupted, this element is not met. *Id.* Ron Morgan, from 2004 until the purchase of Lot 11 in January of 2006, did not see any evidence of occupation, maintenance or ownership by Cottinghams.

> At no time prior to our purchase of Lot 11 did I see any evidence of any occupation of Lot 11 by plaintiffs or anyone else. . . . In 2004 and 2005, during the ten or more times I was on Lot 11 I saw absolutely no evidence of any portion of Lot 11 having been maintained (including mowed) by anyone other than me.

CP 465, ¶ 4. Steele, Morgans' surveyor, while on Lot 11, between January 2005 and January of 2007, did not witness any act or see any evidence of adverse occupation. CP 439, ¶ 5.

4. Exclusive Possession

Where a hopeful adverse possessor's specific uses of claimed property do not include taking steps to prevent others from using the property in a similar manner, exclusive possession is not established. *ITT Rayonier, Inc. v. Bell*, 112 Wn.2d at 759. "A fence is the usual means relied upon to exclude strangers and establish the dominion and control characteristic of ownership." *Id.* at 759. Transient uses such as cutting wild grass on unimproved or unfenced land, even though adverse, are not exclusive possession. *Wood v. Nelson*, 57 Wn.2d 539, 358 P.2d 312 (1961).

This Court was invited to adopt the Colorado rule that the boundary between two parcels shifts over time with the natural growth of trees. This Court rejected that argument holding:

> In essence, this rule provides that the boundary between two parcels of real property shifts over time with the natural growth of trees planted along the boundary unless the party upon whose land the trees are encroaching negotiates some form of joint ownership agreement with the party on whose land the trees were originally planted. For us to hold that a Washington landowner can effect such a boundary line adjustment would be to create an entirely new theory of adverse possession without a basis in either the statutory or common law of this state. . . .
> We are unwilling to recognize an entirely new theory of adverse possession under Washington law.

Happy Bunch, LLC v. Grandview North, LLC, 142 Wn.App. 81, 92-3, 173 P.3d 959 (2007), *rev. denied* 164 Wn.2d 1009 (2008). Consistent with *Happy Bunch,* the planting of small laurel bushes in 1995, which did not mature until years later, cannot be considered exclusive possession in the same sense that a fence might be.

C. Trial Court's Revision of Partial Summary Judgment Was Proper

On January 11, 2011, the trial court ruled at Cottinghams' Motion for Partial Summary Judgment, that Cottinghams had

established adverse possession of a portion of Morgans' Lot 11 and that Morgans should be ejected from that triangle portion. At trial, Morgans moved to revise the Order granting Partial Summary Judgment in favor of Cottinghams as to the disputed area of laurel bushes near the boundary line. CP 683 at 690; RP, Vol. 1, p. 11; RP, Vol. 2, p. 24. The trial court did not commit error in making and entering the following additional finding in Finding of Fact 19: "The Court should revise its earlier Summary Judgment ruling, because at trial it became clear that many laurels were planted on a portion of the joint property line and a substantial portion of them were clearly on Lot 10 and not Lot 11." CP 112.

The trial court's revision of its earlier Partial Summary Judgment Order, which was not a final judgment, was proper and should be affirmed. A partial summary judgment ruling is "not a final judgment and the trial court had authority under CR 54(b) to modify it regardless of CR 60." *Washburn v. Beatt Equipment Co.,* 120 Wn.2d 246, 301, 840 P.2d 860 (1992).

> Absent a proper certification, an order which adjudicates fewer than all claims or the rights and liabilities of fewer than all parties **is subject to revision at any time before entry of final judgment as to all claims and the rights and liabilities of all parties.** CR 54(b); *see Fox v. Sunmaster Products,* 115 Wash.2d 498, 504, 798 P.2d 808 (1990). The partial summary judgment order was not properly certified and it was not a final judgment; the trial court had the authority to modify the order at any time prior to final judgment. (emphasis added)

Id. at 300; *see also Moriatti ex rel. Tarutis v. Farmers Ins. Co. of Washington*, 162 Wn.App. 495, 501-502, 254 P.3d 939 (Div 1, 2011).

"[B]ecause fewer than all of the claims of the parties have been decided by the district court's two partial summary judgment orders, the action has not terminated as to any of the claims and the district court (summary judgment) orders are subject to revision at any time prior to the entry of judgment adjudicating all of the claims. Fed.R.Civ.P. 54(b)." *Williamson v. UNUM Life Ins. Co. of America*, 160 F.3d 1247, 1251 (9th Cir., Cal. 1998).

> On December 19, 1991, the court concluded the December 1989 partial summary judgment order was not a final order under CR 54(b) and was subject to revision at any time prior to entry of final judgment.

> The court reversed its position on the partial summary judgment and ruled, as a matter of law, the school district was vicariously liable for the negligent acts of Mr. Calkins. . . . The court's 1989 partial summary judgment order did not state there was no "just reason for delay" and did not expressly direct entry of judgment. CR 54(b). The order therefore was subject to revision at any time before final judgment was entered. CR 54(b).

Bratton v. Calkins, 73 Wn.App. 492, 496, 870 P.2d 981 (1994).

Repeatedly, in state and federal court, CR 54(b) is cited for the authority that the trial court has the power to modify or correct any previous incomplete or incorrect ruling(s) at anytime before entry of the final judgment on all claims, rights and issues. This rule is the heart of our trial and appellate process. Appellate courts are loath to review partial summary judgment orders and when asked to do so, in writing, advise attorneys that review is not necessary because the trial court can and is expected, before entry of final judgment, to correct any legal mistakes previously made.

Without legal authority, Cottinghams made the absurd argument to the trial court that the Partial Summary Judgment motion was not interlocutory and could not be readdressed by

the trial court at the time of trial. Cottinghams argue incorrectly that a trial court cannot during trial, and before the end of a case, correct a preliminary ruling that is factually or legally incorrect; i.e., preliminary rulings cannot be revisited by the trial court. Cottinghams' argument give no meaning to CR 54 which clearly reads that the partial summary decision(s) were "subject to revision at any time before the entry of Judgment adjudicating all the claims and the rights and liabilities of the parties."

Cottinghams' argument that the trial court should have waited for an appellate court to correct any error of law is unsupported by any legal authority. The trial court's decision to revisit and revise its previous summary judgment decision is supported by court rule and case law and should be affirmed by this Court.

Admittedly, as regards the trial court's finding of adverse possession, there is some confusion in the record. The trial court ultimately entered supplemental Conclusion of Law No. 5, which reads as follows: "The Cottinghams **have not established all**

elements of adverse possession by clear, cogent and convincing evidence as to any portion of Lot 11." (Emphasis added). CP 638. The confusion is created because the trial court did not enter Morgans' proposed supplemental finding 20 which read: "Cottinghams have not established that they adversely possessed any portion of Lot 11." CP 637. Cottinghams' Opening Brief does not help clear up the matter. Cottinghams assign error to Amended Conclusion 5 (Assignment of Error, Conclusions 2f). However, in Cottinghams Opening Brief they argue that both Conclusion 5 and Amended Conclusion 5 are in error, both being "capricious and arbitrary."

> Conclusion 5 . . . [is] not relevant and ignore[s] a history of uses preceding Morgans' purchase. . . . Amended Conclusion 5 appears as capricious and arbitrary challenging as a violation of due process, by sudden selective resort to focus only upon the location of laurel *trunks* as though the Cottingham Declaration (CP 507) did not establish – without contest – other earlier uses with maintenance upon both sides of laurels according to a line defined as between the south alder and the Wilson Iron Pipe. (CP 513, ln. 8, and 515, ln 19-24). Ignoring history of pre-hedge uses, conclusion 5 would attempt to reverse authority firmly holding that property need not be continuously held in an adverse manner after new title until quieted in a lawsuit.

Cottinghams' Opening Brief, pages 23-4. Both arguments are advanced without any citation to the trial transcript and without any legal authority.

Cottinghams next argue that the possession need not be continuously held. Similarly, this argument is contrary to long established Washington law. Legal title can only be acquired by adverse possession if the possession is uninterrupted. *Gorman v. City of Woodinville*, 283 P.3d 1082, 1083 (2012). However, Cottinghams' arguments related to Conclusion 5 and Amended Conclusion 5 need not be considered by this Court. Errors unsupported by legal argument "will not be considered on appeal." *Howell v. Spokane & Inland Empire Blood Bank*, 117 Wn.2d 619, 624, 818 P.2d 1056 (1991). RAP 10.3(a)(6).

D. Conversion/Timber Trespass.

"Conversion is 'the act of willfully interfering with any chattel, without lawful justification, whereby any person entitled thereto is deprived of the possession of it.'" *Brown ex rel. Richards v. Brown*, 157 Wn.App. 803, 817, 239 P.3d 602 (Div. 1, 2010).

Here, Morgans removed eight (8) laurel bushes that were

located on Lot 11 and were encroaching on their driveway, making it difficult to park their vehicles and access their property. The laurel bushes were originally planted by Cottinghams, who believed they had planted them on their lot, Lot 10. As they had grown to such size as to impede Morgans' driveway access, Morgans had the laurel bushes dug out completely, with their root balls intact, in order to allow Cottinghams to replant the bushes elsewhere on their property.

As the adjoining landowner, Morgans were entitled, by law, to cut away any encroaching vegetation that constituted a nuisance or was otherwise causing harm or possible harm to their property. *Lane v. W.J. Curry & Sons*, 92 S.W.3d 355 (Tenn, 2002). Where the roots and branches of trees standing on or near the boundary line extend over or into the adjoining land, the owner of the adjoining land may cut off the intruding growth at his or her own expense. Encroachment by Vegetation, 65 A.L.R. 4th 603 (1988).

> Appellants desired to defend on the theory that the action by respondents was merely for spite and vexation... The court rejected all such evidence and offered proof, on the ground that it was immaterial, because, where branches of trees overlap adjoining

> property, the owner of the adjoining property has an absolute right to have the overhanging branches removed...

Gostina v. Ryland, 116 Wash. 228, 230, 199 P. 298 (1921).

Even assuming a conversion of bushes, the trial court erred in awarding treble damages under RCW 64.12.030.[2] For treble damages to be awarded, Morgans were required to remove trees or shrubs from Cottinghams' property. The laurels were removed from Lot 11 in 2007, when Morgans had warranty title to all of Lot 11. Ex. 28; Ex. 3.

E. Equitable Remedy

There was no adverse possession. However, assuming Cottinghams did adversely possess a portion of Lot 11 by the

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[2] "Whenever any person shall cut down, girdle, or otherwise injure, or carry off any tree, including a Christmas tree as defined in *RCW 76.48.020, timber, or shrub **on the land of another person**, or on the street or highway in front of any person's house, city or town lot, or cultivated grounds, or on the commons or public grounds of any city or town, or on the street or highway in front thereof, without lawful authority, in an action by the person, city, or town against the person committing the trespasses or any of them, any judgment for the plaintiff shall be for treble the amount of damages claimed or assessed." (Emphasis added.) RCW 64.12.030.

planting of young laurel bushes in 1995, the remedy fashioned by the trial court was appropriate and was not an abuse of discretion.

Equity is reviewed for an abuse of discretion. *Willener v. Sweeting,* 107 Wn.2d 388, 397, 730 P.2d 45 (1986). Equity "requires the court to fashion an equitable solution. *Busch v. Nervik*, 38 Wn.App. 541, 687 P.2d 872 (1984)." *Willener v. Sweeting*, 107 Wn.2d at 397.

If, after trial, the trial court still concluded that Cottinghams had adversely seized a small sliver of Morgans' Lot 11, the equitable solution fashioned by the trial court was requested by Morgans.

> Assuming, after trial, this Court concludes that Cottingham owns a small portion of Lot 11 by adverse possession; the remedy should be to quiet title in Morgan to the parcel adversely possessed and require Morgan to pay the fair market value of the parcel to Cottingham. *See, Proctor v. Huntington,* 146 Wn.App. 836, 192 P.3d 958 (2008), 169 Wn.2d 491, 238 P.2d 117 (2010).

CP 690.

Assuming Cottinghams established by clear, cogent and convincing evidence that they adversely possessed a small triangle

of Morgans' Lot 11, *Proctor* clearly allows for and supports the trial court's equitable remedy.

> In upholding the equitable remedy imposed by the trial court, we recognize the evolution of property law in Washington away from rigid adherence to an injunction rule and toward a more reasoned, flexible approach. . . Consistent with our case law, the trial court's remedy requires the Huntingtons to pay Proctor fair market value for the land upon which they unwittingly encroached. This is exactly the sort of analysis that our precedent prescribes.

Proctor v. Huntington, 169 Wn.2d 491, 504, 238 P.3d 1117 (2010).

Cottinghams recognize that if adverse possession was established under the facts of this case, the trial court's equitable remedy of requiring Morgans to pay Cottinghams the fair market value of the small triangle was the proper equitable remedy.

F. Jurisdiction

Cottinghams, without legal authority, repeatedly argue that the trial court, in equity, did not have "jurisdiction" to fashion an equitable remedy. This argument ignores the following undisputed facts. Cottinghams were the plaintiffs in this action. Cottinghams' First Cause of Action requested the Whatcom County Superior Court to quiet title in a portion of Lot 11 in Cottingham. CP 577.

Cottinghams' Second Cause of Action requested the Superior Court to grant an easement over a portion of Lot 11 for "maintenance" of the laurel bushes. CP 578. Cottinghams' Fifth Cause of Action requested an injunction. CP 580. Finally, Cottinghams' asked the Superior Court to grant such other relief as the trial court believed appropriate in equity. CP 584.

Cottinghams did not question the trial court's jurisdiction until after trial and until after judgment, and only when Cottinghams did not like the equity exercised by the trial court. [3] In Washington, quiet title actions are equitable actions. *Durrah v. Wright*, 115 Wn.App. 634, 644-45, 63 P.2d 184 (2003), *review denied* 150 Wn.2d 1004 (2003). Cottinghams invloked equity by asking the trial court to quiet title in the disputed property.

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[3] The term jurisdiction is used more than 30 times in Cottinghams' Opening Brief in arguments that get more confusing the more times it is used. Examples of those arguments are:

1) "Equity favoring Morgans' counterclaims is as absent as jurisdiction."

2) "Finding 23 awards a leap over the agency jurisdiction, relieving Morgan from the burden of demonstrating valid permitting."

3) "Cottinghams' Motion[s] . . . advised on doctrines of primary jurisdiction exhaustion of remedies, Whatcom County's interest in permitting, and Land Use Petition Act jurisdiction . . ." (Opening Brief, p. 29, 27, 21.)

At trial, Morgans advised the trial court that it appeared that Cottinghams dispute was with Whatcom County: "I think the dispute the Cottinghams have was with the permit process that the County did. They were not happy with the County permit." RP, Vol. 1, p. 54. It appears that Cottinghams continue to ask Morgans to defend conduct of Whatcom County that makes Cottinghams unhappy, and have incorrectly tried to dress their argument(s) in a cloak of jurisdiction.

> MR. SHEPHERD: Yes, that's what -- I'm afraid I was not prepared to defend the County in this case. I should have been.
> THE COURT: I don't think you have to.

RP, Vol. 1, p. 76.

G. Cottinghams' Other Arguments on Findings

Cottinghams' assignments of error, for which there is not argument, are waived. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). Even if the assignment is argued, when the argument is "not supported by any reference to the record nor by any citation of authority, . . . (the appellate courts) do not consider them." *Id.*

In Finding 20 the trial court found that "Cottinghams have established that they adversely possessed 292.3 square feet of Lot 11. Cottinghams also assigned error to this finding arguing that "Finding 20 . . . fail(s) to distinguishing (sic) the true description and location of Lot Eleven . . ." Opening Brief, page 8. Thereafter, in Cottinghams' Opening Brief, no section, paragraph or sentence returns to this allegation. Assuming Cottinghams only dispute with Finding 20 is the square footage of the pie shaped parcel, Morgans can find no place in the Opening Brief where Cottinghams have suggested what the size of the parcel should be. The size of the triangle adversely possessed was supported by the testimony of Steele. RP Vol. 2, p. 128-132.

Cottinghams have not assigned error or argued that Finding 21 is not supported by substantial evidence. Therefore, the market value of the parcel is $28.11 per square foot. That number was supported by the testimony of Gustafson. RP Vol. 2, p. 10.

Cottinghams assigned error to Finding 23, including 23(A) through 23(F). Cottinghams' Opening Brief, pages 9 and 10. Thereafter, Finding 23 and all portions thereof appear part of

Cottinghams' jurisdiction argument, except for 23(C). Cottinghams, without citation to the record and without legal authority, argue:

> No reasonable fact finder would enter Finding 23C's good faith on facts revealing that after Morgans' plan attempted to violate the shore setback they moved their footprint into their neighbor's improvements and wrongfully wasted such improvements with neither notice nor investigation of entitlement while also violating their permits driveway setback.

Cottinghams' Opening Brief, page 38. While the equitable "clean hands" argument might seem at first attractive, no citation is made to the record, because the facts are simply made up. "Reference to the record must be included for each factual statement." RAP 10.3(a)(5).

Similar defects exist in Cottinghams' Opening Brief for their assignment of error to Findings 24, 25, 26, 30, Supplemental Finding 23D, and Findings 4, 5, 7, 8, 10, 11, 12, 13, 14, 15, 17, 18 and 19, all of which are assigned as error by Cottinghams but for which no argument or legal authority is provided.

H. Cottinghams' Additional Arguments.

(1) Superior Title Prevails. Cottinghams begin section 3 of their argument by arguing that "[a] quiet title action challenges the

defendants to establish the quality of their title." Opening Brief, p. 30. No authority is cited for this argument and it is contrary to Washington law. Cottinghams have the burden of proving their adverse possession claim. *Maier v. Giske* , 154 Wn.App. at 18. Cottinghams' burden is clear proof. *Lee v. Lozier*, 88 Wn.App. 176, 185, 945 P.2d 214 (1997). Even assuming Morgans had the burden to prove title, Morgans' Statutory Warranty Deed clearly established the quality of their title to Lot 11. Ex. 3.

(2) Right to a Decree. Cottinghams next argue that the trial court did not find "any Lot 11 corner stakes as true and correct." Opening Brief, p. 35. Cottinghams' argument seems to suggest that the north boundary of Lot 11 was not determined as a matter of fact or law. However, there never was a dispute as to the location of the North boundary of Lot 11. The dispute was the size and nature of the alleged adverse occupation. Steele provided his survey. Ex. 4; Ex. 5; Ex 12. Cottinghams' expert, Ayers, provided his survey. Ex. 12. Ayers used Steele's survey to set the north property line of Lot 11 using the "same bearing and distance." RP Vol. 2, pp. 56-7, 62.

(3) Innocence Was Contradicted by Lack of Investigation. Cottinghams' argue that Morgans were not innocent because they saw Wilson's plat or are charged with knowledge of it. Opening Brief, p. 36. Cottinghams' support this allegation by reference to a portion of the record where Ron Morgan admitted he did not understand counsel Cottingham's question. Id., at 37. The exchange Cottinghams apparently rely upon to support this portion of their Opening Brief is:

> Q. But you're actually saying that you have a right to condemn access, aren't you? Are you agreeing that you do have access?
> A. I don't understand your question.
> Q. We'll get back to that.

RP, Vol. 1, p. 125, ln. 25.

Without further cite to the record or authorities, Cottinghams simply argue that "all" acts of Morgans "are acts in bad faith, revealing calculated risk-taking." Opening Brief p. 39.

(4) Nuisance/Injunctive Relief. The next four pages of Cottinghams' Opening Brief are used to argue, without any legal authority, the proposal that there may be a continuing health code violation because, during trial, Morgans failed in their "duty . . . to

provide wet-season high ground water evidence to officer." Opening Brief, p. 42. It is presumed by Morgans that Cottinghams, by using the term "officer", are intending to make reference to some imaginary Whatcom County official. Morgans are aware of no authority requiring Morgans to present evidence, during the trial, of the performance of Morgans' duties owed to Whatcom County. Again, Cottinghams confuse their burden of proof at trial on nuisance and or other claims, as well as Cottinghams' frustration with Whatcom County, with Cottinghams' legal issues with Morgans.

(5) Balancing. Cottinghams conclude their opening brief by arguing that "[b]alancing finds little justification for this desperate approach." Opening Brief, p. 50. It is assumed the argument was intended to be directed to the decisions of the trial court as regards Cottinghams' arguments 8 through 13. However, a review of pages 46 through 51 of Cottinghams' Opening Brief demonstrates that the argument is better directed to those sections of Cottinghams' Opening Brief.

Cottinghams take issue with the trial court's determination regarding general damages (privacy value); none were awarded. Yet, Cottinghams provided no testimony regarding general damages and no legal authority for allowing general damages. Cottinghams' claim the trial court's dismissal of their Outrage claim was error. Apparently, Cottinghams incorrectly believe their appeal argument is supported by argument at trial because Cottinghams erroneously cite trial argument for factual support. 12-7-11 RP, pp. 125-128. At page 128, counsel Cottingham's argument concluded as follows:

> MR. SHEPHERD: That's argument, Your Honor, I don't even know if it's relevant but it surely isn't testimony.
> THE COURT: Yeah. You could probably try to argue something in closing.
> MR. COTTINGHAM: Thank you. One moment if I may.

12-7-11 RP, p. 128.

I. Attorney Fees

Cottinghams argue, again without authority, and without doing a garnishment, that the garnishment statute allows for attorney fees on appeal. It does not. Even though this is not a LUPA action and ignoring the fact that Morgan has no issue with

any permitting action of Whatcom County, Cottinghams argue, again without authority, that this Court should view the Cottinghams' appeal as proceeding under LUPA. It is not. Whatcom County is not a party and Morgans have no issue with Whatcom County. Finally, Cottinghams incorrectly argue, again without legal authority, that Morgans should be sanctioned, pursuant to RAP 18.9, for arguing that Cottinghams failed to prove adverse possession and/or for defending Cottinghams' appeal. Unfortunately, as frustrated as Morgans are with Cottinghams' Opening Brief, they do not argue that Morgans' appeal is frivolous. Therefore, neither party is entitled to attorney fees in this action.

Cottinghams' reliance upon RCW 8.24.030 is misplaced. The trial court's judgment and findings related to attorneys' fees and costs, under RCW 8.24.030, have not been appealed or assigned error by Morgans or appropriately appealed, appropriately assigned error or appropriately argued by Cottinghams.

VI – CONCLUSION

If this Court determines that adverse possession was not established by Cottinghams by substantial evidence, the purchase

ordered of Morgans by the trial court is error and should be reversed by this Court and title to all of Lot 11 quieted in Morgans requiring no payment to Cottinghams.

If this Court determines that adverse possession was established by substantial evidence, the equitable remedy fashioned by the trial court was not an abuse of discretion and should be affirmed by this Court.

The remainder of the decisions of the trial court should be affirmed, except its award of treble damages.

Respectfully submitted this 21st day of September 2012.

SHEPHERD AND ABBOTT

By 
Douglas R. Shepherd, WSBA # 9514
Bethany C. Allen, WSBA # 41180
Of Attorneys for Cross-Appellants
Morgans

APPENDIX A

RCW 4.16.020

Actions to be commenced within ten years — exception.

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

Within ten years:

(1) For actions for the recovery of real property, or for the recovery of the possession thereof; and no action shall be maintained for such recovery unless it appears that the plaintiff, his or her ancestor, predecessor or grantor was seized or possessed of the premises in question within ten years before the commencement of the action.

(2) For an action upon a judgment or decree of any court of the United States, or of any state or territory within the United States, or of any territory or possession of the United States outside the boundaries thereof, or of any extraterritorial court of the United States, unless the period is extended under RCW 6.17.020 or a similar provision in another jurisdiction.

(3) Of the eighteenth birthday of the youngest child named in the order for whom support is ordered for an action to collect past due child support that has accrued under an order entered after July 23, 1989, by any of the above-named courts or that has accrued under an administrative order as defined in RCW 74.20A.020(6), which is issued after July 23, 1989.

[2002 c 261 § 2; 1994 c 189 § 2; 1989 c 360 § 1; 1984 c 76 § 1; 1980 c 105 § 1; Code 1881 § 26; 1877 p 7 § 26; 1854 p 363 § 2; RRS § 156.]

APPENDIX B

RCW 8.24.030

Procedure for condemnation — fees and costs.

The procedure for the condemnation of land for a private way of necessity or for drains, flumes or ditches under the provisions of this chapter shall be the same as that provided for the condemnation of private property by railroad companies, but no private property shall be taken or damaged until the compensation to be made therefor shall have been ascertained and paid as provided in the case of condemnation by railroad companies.

In any action brought under the provisions of this chapter for the condemnation of land for a private way of necessity, reasonable attorneys' fees and expert witness costs may be allowed by the court to reimburse the condemnee.

[1988 c 129 § 3; 1913 c 133 § 2; RRS § 936-2. Prior: 1895 c 92 § 2.]

APPENDIX C

RCW 64.12.030

Injury to or removing trees, etc. — damages.

Whenever any person shall cut down, girdle, or otherwise injure, or carry off any tree, including a Christmas tree as defined in *RCW 76.48.020, timber, or shrub on the land of another person, or on the street or highway in front of any person's house, city or town lot, or cultivated grounds, or on the commons or public grounds of any city or town, or on the street or highway in front thereof, without lawful authority, in an action by the person, city, or town against the person committing the trespasses or any of them, any judgment for the plaintiff shall be for treble the amount of damages claimed or assessed.

[2009 c 349 § 4; Code 1881 § 602; 1877 p 125 § 607; 1869 p 143 § 556; RRS § 939.]

APPENDIX D

CIVIL RULE 54 - JUDGMENTS AND COSTS

(a) Definitions.

(1) Judgment. A judgment is the final determination of the rights of the parties in the action and includes any decree and order from which an appeal lies. A judgment shall be in writing and signed by the judge and filed forthwith as provided in rule 58.

(2) Order. Every direction of a court or judge, made or entered in writing, not included in a judgment, is denominated an order.

(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as aclaim, counterclaim, cross claim, or third party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination in the judgment, supported by written findings, that there is no just reason for delay and upon an express direction for the entry of judgment. The findings may be made at the time of entry of judgment or thereafter on the courts own motion or on motion of any party. In the absence of such findings, determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

(d) Costs, Disbursements, Attorney's Fees, and Expenses.

(1) Costs and Disbursements. Costs and disbursements shall be fixed and allowed as provided in RCW 4.84 or by any other applicable statute. If the party to whom costs are awarded does not file a cost bill or an affidavit detailing disbursements within 10 days after the entry of the judgment, the clerk shall tax costs and disbursements pursuant to CR 78(e).

(2) Attorney's Fees and Expenses. Claims for attorney's fees and expenses, other than costs and disbursements, shall be made by motion unless the substantive law governing the action provides for the recovery of such fees and expenses as an element of damages to be proved at trial. Unless otherwise provided by statute or order of the court, the motion must be filed no later than 10 days after entry of judgment.

(e) Preparation of Order or Judgment. The attorney of record for the prevailing party shall prepare and present a proposed form of order or judgment not later than 15

days after the entry of the verdict or decision, or at any other time as the court may direct. Where the prevailing party is represented by an attorney of record, no order or judgment may be entered for the prevailing party unless presented or approved by the attorney of record. If both the prevailing party and his attorney of record fail to prepare and present the form of order or judgment within the prescribed time, any other party may do so, without the approval of the attorney of record of the prevailing party upon notice of presentation as provided in subsection (f)(2).

(f) Presentation.

(1) Time. Judgments may be presented at the same time as the findings of fact and conclusions of law under rule 52.

(2) Notice of Presentation. No order or judgment shall be signed or entered until opposing counsel have been given 5 days' notice of presentation and served with a copy of the proposed order or judgment unless:

(A) Emergency. An emergency is shown to exist.

(B) Approval. Opposing counsel has approved in writing the entry of the proposed order or judgment or waived notice of presentation.

(C) After verdict, etc. If presentation is made after entry of verdict or findings and while opposing counsel is in open court.

[Amended effective September 1, 1989; September 1, 2007.]

APPENDIX E

CIVIL RULE 54(b) - JUDGMENTS AND COSTS

...

(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as aclaim, counterclaim, cross claim, or third party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination in the judgment, supported by written findings, that there is no just reason for delay and upon an express direction for the entry of judgment. The findings may be made at the time of entry of judgment or thereafter on the courts own motion or on motion of any party. In the absence of such findings, determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

APPENDIX F

RAP 10.3(a)(5) - CONTENT OF BRIEF

(a) Brief of Appellant or Petitioner. The brief of the appellant or petitioner should contain under appropriate headings and in the order here indicated:

...

(5) Statement of the Case. A fair statement of the facts and procedure relevant to the issues presented for review, without argument. Reference to the record must be included for each factual statement.

APPENDIX G

RAP 10.3(a)(6) - CONTENT OF BRIEF

(a) Brief of Appellant or Petitioner. The brief of the appellant or petitioner should contain under appropriate headings and in the order here indicated:

...

(6) Argument. The argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record. The argument may be preceded by a summary. The court ordinarily encourages a concise statement of the standard of review as to each issue.

APPENDIX H

RAP 18.9 - VIOLATION OF RULES

(a) Sanctions. The appellate court on its own initiative or on motion of a party may order a party or counsel, or a court reporter or other authorized person preparing a verbatim report of proceedings, who uses these rules for the purpose of delay, files a frivolous appeal, or fails to comply with these rules to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court. The appellate court may condition a party's right to participate further in the review on compliance with terms of an order or ruling including payment of an award which is ordered paid by the party. If an award is not paid within the time specified by the court, the appellate court will transmit the award to the superior court of the county where the case arose and direct the entry of a judgment in accordance with the award.

(b) Dismissal on Motion of Commissioner or Clerk. The commissioner or clerk, on 10 days' notice to the parties, may (1) dismiss a review proceeding as provided in section (a) and (2) except as provided in rule 18.8(b), will dismiss a review proceeding for failure to timely file a notice of appeal, a notice for discretionary review, a motion for discretionary review of a decision of the Court of Appeals, or a petition for review. A party may object to the ruling of the commissioner or clerk only as provided in rule 17.7.

(c) Dismissal on Motion of Party. The appellate court will, on motion of a party, dismiss review of a case (1) for want of prosecution if the party seeking review has abandoned the review, or (2) if the application for review is frivolous, moot, or solely for the purpose of delay, or (3) except as provided in rule 18.8(b), for failure to timely file a notice of appeal, a notice of discretionary review, a motion for discretionary review of a decision of the Court of Appeals, or a petition for review.

(d) Objection to Ruling. A counsel upon whom sanctions have been imposed or a party may object to the ruling of a commissioner or the clerk only as provided in rule 17.7.

ORIGINAL

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

DAVID COTTINGHAM and JOAN COTTINGHAM, Appellants/Petitioners, vs. RONALD MORGAN and KAYE MORGAN, Respondents.	**Case No. 68202-4-I** **Whatcom County Superior Court Case No. 09-2-01773-1** **Declaration of Service**

I, Jen Petersen, declare that on September 21, 2012, I caused to be served a copy of the following document: **Respondent/Cross-Appellants' Opening Brief;** and a copy of this **Declaration of Service**, in the above matter, on the following person, at the following address, in the manner described:

David C. Cottingham, Esq.	( )	U.S. Mail
Cottingham Law Office, PS	( )	E-Mail
103 E. Holly Street	( )	Fax
Suite 418	( )	Messenger Service
Bellingham, WA 98225	(X)	Personal Service

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

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Filed
9-24-12
Court of Appeals
Division I

DATED this 21st day of September 2012, at Bellingham, Washington.

Jen Petersen

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