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FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2006.01.01 PM 4:03

No. 70691-8

COURT OF APPEALS, DIVISION I,
FOR THE STATE OF WASHINGTON

REGINALD K. WREN and BRENDA M. WREN, husband and wife,

Respondents,

v.

TAMMY S. BLAKEY, an unmarried person, and
FLYING T RANCH, INC., a Washington corporation,

Appellants.

REPLY BRIEF OF APPELLANTS

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ORIGINAL

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I. INTRODUCTION

Reginald and Brenda Wren's response brief is largely unremarkable, with three exceptions: their rambling, five page introduction; their argumentative statement of the case; and their transparent attempt to avoid mentioning Tammy Blakey's 1990 fence repairs. *See, e.g.*, Br. of Resp'ts at 29-30. This Court should not condone the Wrens' violations of the Rules of Appellate Procedure or be misled by their efforts to muddy the waters. An important point remains: while the parties and their predecessors-in-interest treated the historic fence as the boundary between them, that fence has never been located on the section/deed line. The historic fence has always rested west of the section/deed line.

The Wrens offer nothing to dissuade this Court from reversing the trial court's orders quieting title in the Wrens and awarding them attorney fees and costs. The Court should reverse and award Blakey and Flying T Ranch, Inc. their costs on appeal.

II. RESPONSE TO THE WRENS' STATEMENT OF THE CASE

Blakey and Flying T must begin their response to the Wrens' statement of the case by pointing out the obvious: the Wrens' introduction is far from the concise introduction that RAP 10.3(a)(3)

requires¹ and their statement of the case violates RAP 10.3(a)(5).² Their statement is a far cry from the “fair recitation” required by the rules and places an unacceptable burden on Blakey, Flying T, and the Court. *Lawson v. Boeing Co.*, 58 Wn. App. 261, 271, 792 P.2d 545 (1990), *review denied*, 116 Wn.2d 1021 (1991).

Additionally, there must be a reference to the record for each factual statement of the case. RAP 10.3(a)(5); RAP 10.4(f). But long passages in the Wrens’ statement lack any reference to the record. The Court should disregard any factual material not supported by the record. RAP 10.7; *Nelson v. McGoldrick*, 127 Wn.2d 124, 141, 896 P.2d 1258 (1995) (striking portions of supplemental brief containing factual assertions not supported by the record). Citations to the record are required to enable the Court to properly consider a case; sanctions may be imposed for violating the rules. *Hurlbert v. Gordon*, 64 Wn. App. 386, 399-400, 824 P.2d

¹ RAP 10.3(a)(3) permits an optional, “concise” introduction. The introduction is not meant as a substitute for the statement of the case or the argument section of the brief. It is meant to be a concise introduction to the issues presented. *Washington Appellate Practice Deskbook* (WSBA 3d ed. 2005, 2011 Supplement) at § 19.7(8) (stating: “The introduction should not exceed one or two pages. The introduction should give the reader or listener a high-level picture of the forest before plunging into the trees of the brief.”).

² RAP 10.3(b) dictates that a response brief conform to RAP 10.3(a) and answer the appellant’s opening brief. A statement of the case is not required; however, if one is provided, it must contain a “fair statement of the facts and procedure relevant to the issues presented for review, without argument.” RAP 10.3(a)(5)

1238, *review denied*, 119 Wn.2d 1015 (1992) (imposing sanctions for failing to properly cite to the record in the statement of the case). *See also, Litho Color, Inc. v. Pac. Emp'rs Ins. Co.*, 98 Wn. App. 286, 305, 991 P.2d 638 (1999) (imposing sanctions for counsel's failure to comply with the rules). The Court should disregard any "facts" claimed by the Wrens that are not grounded in the record.

The Court should also ignore Wrens' absurd suggestion to "forget about the fence" where their claims are indisputably related to and based on Blakey and Flying T's alleged destruction of the historic fence and construction of a new fence (purportedly in the middle of the Wrens' field). CP 362. *The historic fence and the hedgerow surrounding it form the heart of this case.* The Court cannot consider one without the other.³

Although the Wrens' begin their statement by examining the historic fence as it existed in the 1930's, they then inexplicably skip ahead to the repairs Blakey performed in 2009 precipitating this lawsuit. Br. of Resp'ts at 3, 6-7. In doing so, they self-servingly ignore the work she performed on the historic fence in 1990.

Blakey and her father walked the perimeter of Flying T's

³ The Wrens suggest the hedgerow served as a more effective barrier between the parties' properties than did the fence. Br. of Resp'ts at 3. Even if it did, the hedgerow remained planted in the same location and the historic fence always ran through it. Ex. 12. The existing fence runs through that same hedgerow. Exs. 44, 46.

property in 1990 to evaluate the condition of the fencing surrounding it. RP 414-16. During their visual inspection they had an “across the fence” conversation with the Wrens’ predecessor-in-interest, Robert Rollins. RP 411. Although Rollins admitted to Blakey and her father that he had not surveyed his property to identify the actual boundary between the two properties, he told them the historic fence had always served as the agreed boundary. RP 415. Robert made a similar admission at trial. RP 354; CP 333.

Blakey had to use a backhoe to cut down the hedgerow growing in front of the historic fence before she could begin to repair it. RP 418-19, 424. In doing so, she accidentally knocked down a small section of fencing. RP 419, 423. She replaced the broken section with new barbed wire and steel t-posts and then repaired the sections that remained standing. RP 419-20. With one exception, she repaired or replaced the fence in its historic location. RP 422. The single exception was a gap at the north end, which she closed with a new section of barbed wire fencing. RP 419-20. This new section of fencing replaced a single hot wire that used to run between the historic fence and a mature alder tree at the north end of the properties.⁴ RP 411, 421-22, 432-34. Thus,

⁴ Following the then-existing hot wire from the historic fence to the alder

even assuming without agreeing that Blakey moved the fence during her 1990 repair work, she acquired title to the property lying west of the section/deed line and east of the historic fence by means of adverse possession 10 years later when the Rollins failed to challenge her possession of it.

The Wrens are only partially correct when they state a fence has been located “on the boundary line between the two parcels.” Br. of Resp’ts at 2, 3. They correctly state a fence has been located between the properties since the 1930s; however, they incorrectly state that fence sits on the actual boundary line. Time and again the parties’ witnesses testified the observable boundary between the properties was the historic fence and/or the hedgerow. RP 100, 180, 238, 354, 358, 411; Ex. 40, pp. 26, 28. The witnesses simply assumed the historic fence sat on the section/deed line because that was what they could see.

The Wrens’ restatement of the witnesses’ testimony regarding the location of the section/deed line is misleading. For example, the Wrens claim the historic fence was located “on the property line” during their predecessor-in-interest Charles Kroeze’s

tree at the north end of the properties caused the fence to veer slightly west at that end. CP 30. This slight digression explains why Ed Tannis observed that alder tree inside Flying T’s boundaries when he viewed the properties during the trial. RP 411, 421-22,432-33.

ownership. Br. of Resp'ts at 6. Yet Kroeze did not testify that the historic fence was located on the boundary line; rather, he testified the historic fence was considered the boundary. Ex. 40, pp. 26, 28. He never testified the historic fence sat on the section/deed line. He just assumed that it did. *Id.* In fact, it was the Wrens' counsel who defined the term "boundary line" as "the area now where there is - in the vicinity of which there is a new fence." *Id.* at 12, 13.

Similarly, the Wrens claim the Rollins testified the historic fence sat on the section/deed line until Blakey moved it in 2009. Br. of Resp'ts at 7. That the Rollins testified there was a fence between the properties does not mean it sat on the section/deed line. In fact, the record cites the Wrens provide describe the location of the historic fence rather than the location of the section/deed line. While the Rollins' daughter, Lois Geist, described the property line as the hedgerow, she was never shown a survey to confirm the historic fence sat on the true line. RP 112.

The Wrens claim Blakey constructed the existing fence in 2009 "west of the location of the historic fence." Br. of Resp'ts at 3. The photographic evidence admitted at trial confirms Blakey did not move the historic fence. *See, e.g.*, Exs. 41, 44, 46, 51, 52. If she had, then the existing fence would sit in the middle of the Wrens'

field; clearly, it does not. Rather, the fence remains where it has always been - in the hedgerow in the trees between the properties.⁵ *Id.* Although the Wrens admit the aerial photographs show the historic fence in the hedgerow, they refuse to acknowledge more current photographs *show the existing fence sitting in that same hedgerow.* Exs. 41, 44, 46. Had Blakey moved the historic fence as the Wrens' suggest, then she would have had to simultaneously move the surrounding hedgerow. This she never did.

The Wrens contend William Lloyd's survey (exhibit 6) confirms that Blakey moved the historic fence in 2009. Br. of Resp'ts at 10. Not so. That Lloyd's survey depicts the existing fence to the west of the section/deed line does not mean that Blakey moved the historic fence in 2009. Rather, exhibit 6 highlights the mistaken belief of the parties and their predecessors-in-interest that the historic fence sat on the section/deed line. But the historic fence has never been located on the section/deed line.

Finally, the Wrens never cultivated or otherwise used the property lying east of the historic fence and west of the true

⁵ As the aerial photographs show, a row of trees has existed between the parties' properties for more than 40 years. *See, e.g.*, 8, 10, 12, 14, 16. The historic fence ran from tree to tree within the tree line. Remnants of that fence remain in their original location, embedded in those trees. Ex. 51. The existing fence also runs from tree to tree within the tree line. Exs. 42-50. The historic fence and the existing fence are affixed to some of the same trees in nearly the same locations. Ex. 51.

boundary line. Flying T and its predecessors-in-interest did.

III. ARGUMENT IN SUPPORT OF THE REPLY BRIEF

A. Standard of Review

The parties agree this Court reviews findings of fact entered after a bench trial to determine if they are supported by substantial evidence, and, if so, whether those findings support the trial court's conclusions of law. Br. of Appellants at 16; Br. of Resp'ts at 18. Where the challenged findings and conclusions are insufficiently supported, as is the case here, this Court should reverse.

The parties also agree this Court reviews a trial court's award of attorney fees for an abuse of discretion. Br. of Appellants at 10; Br. of Resp'ts at 45. But they disagree about the sufficiency of the trial court's findings on that issue. The Wrens fail to recognize that cursory findings are insufficient. *In re Marriage of McCausland*, 159 Wn.2d 607, 620, 152 P.3d 1013 (2007); *In re Marriage of Horner*, 151 Wn.2d 884, 896-97, 93 P.3d 124 (2004). The trial court must exercise its discretion on articulable grounds and make an adequate record for review. *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998). It did not do so here.

B. The Trial Court Erred by Finding Blakey and Flying T Failed to Adversely Possess Any Property West of the Section/Deed Line and East of the Historic Fence

1. The historic fence has never been located on the section/deed line

Blakey and Flying T first argued in their opening brief that substantial evidence does not support the trial court's finding that the historic fence was located on the section/deed line. Br. of Appellants at 16. The Wrens disagree. Br. of Resp'ts at 19. Like the trial court, they misinterpret the evidence. The historic fence has never been located on the section/deed line.

Three professional land surveyors independently determined the fence between the properties (the historic fence or the existing fence) sat west of the actual section/deed line. Russell Coffelt, PLS, surveyed Flying T's property in 1992.⁶ Ex. 53. Coffelt unmistakably referenced a fence located west of the section/deed line between what is now the Wrens' property and Flying T's property. *Id.* Lloyd surveyed the Wrens' property in 2010. Ex. 6. Like Coffelt, Lloyd depicted the fence lying west of the section/deed

⁶ The Wrens suggest Coffelt's failure to argue the sketch prepared by Lloyd (exhibit 6) or the aerial exhibits prepared by Terry Curtis misplaced the section/deed line is somehow fatal to Blakey and Flying T's claim. Br. of Resp'ts at 20. It would be impossible for Coffelt to do have done so as he is deceased and his survey was prepared *decades before* either Lloyd's sketch or Curtis's exhibits were prepared.

line. *Id.* Robert Huey, PLS, surveyed Flying T's property in 2013.⁷ CP 30. Like Coffelt and Lloyd, Huey located the fence west of the section/deed line. *Id.* This evidence supports a finding that the historic fence never sat on the section/deed line and further substantiates Blakey's testimony that she did not move the fence during her repairs to it in 2009.

Despite the fact that three professional land surveyors unequivocally established that the fence between the properties (either the historic fence or the existing fence) has always been located west of the section/deed line, the Wrens argue exhibit 28 justifies the trial court's findings that the historic fence was located on the section/deed line and that Blakey moved the fence in 2009. Br. of Resp'ts at 25-26. It does not because the exhibit was prepared by an unqualified witness and is fundamentally flawed.

⁷ The Wrens make much ado about Huey's declaration in support of reconsideration, mistakenly asserting the trial court did not consider it. Br. of Resp'ts at 22. Huey's declaration was properly before the trial court. The Wrens simply turn a blind eye to the fact that the trial court considered the evidence where it failed to strike that evidence from the record. CP 444-45 (stating the trial court "read the briefs and materials submitted by the parties[.]").

Nothing in CR 59 prohibits the submission of new or additional materials on reconsideration following a bench trial. Under CR 59(g), a trial court may, within its discretion, consider additional evidence at a motion for a new trial following a bench trial. *See also, Ghaffari v. Dep't of Licensing*, 62 Wn. App. 870, 875-76, 816 P.2d 66 (1991), *review denied*, 118 Wn.2d 1019 (1992) (consideration of additional evidence at motion for reconsideration of bench trial within discretion of trial court). Additional evidence accepted post-trial is subject to the same rules for admissibility applicable at trial. *Id.* at 876.

Photogrammetrist Terry Curtis prepared exhibit 28. While he may be qualified as photogrammetrist, he is not a professional land surveyor and thus lacks the expertise to locate a property or section line. In fact, it would be unlawful for him to do so. RCW 18.43.010.⁸ Curtis nevertheless extrapolated the location of the section/deed line on exhibit 28 using aerial images overlaid with parcel data that he retrieved from Snohomish County's web site.⁹ RP 165. But as the disclaimer on the Snohomish County Assessor's web site warns, the data provided there cannot be used to locate property lines because it is provided for "illustrative purposes only."¹⁰ Gerald Painter, PLS, testified that the data

⁸ RCW 18.43.010 states:

. . . it shall be unlawful for any person to practice or to offer to practice in this state, engineering or land surveying, as defined in the provisions of this chapter, or to use in connection with his or her name or otherwise assume, use, or advertise any title or description tending to convey the impression that he or she is a professional engineer or a land surveyor, unless such a person has been duly registered under the provisions of this chapter.

⁹ Curtis was unsure where he obtained his data, testifying at times that it came from "permitting" and at others that it came from the Assessor's office. RP 165.

¹⁰ The disclaimer on the Assessor's web site states, in pertinent part:

Use the interactive maps and information at your own risk. All maps, data, and information set forth herein ("Data"), are for illustrative purposes only and are not to be considered an official citation to, or representation of, the Snohomish County Code Snohomish County makes no representation or warranty concerning the content, accuracy,

available on the Assessor's website provides only the approximate location of a section/deed line and not a definitive line because the Assessor is only interested in collecting property taxes rather than in accurately surveying land. RP 345. Curtis acknowledged his illustrative exhibits were not entirely accurate. RP 208.

That exhibit 28 is fundamentally flawed is evident. According to Curtis, the existing fence sits in the middle of the Wren's field. Ex. 28. But Curtis never visited the Wren or Flying T properties to verify that exhibit 28 was correct. RP 190. Had he done so he would have seen that he depicted the existing fence in exhibit 28 far removed from its actual location. Moreover, he would have seen that a substantial portion of the hedgerow remains on the Wren's side of the fence. Exs. 42-52. If Blakey had moved the fence into the Wrens' field as exhibit 28 erroneously suggests she did, then the existing fence would no longer be in the tree line and

currency, completeness or quality of the Data contained herein and expressly disclaims any warranty of merchantability or fitness for any particular purpose.

See <http://gis.snoco.org/maps/property/index.htm> (and then click the link to open SCOPI in a new browser window), last visited April 17, 2014 (emphasis added).

A disclaimer on the Snohomish County Planning and Development Services web site similarly warns that the "information provided on this web site is considered unofficial." See <http://gis.snoco.org/maps/permits/>, last visited April 17, 2014.

surrounded by the hedgerow as it is now. RP 401-402, 449; Exs. 42-52.

Substantial evidence does not support the trial court's findings that the historic fence sat on the section/deed line or that Blakey moved the fence into the Wrens' field in 2009 because the exhibit the court relied on to support its findings was demonstrably inaccurate. On the contrary, overwhelming evidence from three professional land surveyors and the photographs admitted at trial confirm that the fence has always been located west of the section/deed line and reinforce Blakey's testimony that she did not move it in 2009.

2. Blakey and Flying T acquired title to the disputed property by adverse possession

Blakey and Flying T next argued that the trial court erred by finding they failed to prove they acquired title to the strip of land lying west of the section/deed line and east of the historic fence by adverse possession. Br. of Appellants at 22-25. The Wrens unsurprisingly disagree, arguing Blakey and Flying T did not take any steps to possess any land close to the section/deed line until Blakey tore out the historic fence in 2009. Br. of Resp'ts at 29-30. Like the trial court, the Wrens fail to acknowledge that Flying T

acquired title to that strip of land by adverse possession *decades before* Blakey's purchase in 1989 or her fence repairs in 2009.

One may rest a claim to title via adverse possession on the adverse possession of a predecessor-in-interest. *El Cerrito, Inc. v. Ryndak*, 60 Wn.2d 847, 856, 376 P.2d 528 (1962). Flying T's predecessors-in-interest cultivated the strip of land west of the section/line deed and east of the historic fence for more than 50 years. *See, e.g.*, Exs. 8-26, 40; CP 333, 337. They affirmatively used the land up to and including the hedgerow and the historic fence so that a reasonable person would assume that they owned it. The Rollins, the Wrens' predecessors-in-interest, had notice of this adverse use for the requisite statutory 10-year-period. And the possession of the area surrounding the hedgerow and the historic fence by Flying T's predecessors-in-interest was open and notorious as a matter of law. When real property has been held by adverse possession for 10 years, such possession ripens into an original title. *El Cerrito, Inc.*, 60 Wn. at 855. The person acquiring title by adverse possession can convey it to another party without having had title quieted in him prior to the conveyance.¹¹ *Id.* at 855-

¹¹ Failure of a predecessor-in-interest to include within a deed a legal description of an adjacent strip of land does not deprive a successor-in-interest from acquiring title to that strip by adverse possession, when it is apparent that the predecessor intended to convey more land than the deed described.

56. Accordingly, Flying T's predecessors-in-interest acquired title to this strip of land decades ago and that title was transferred to Flying T in 1989.

The doctrine of adverse possession protects "both those who knowingly appropriated the land of others, and those who honestly held the property in the belief that it was their own." *Doyle v. Hicks*, 78 Wn. App. 538, 543, 897 P.2d 420 (1995), *review denied*, 128 Wn.2d 1011 (1996) (quoting *ITT Rayonier, Inc. v. Bell*, 112 Wn.2d 754, 760, 774 P.2d 6 (1989)). To establish a claim of adverse possession, the possession must be open and notorious, actual and uninterrupted, exclusive, and hostile to the actual owner. *Chaplin v. Sanders*, 100 Wn.2d 853, 857, 676 P.2d 431 (1984). Each of these elements must exist concurrently for the statutorily prescribed 10-year period. RCW 4.16.020(1). The ultimate test of adverse possession is whether the party claiming it exercised dominion over the land in a manner consistent with acts of a true owner, taking into consideration the nature and location of the land. *Timberlane Homeowners Ass'n Inc., v. Brame*, 79 Wn. App 303, 309-10, 901 P.2d 1074 (1995), *review denied*, 129 Wn.2d 1004 (1996);

El Cerrito, Inc., 60 Wn.2d at 856. *See also, Buchanan v. Cassell*, 53 Wn.2d 611, 614, 335 P.2d 600 (1959) (Washington follows the rule that a purchaser may tack to his own the adverse use of his predecessor-in-interest, when the land was intended to be included in the deed between them, but was mistakenly omitted from the description).

ITT Rayonier, 112 Wn.2d at 759. Where adverse possessors and their predecessors use and maintain property as if it is their own for longer than the statutory 10-year period, and the true title owner actually or constructively knows of the possessor's adverse use throughout the same period, the elements of hostility and open and notorious use are satisfied. *Chaplin*, 100 Wn.2d at 862-863.

Muench v. Oxley, 90 Wn.2d 637, 584 P.2d 939 (1978), *overruled on other grounds by Chaplin*, 100 Wn.2d at 862 n.2, and *Scott v. Slater*, 42 Wn.2d 366, 255 P.2d 377, (1953), *overruled on other grounds by Chaplin*, 100 Wn.2d at 862 n.2, do not defeat Blakey and Flying T's adverse possession claim. Br. of Resp'ts at 30-31. Actual possession is a highly fact-dependent determination that depends on the nature and locality of the property involved. *Heriot v. Smith*, 35 Wn. App. 496, 504, 668 P.2d 589 (1983). While the Supreme Court has held that possession up to a fence line is not established when the fence is dilapidated and heavily covered by trees and underbrush, *Muench*, 90 Wn.2d at 642, it has held that building a fence and pasturing up to it is sufficient possession when the fence is recognized as a boundary. *Taylor v. Talmadge*, 45 Wn.2d 144, 150, 273 P.2d 506 (1954), *overruled on other grounds by Chaplin*, 100 Wn.2d at 862 n.2. Here, Robert Rollins

and Charles Kroeze both testified that the historic fence was the recognized and agreed boundary and that cattle was pastured up to the historic fence on each side. Ex. 40, pp. 9, 14; RP 92.

Anderson v. Hudak, 80 Wn. App 398, 907 P.2d 305 (1995), is likewise unavailing for the Wrens. Br. of Resp'ts at 31. In *Anderson*, Division II held the mere planting of trees 15-feet over the property line onto a neighbor's land does not establish adverse possession if the tree planter never waters, prunes, trims, or otherwise cares for the trees. *Anderson* instructs, however, that had the record not been "absolutely devoid of any affirmative acts taken by Anderson to maintain and cultivate the trees after they were planted," the result would have been different. *Id.* at 402-03.

But here, ample evidence demonstrates that Flying T and its predecessors-in-interest occupied, used exclusively, and openly maintained the property on Flying T's side of the historic fence for more than 50 years. Kroeze and Jack Thorsen, one of Flying T's predecessors-in-interest, shared repair of the historic fence until the 1960s. Ex. 40, pp. 17-18. Moreover, Blakey repaired or replaced the historic fence not once, but twice. The Wrens' predecessors-in-interest, the Rollins, knew of Flying T's adverse use for more than the statutory 10-year period. CP 333, 337; RP 354, 358. More

importantly, the Wrens presented no evidence that they or their predecessors-in-interest used or occupied any of the land east of the historic fence and west of the section/deed line. The hedgerow and the historic fence, and the exercise of dominion over the area adjacent to them, was easily discernible to all.¹² The trial court's conclusion that Flying T did not adversely possess the disputed strip of land is contrary to the evidence and incorrect as a matter of law.¹³ *See El Cerrito, Inc.*, 60 Wn.2d at 855 (noting title acquired by adverse possession cannot be divested by acts other than those required where title was acquired by deed).

This Court should reverse the trial court's determination that Blakey and Flying T did not acquire title to the strip of land in the area of the historic fence where overwhelming evidence demonstrates that they or their predecessors-in-interest adversely possessed it for the statutorily prescribed time. The Court should simultaneously reverse the award of attorney fees and costs to the

¹² Whether the Court delineates the properties using the hedgerow or the fence is immaterial. *See, e.g., Town of Clyde Hill v. Roisen*, 111 Wn.2d 912, 767 P.2d 1375 (1989) (discussing a city fence ordinance that specifically defined "naturally grown fences" and recognizing that absent the legal definition, the trees were "factually" a fence).

¹³ Flying T did not have to satisfy all of the elements of adverse possession where Kroeze, Robert Rollins, and Tannis testified that all of the elements had been satisfied long before Blakey purchased Flying T's property. The only exception was the 50-feet at the north end of the properties; even so, Blakey's 1990 repair work there stood unchallenged for 19 years.

Wrens based on Blakey and Flying T's trespass. *Segaline v. Dep't of Labor & Indus.*, 169 Wn.2d 467, 475-76, 238 P.3d 1107 (2010) (vacating award of attorney fees and costs where statutory basis for that award no longer applied).

C. The Trial Court Erred by Holding Blakey Personally Liable

Blakey and Flying T also argued in their opening brief that the trial erred by entering a judgment holding Blakey personally liable for the Wrens' damages. Br. of Appellants at 35-40. The Wrens respond that Blakey's liability was not based upon a corporate disregard theory. Br. of Resp'ts at 33-34. But even assuming the Wrens' claim was based on Blakey's active participation in the trespass giving rise to this lawsuit as the Wrens now allege, her personal liability remains inappropriate. Under certain circumstances, corporate officers may face personal liability for tortious conduct other than by piercing the corporate veil. *Dodson v. Economy Equip. Co., Inc.*, 188 Wash. 340, 62 P.2d 708 (1936). But the Wrens fail to recognize *Dodson* and its progeny have all limited its application to circumstances where the tortfeasor was a corporate officer who actively participated in a conversion. *See, e.g., Johnson v. Harrigan-Peach Land Dev. Co.*, 79 Wn.2d 745, 752, 489 P.2d 923 (1971); *Franklin v. Gilbert Ice Cream Co.*,

191 Wn.2d 269, 275, 71 P.2d 52 (1937); *Betchard-Clayton, Inc. v. King*, 41 Wn. App. 887, 893, 707 P.2d 1361 (1985).

Where the Wrens never alleged that Blakey actively participated in a tortious conversion, the trial court could not justify imposing personal liability on her other than by piercing the corporate veil. As Blakey and Flying T noted in their opening brief, to the extent the trial court may have based its decision to hold Blakey personally liable on piercing the corporate veil, it erred by doing so in the absence of factual findings requisite to that piercing. Br. of Appellants at 37-40. This Court should reverse the judgment entered against Blakey in her personal capacity.

D. The Trial Court Abused Its Discretion When It Awarded Attorney Fees to the Wrens

Blakey and Flying T also challenged the trial court's award of attorney fees and costs to the Wrens, arguing that the court failed to enter appropriate findings of fact and conclusions of law to support the award and to properly segregate fees. Br. of Resp'ts at 25-34. The Wrens urge this Court to ignore the deficiencies in the trial court's findings. The Court should decline their invitation.

The Wrens first claim the trial court determined their intentional trespass and quiet title claims were so intertwined that segregation was not required. Br. of Resp'ts at 35, 38. The trial

court did not find the Wrens claims were so intertwined as to preclude segregation *because it entered no such findings*. CP 92. The trial court never found that their claims involved the same core facts or that distinguishing between their successful claims and their unsuccessful claims was difficult. The Wrens implicitly admit as much by failing to cite to any contrary findings in their brief.

Here, the trial court signed the Wrens' proposed findings of fact and conclusions of law without making any changes. CP 92. It made no findings relating to the calculation of the lodestar amount except to find:

The Plaintiffs have incurred the following reasonable costs, including by not limited to investigative costs and reasonable attorney's fees and other litigation related costs in the following amounts[.]

CP 92. This finding is insufficient to support the fee award. "Courts must take an active role in assessing the reasonableness of fee awards, rather than treating cost decisions as a litigation afterthought. Courts should not simply accept unquestioningly fee affidavits from counsel." *Mahler*, 135 Wn.2d at 434-35.

In *Mahler*, a plaintiff injured in a car accident settled with the tortfeasor. State Farm, her insurer, demanded to be reimbursed for all the payments furnished to the plaintiff under her coverage for

personal injury protection. State Farm rejected the plaintiff's demand for State Farm's share of the attorney fees incurred in obtaining the settlement with the tortfeasor. Following mandatory arbitration, State Farm requested a trial de novo and failed to improve its position. The trial court awarded fees and costs of \$32,694.59 pursuant to MAR 7.3, and a larger amount pursuant to *Olympic S.S. Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991). The Supreme Court determined that *Olympic S.S.* was not a valid basis for awarding fees under the circumstances. Because the trial court had not explained its analysis in entering the fee award, the Supreme Court remanded and established the rule that an award of attorney fees must be supported by findings of fact and conclusions of law. *Mahler*, 135 Wn.2d at 435.

While the trial court entered findings and conclusions in the present case, they are too conclusory to support this Court's review. There is no indication that the trial judge actively and independently confronted the question of what was a reasonable fee. CP 92. For example, this Court has no way to know if the trial court considered any of Blakey and Flying T's objections. The court simply accepted, unquestioningly, the fee declaration from the Wren's counsel.

Although a trial court does not need to deduct hours to prove

to this Court that it has taken an active role in assessing the reasonableness of a fee request, it must do more than give lip service to the word “reasonable.” *Berryman v. Metcalf*, 177 Wn. App. 644, 658, 312 P.3d 745 (2013). The findings must show how the trial court resolved disputed issues of fact and the conclusions must explain the court’s analysis. The findings and conclusions in this case are insufficient under *Mahler* and its progeny.

Normally, this Court remands a fee award that is unsupported by an adequate record for the entry of proper findings of fact and conclusions of law. *See, e.g., Mahler*, 135 Wn.2d at 435; *Eagle Point Condo. Owners Ass’n v. Coy*, 102 Wn. App. 697, 715-16, 9 P.3d 898 (2000) (remanded because trial court “simply announced a number”). This is because the trial judge is in the best position to determine what should be included in the lodestar calculation. *Chuong Van Pham v. City of Seattle*, 159 Wn.2d 527, 540, 151 P.3d 976 (2007). But the Wrens argue a remand here would be “a waste of time and resources.” Br. of Resp’ts at 43. A remand on the existing record is the better course of action where it will preserve to the trial court its traditional role of resolving disputed facts and exercising suitable discretion. *Berryman*, 177 Wn. App. at 660. This Court’s responsibility is simply “to ensure that discretion

is exercised on articulable grounds.” *Mahler*, 135 Wn.2d at 435, 957 P.2d 632.

The Wrens must “abide the consequences” of their failure to procure appropriate findings to support the fee award. *Peoples Nat’l Bank v. Birney’s Enters., Inc.*, 54 Wn. App. 668, 670, 775 P.2d 466 (1989). Accordingly, this Court should remand to the trial court for the entry of appropriate findings and the calculation of attorney fees using the lodestar method if it does not reverse the judgment entered against Blakey and Flying T in its entirety.

E. The Court Should Deny the Wrens’ Request for Attorney Fees on Appeal

The Wrens seek attorney fees and costs on appeal under RAP 18.1. Br. of Resp’ts at 45. “Where a statute or contract allows an award of attorney fees at trial, an appellate court has authority to award fees on appeal.” *Standing Rock Homeowners Ass’n v. Misich*, 106 Wn. App. 231, 247, 23 P.3d 520 (2001). The trial court awarded the Wrens attorney fees and costs under RCW 4.24.630 after finding Blakey and Flying T did not adversely possess the disputed property. On the same basis, the Wrens assert they are also entitled to attorney fees and costs on appeal. Br. of Resp’ts at 45. Where the Court concludes the trial court erred in quieting title in the Wrens, there is no basis for an award of fees on appeal under

RAP 18.1. The Wrens' request should be denied.

IV. CONCLUSION

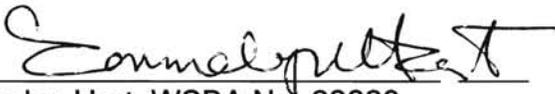
The Wrens offer no legitimate response to the arguments Blakey and Flying T raised in their opening brief. The challenged factual findings and the conclusions that flow from them are not supported by substantial evidence. Accordingly, this Court should reverse the trial court's judgment.

The Court should deny attorney fees and costs to the Wrens on appeal and instead award Blakey and Flying T their costs.

DATED this 21st day of April, 2014.

Respectfully submitted,

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DECLARATION OF SERVICE

On said day below I emailed a courtesy copy and deposited in the U.S. Postal Service for service a true and accurate copy of the foregoing Reply Brief of Appellants to the following:

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

DATED: April 21, 2014, at Seattle, Washington.



Vicki Milbrad

LEWIS BRISBOIS BISGAARD & SMITH