

No. 72919-5-I

**COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON**

SONJA O. BEAL and ROBERT E. BEAL,

Respondents/Cross-Appellants,

v.

RICHARD D. CAMPBELL and
REBECCA LEE MARCY,

Appellants/Cross-Respondents.

Brief of Respondents/Cross-Appellants

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I. INTRODUCTION

This case provides the Court of Appeals with an opportunity to clarify the duties and damages the grantors of a statutory warranty deed, Rebecca Lee Marcy and Richard Campbell (collectively “Campbell”), owe to their grantees, Sonja and Robert Beal (“Beals”), for breach of the statutory warranty deed’s covenants, specifically the covenant of quiet possession, covenant of seisin and covenant to defend.

II. ASSIGNMENTS OF ERROR ON CROSS-APPEAL

A. Assignments Of Error

1. The trial court erred in entering Judgment that did not include interest on the value of property the Beals lost from the day the property was purportedly conveyed to them by warranty deed (*Appeal of Finding of Fact 14 and Conclusion of Law 9*).

2. The trial court erred in entering Judgment limiting Beals’ attorney fees award to fees incurred prior to March 25, 2014, since some later-incurred attorney fees were proximately caused by Campbell’s breach of the covenant to defend, or alternatively, are recoverable under the doctrine of equitable indemnity (*Appeal of Finding of Fact 13 and Conclusion of Law 10*).

B. Issues Pertaining To Assignments Of Error

1. Whether interest on the value of lost property should be awarded to the grantees from the day the property was purportedly conveyed (Assignment of Error 1)?

2. Whether interest awarded to grantees should accrue at the statutory rate of 12 percent per annum when no other interest rate appears in any agreement between the parties (Assignment of Error 1)?

3. Whether a grantee should be awarded, as attorney fees proximately caused by grantors' breach of the covenant to defend, fees resulting from grantor's attempts to evade the duty to defend (Assignment of Error 2)?

III. STATEMENT OF THE CASE

In 1997, George and Ellen Welch (the "Welches") purchased property at 9703 SW 264th Street on Vashon Island (the "Lopez Francis Property"). CP 384. In 1998, the Welches constructed a fence (the "property line fence") to separate the Lopez Francis Property from 9713 SW 264th Street (the "Beal Property"). CP 384-385. The Welches maintained the property line fence and had exclusive use and enjoyment of the entire property, up to and including the fence from 1998 until the Welches sold the Lopez Francis Property to James C. Lopez and Tessa B. Francis ("Lopez and Francis") in 2007. CP 385.

Since 2007, Lopez and Francis have enjoyed exclusive use and control of the Lopez Francis Property and the portion of the Beal Property that was set off on the Lopez Francis side of the property line fence (the “disputed property”). CP 395.

Despite their best efforts, the Beals discovered no evidence to show their predecessor, Sally A. Brown, who owned the Beal Property from 1998 until 2011, or Campbell, the owner of the Beal Property from May to November 2011, ever asserted a claim or right to the disputed property. CP 396, 402.

On May 13, 2011, Mr. Campbell, a real property investor and licensed real estate agent, purchased the Beal Property at a Trustee’s Sale. CP 427. Mr. Campbell paid \$160,000.00 for the Beal Property. CP 436. In October 2011, Ms Beal entered into a purchase and sale agreement with Mr. Campbell to purchase the Beal Property for \$274,000.00. CP 401. Mr. Campbell’s listing on the Northwest Multiple Listing Service represented that the Beal Property, including the disputed property, was 62,000 square feet. EX 2. On November 28, 2011, Campbell executed a Statutory Warranty Deed that purported to convey title of the Beal Property to the Beals. CP 404-406, EX 4. The disputed property was included in the Deed’s legal description. CP 406, EX 4.

In early 2013, Beals decided to fence the southern boundary of the Beal Property to better contain their horses and goats. CP 410. Beals surveyed and marked the boundaries to ensure the new fence would run along the property line. *Id.* After the survey, Mr. Beal began placing stakes to construct the fence. *Id.* Ms Francis, Beals' southern neighbor, objected and told Beals to cease construction of the fence and get off the disputed property. Lopez and Francis claimed to have adversely possessed the disputed property. The disputed property was a significant part of the southern-portion of the Beal Property. *Id.*

Beals, through their attorneys, immediately began investigating Lopez and Francis's claim. CP 427. On March 26, 2013, Beals received a letter from John Phillips, then counsel for Lopez and Francis and later Campbell's counsel at trial, asserting Lopez Francis' adverse possession claim. CP 427-428. Included with the letter were written statements by Mr. Lopez and Ms Welch indicated that, by tacking the Welches' use to their use, Lopez and Francis had adversely possessed the disputed property by 2008. *Id.* The following day, March 27, 2013, Beals' counsel sent a letter to Campbell notifying him that Lopez and Francis claimed ownership of the disputed property by adverse possession, that Beals looked to Campbell to indemnify them, and that Beals were tendering defense of the claim to Campbell. CP 428.

After tendering the defense to Campbell, Beals continued investigating the Lopez Francis' adverse possession claim. RP 218. On May 22, 2013, Beals again wrote to Campbell regarding the tender of defense as Beals were concerned with attorney fees and costs they were incurring defending title. CP 428. On May 24, 2013, Campbell accepted Beals' tender of defense conditioned on Campbell controlling the defense, on not paying any damages for the lost property to Beals and on not paying Beals' their attorney fees incurred defending title. *Id.* On May 27, 2013, Beals' counsel alerted Campbell that conditional acceptance of the tender was ineffective. *Id.*

On June 1, 2013, Campbell again conditionally accepted the tender. CP 429. This time, Campbell conditioned acceptance of the tender on Beals paying their own attorney fees incurred defending title, on Campbell acting as Beals' *pro se* counsel, and on Beals bringing a quiet title action against Lopez and Francis. *Id.* Campbell wanted to avoid paying attorney fees since an attorney Campbell had consulted indicated attorney fees could be "\$50,000.00 per side." *Id.* Campbell was again informed that conditional acceptance was ineffective. CP 475. Although refusing to actually defend, Campbell repeatedly requested that Beals settle the case with Lopez and Francis. RP 126.

On September 12, 2013, concerned that additional delay would strengthen the Lopez Francis' adverse possession claim and frustrated by Campbell's failure to defend title, Beals filed a Complaint to Quiet Title against Lopez and Francis and for Breach of Warranties against Campbell. CP 429. On or about September 19, 2013, Lopez and Francis counter-claimed for adverse possession. *Id.* On October 25, 2013, Beals, still concerned with Campbell's failure to defend title, sent Campbell a follow-up tender of defense. CP 430. The follow-up tender again notified Campbell of the Lopez Francis' claim, that Beals looked to Campbell to indemnify them, that the letter was a formal tender of defense, and that Campbell would be bound to the factual determinations of the initial action in any subsequent litigation should Campbell refuse the tender. *Id.*

On November 1, 2013, Campbell again conditionally accepted the tender. *Id.* Amongst Campbell's conditions was that Beals answer the Lopez Francis' adverse possession claim (i.e., defend title). *Id.* On November 7, 2013, Beals again notified Campbell that conditional acceptance was ineffective. CP 475. Since Campbell refused to defend, Beals' counsel answered the Lopez Francis' adverse possession claim on November 14, 2013. CP 430.

On October 7, 2013, Campbell noted the first of two summary judgment motions Campbell would file against Beals. CP 19. (Lopez and

Francis would also move for summary judgment against Beals. CP 155.) Campbell's first summary judgment motion requested that the trial court enter an order "absolving Campbell-Marcy from any obligation to 'defend' title or pay legal costs." CP 29. Although Campbell claimed to have defended title, Campbell never defended title despite conditionally accepting the tender on at least three separate occasions. RP 218.

On February 24, 2014, after the various summary judgment motions were denied to allow additional time for discovery, Beals, Lopez Francis, and Campbell (collectively the "Parties") made and entered into a Release and Settlement Agreement (the "Settlement Agreement"). CP 430. The Settlement Agreement resolved the quiet title and adverse possession actions by stipulating to entry of Judgment that would effectively adjust the property line between the Lopez Francis' Property and Beal Property as though Lopez and Francis had prevailed on their adverse possession claim; that is, conveying the disputed property to Lopez and Francis. CP 430-431. All Parties, including Campbell, executed the Settlement Agreement. CP 431.

By executing the Settlement Agreement, Campbell acknowledged that there was no objection to settlement and expressly recognized that Lopez and Francis owned the disputed property. *Id.* An agreed Judgment, executed by the Parties, was entered by the trial court on March 25, 2014.

CP 345. The agreed Judgment quieted title to 7,761 square feet of disputed property in Lopez and Francis and dismissed Beals' quiet title claim and Lopez Francis' adverse possession claim with prejudice. CP 347. The property line mandated by Lopez and Francis left Beals with two narrow peninsulas totaling 1,387 square feet of effectively valueless property, one on each side of the disputed property. RP 40. In total, due to the Lopez Francis' adverse possession, Beals lost 9,148 square feet of property they had paid Campbell for in 2011. CP 709. Upon entry of the agreed Judgment, Beals' breach of covenant claims should have been all that remained for trial. CP 368.

Soon after entry of the Agreed Judgment, Campbell noted a second summary judgment motion in another attempt to evade the duty to defend. CP 351. Campbell argued that Beals could not prevail on their breach of covenant claims due to the Settlement Agreement precluding a judicial determination that Lopez Francis had adversely possessed the disputed property, and that Campbell had satisfied the duty to defend. CP 354. In response, Beals incurred significant attorney fees compiling evidence regarding the Lopez Francis claim, refuting Campbell's false statements that he had not participated in the Settlement Agreement, and briefing arguments regarding Campbell's allegations. CP 362, 505. Beals also

noted a cross-motion for summary judgment for breach of the covenants to defend, of seisin, and quiet enjoyment (i.e. quiet possession). CP 362.

On August 29, 2014, the Court heard the cross-motions for summary judgment. RP 5. Beals presented evidence that Lopez and Francis had adversely possessed the disputed property and confirmed that Beals, despite their best efforts, could not discover significant evidence to contradict Lopez Francis' adverse possession claim. CP 384, 389, 394, 400. Campbell presented no evidence to contradict evidence that Lopez and Francis had adversely possessed the disputed property. RP 21.

The trial court, as a result of Campbell's motion, also considered substantial evidence, briefing and argument regarding Campbell's failure to defend title in good faith and the title issues that had presumably been resolved through the Agreed Judgment. CP 376-379, RP 8-13. Much of the pleadings and argument on the August 29, 2014 cross-motions for summary judgment concerned Campbell's attempts to evade the duty to defend and the title issues that were presumably dispensed of through the Agreed Judgment. *Id.* The trial court, after considering the evidence, denied Campbell's motion, CP 725, and granted Beals' motion for partial summary judgment as to Campbell's liability for breaching the covenant of seisin, quiet possession and to defend. CP 557.

At the damages trial, Beals called a licensed real estate appraiser, Brenda Sestrap, to testify regarding the value of disputed property which was lost due to Lopez Francis' adverse possession claim. RP 36. Ms Sestrap had appraised the Beal Property and the disputed property. *Id.* Ms Sestrap testified that, in her professional opinion, the value of the lost property was \$18,446.52 in November 2011, when Beals purchased the Beal Property from Campbell. RP 43, 50.

Mr. Campbell testified that, as a former owner, he personally valued the lost property at "a few thousand" dollars. RP 128. Unlike Ms Sestrap, Mr. Campbell is not an appraiser and had never done an appraisal of the Beal Property or the disputed property. RP 111, 114. Mr. Campbell also testified that according to an email he had previously sent to Beals, \$21,000.00 was a "reasonable value" of the disputed property. RP 128, Ex. 12.

In agreeing with Ms Sestrap's valuation, the trial court relied on her credibility as a witness, her well-reasoned methodology, her many years of experience as licensed appraiser and her independence as a witness. RP 254-256. Based on Ms Sestrap's testimony, the trial court concluded that the lost property's value was \$18,446.52. RP 257. The trial court, however, denied the Beals request for interest on the lost property's value from the date of conveyance (i.e., the date on which the

Beals paid Campbell for the property). The trial court reasoned that since damages were not liquidated until the moment of the oral ruling, Beals were not entitled to interest on the lost property's value. *Id.*

With regard to attorney fees, Ms Beal testified that all of the work performed by Beals' counsels through March 25, 2014, was in defense of title. RP 102. Mary Holleman, the attorney primarily responsible for the Beal matter prior to March 25, 2014, also testified that all the time devoted to the Beal matter through March 25, 2014 was in defense of title. RP 219. Based on Ms Beal and Ms Holleman's testimony, the court concluded that all of Beals' attorney fees through March 25, 2014 were recoverable as fees incurred defending title.

The trial court concluded that they were recoverable as fees incurred defending title because the fees were proximately caused by Campbell's breach of the covenant to defend and arose from Campbell's "conditional and essentially ineffective responses to tender." RP 258-259. However, the court refused to award any fees incurred after March 25, 2014, the day the Agreed Judgment was entered, since the title issues were presumably settled as of the Agreed Judgment. RP 259.

IV. SUMMARY OF ARGUMENT

The trial court appropriately granted Beals' motion for partial summary judgment after it reviewed uncontroverted evidence that

Campbell breached the covenant of seisin, quiet possession, and defense. Since Campbell presented no evidence to contradict the evidence of adverse possession, conditional acceptances of the tender, or failure to defend title, there is no basis for reversing the trial court's order. This Court should affirm the trial court's order granting Beals' motion for partial summary judgment.

The trial court also acted appropriately in awarding Beals \$18,446.52 for the value of property lost due to Lopez Francis' adverse possession claim and \$21,310.00 in reasonable attorney fees incurred defending title through March 25, 2014, based on the credible testimony before the trial court. Beals, however, should have also received interest on the lost property's value and the additional attorney fees proximately caused by Campbell's breach of the duty to defend after March 25, 2014.

V. ARGUMENT OPPOSING CAMPBELL'S APPEAL

A. The Trial Court Acted Appropriately In Granting Beals' Motion For Partial Summary Judgment.

1. Standard of review.

On appeal of summary judgment, the standard of review is de novo, and the appellate court performs the same inquiry as the trial court. Lybbert v. Grant County, State of Wash., 141 Wn.2d 29, 34, 1 P. 3d 1124 (2000) (citing Nivens v. 7-11 Hoagy's Corner, 133 Wn.2d 192, 197-198,

943 P. 2d 286 (1997)). The appellate court considers the same evidence that the trial court considered. Baechler v. Beaunaux, 167 Wn. App. 128, 133, 272 P. 3d 277 (2012) (citing Lybbert at 34). The Court of Appeals may affirm summary judgment on any ground supported by the record. Plese-Graham, LLC v. Loshbaugh, 164 Wn. App. 530, 541, 269 P.3d 1038 (2011) (citing Estep v. Hamilton, 148 Wn. App. 246, 256, 201 P. 3d 331 (2008), *review denied*, 166 Wn.2d 1027, 217 P. 3d 336 (2009)).

Beals motion was made pursuant to CR 56(c) which allows for summary judgment on liability even though a genuine issue exists as to damages. CR 56(c). A moving party is entitled to summary judgment where the declarations establish it is entitled to judgment as a matter of law. *See* Ranger Ins. Co. v. Pierce County, 164 Wn.2d 545, 192 P.3d 886 (2008). Since the declarations submitted with Beals' summary judgment motion contained uncontroverted evidence that no issues of material fact existed as to whether Campbell breached the covenants of seisin, quiet possession and defense, Beals' motion was appropriately granted.

2. All the evidence before the trial court indicated Campbell breached the covenants in the statutory warranty deed

The operative words of conveyance in a statutory warranty deed are, "The grantor...conveys and warrants." RCW 64.04.030. Where that granting language is used, the deed carries all five covenants, which are

covenants against defects arising through the grantor or any prior owner. 18 Wash. Prac., Real Estate § 14.3 (2d ed.). The warranty deed's five covenants are "obligatory upon any grantor as fully and with like effect as if written at full length in such deed." RCW 64.04.030.

The statutory warranty deed Campbell executed to convey title to Beals contained all five covenants. CP 404-406, EX 4. All the evidence before the trial court supported its findings that Campbell breached three covenants of the warranty deed: (1) seisin ("at the...making and delivery of such deed grantor was lawfully seized of an indefeasible estate in fee simple"); (2) quiet possession ("grantor warrants to the grantee...the quiet and peaceable possession of such premises"); and, (3) defense (grantor will defend the title against all persons who may lawfully claim the same"). RCW 64.04.030, *see also* 18 Wash. Prac., Real Estate § 14.2 (2d ed.).

- a. *Campbell breached the covenant of seisin by conveying property in Lopez and Francis' possession to Beals.*

The covenant of seisin is a present covenant, breached at the moment of conveyance when a grantor does not have the entire estate legally described in the deed. 18 Wash. Prac., Real Estate § 14.2 (2d ed.).

The grantee need not suffer an actual intrusion against possession by

another person – the mere absence of the estate itself constitutes the breach. 18 Wash. Prac., Real Estate § 14.3 (2d ed.).

Campbell’s breach of the covenant of seisin is made plain by the Court’s decision in Double L. Properties, Inc. v. Crandall, 51 Wn. App. 149, 151, 751 P.2d 1208 (1988). In that case, a warranty deed’s grantor declined to defend the grantee against a third-party’s adverse possession claim despite the grantee tendering defense of the action to the grantor; the parties stipulated to an order of dismissal of all claims involving the third-party once it was determined that adverse possession could not be established. The grantor and grantee’s claims regarding breach of warranties remained for litigation. *Id.*

Despite the failure of the third-party’s adverse possession claim in Double L. Properties, the court held that a grantor “breaches the covenant of seisin if, at the time of the sale, an adverse claimant is actually in possession of all or a portion of the land conveyed, whether his claim is rightful or wrongful.” *Id.* at 156. In Mastro v. Kumakichi Corp., this Court similarly held that a grantor breaches the covenant of seisin when the grantor delivers a deed to a grantee while a third-party encroachment exists on the described property. Mastro v. Kumakichi Corp., 90 Wn. App. 157, 163, 951 P.2d 817 (1998). The adverse possession claim’s merits are irrelevant for the purposes of the covenant of seisin. *Id.*

At the August 29, 2014, hearing on cross-motions for summary judgment, Beals presented the trial court with the warranty deed in which the disputed property was legally described. CP 419, 421. Beals also presented evidence that Lopez and Francis possessed the disputed property at the time Campbell conveyed the Beal Property to the Beals. CP 385, 390, 395. Campbell presented no evidence contradicting evidence that Lopez and Francis' possessed the disputed property at the time of conveyance. RP 5-6.

To the contrary, Campbell signed the Settlement Agreement and signed the Agreed Judgment approving it for entry and waiving notice of presentation. The Agreed Judgment quieted title to disputed property in Lopez and Francis and resolved the quiet title and adverse possession claims, CP 488-492 and RP 163-164. At trial Campbell conceded the adverse possession claim. RP 178, 181. Since the only evidence before the trial court showed Campbell had conveyed title to property that was in Lopez Francis' possession at the time of conveyance, the court correctly held that Campbell breached the covenant of seisin. The trial court's order finding Campbell in breach of the covenant of seisin should be affirmed.

- b. *Campbell breached the covenant of quiet possession by conveying to Beals, property Lopez and Francis had adversely possessed.*

Future covenants are typically breached only by events that occur after the moment of conveyance. For example, the covenant of quiet possession (also sometimes referred to as the covenant of quiet enjoyment, warranty or general warranty) is breached when, after conveyance, a person with superior or paramount legal right disturbs the grantee's possession. 18 Wash. Prac., Real Estate § 14.2 (2d ed.), *see also* 18 Wash. Prac., Real Estate § 14.3 (2d ed.). While a third-party may claim that paramount title existed at conveyance, the covenant is breached when the third-party disturbs the grantee's possession. Disturbance can be by physical entry on the land or constructive eviction by a third-party proving superior right and prevailing in an action for possession. 18 Wash. Prac., Real Estate § 14.3 (2d ed.).

Although breach of the covenants of seisin and quiet possession are often confused, the difference between the two is in the validity of the underlying title infringement. The existence of the infringement is all that is relevant to determine breach of seisin, while the covenant of quiet possession is breached when a third-party has paramount legal right. Washington's Supreme Court discussed the differences between the covenant of seisin and covenant of quiet possession in Hoyt v. Rothe:

there are many cases which hold that the possession of one who...disputes a boundary line is not such a possession as will work a constructive eviction, and sustain an action upon the covenants of his deed by the grantee. There are, on the other hand, many well-considered cases holding that, if land is conveyed by deed of general warranty [sic], and a part of it...is in the possession of another, the adverse possession operates as a constructive eviction eo instante.¹ The covenant of warranty protects only against an ouster from the possession; and there can therefore be no breach of it assigned without alleging an actual eviction. It is true that *evidence of a paramount title in a stranger, and that the warrantee, in consequence, yielded up the possession, will support such an allegation; for the law does not require the idle and expensive ceremony of being turned out by the legal process, when that result would be inevitable*. Still, however, an actual ouster must be set out. It is unnecessary to cite cases to this point; the difference between a covenant of warranty and of seisin being recognized as existing in England and our sister states.

Hoyt v. Rothe, 95 Wash. 369, 373, 163 P. 925 (1917) (citing Clarke v. McAnulty, 3 Serg. & R. (Pa.) 364-371) [emphasis added].

Even more important than the Court's discussion of the difference between the covenants of seisin and quiet possession in Hoyt, is its complete rejection of the argument (Campbell's argument) that paramount legal right must be established by court order and not by evidence of ouster, adverse possession and settlement. Hoyt squarely rejects Campbell's approach since "evidence of... paramount title in a stranger, and that the warrantee, in consequence, yielded up... possession, will support such an allegation; for the law does not require the idle and

¹ Eo instante is latin for "at that moment."

expensive ceremony of being turned out by the legal process, when that result would be inevitable.” *Id.*

Since Hoyt, Washington’s rule regarding breach of the covenant of quiet possession is that when a grantor conveys land to a grantee by warranty deed “and a part or the whole of it is in the possession of another claiming title...who refuses to quit on demand,” the grantee may rely on the covenant and rescind the contract, or affirm it and demand damages to the extent of the value of the property lost to the third-party claim. *Id.* In other words, where premises are possessed by third-persons claiming under superior title at the time the deed is delivered, and the grantee cannot be put into possession, the covenant is breached. Whatcom Timber Co. v. Wright, 102 Wash. 566, 568, 173 P. 724 (1918).

Evidence of adverse possession is, therefore, sufficient to support Lopez and Francis’ claim to title of the disputed property so long as such possession is adverse and hostile for the statutory period. Hoyte at 374. All the evidence before the trial court showed that Lopez and Francis, when tacking the use of their predecessors, had actual, hostile, open, notorious, continuous and exclusive use of the disputed property from 1998. CP 385, 390, 395. Campbell presented no contrary evidence. CP 402, RP 21. At trial, Campbell even conceded that adverse possession had been established by Lopez and Francis. RP 181. Indeed, one of the

reasons Beals settled with Lopez and Francis was the lack of evidence contradicting adverse possession. CP 402. As this Court has held, a grantee *does not* abandon a claim against a grantor by settling an adverse possession claim. Mastro at 160.

That Beals, with Campbell's participation and agreement, settled the adverse possession and quiet title claims with Lopez and Francis is irrelevant. Paramount title was established by uncontroverted evidence of ouster, adverse possession and entry of the Agreed Judgment. Since the evidence of adverse possession presented to the trial court was not and could not be contradicted by Campbell, the trial court appropriately held that Campbell breached the covenant of quiet possession by trying to convey property to Beals that had been adversely possessed by Lopez and Francis. RP 6-8. The trial court's order finding Campbell in breach of the covenant of quiet possession should be affirmed.

c. *Campbell breached the covenant to defend by conditionally accepting the tender of defense and failing to defend title.*

RCW 64.04.030 makes a covenant "to defend title thereto against all persons who may lawfully claim the same" a separate covenant of the statutory warranty deed. RCW 64.04.030. While there is little Washington authority on the covenant to defend, Washington's Supreme Court has spoken regarding a grantor's duty to defend in good faith in

Edmonson v. Popchoi, 172 Wn.2d 272, 279-280, 256 P.3d 1223 (2011).

Although, the Supreme Court's decision in this case goes uncited in Campbell's brief, it is the preeminent case regarding the duty to defend and damages for breach of the statutory covenants.

The warranty to defend means that, upon proper tender, a grantor is obligated to defend in good faith and is liable for a breach of that duty. Defend means something more than complete concession to a party's claims. The duty of good faith, at minimum, requires faithfulness to an agreed common purpose and consistency with the justified expectations of the other party. Bad faith may be overt or may consist of inaction.

Edmonson at 279-280.

In Edmonson, a case with facts strikingly similar to the present case, the grantees commissioned a survey of residential property they were purchasing and discovered an encroaching fence built by the adverse possessor's predecessor. After the sale, the adverse possessor sent the grantees a letter alerting them of the adverse possession claim. The grantees forwarded the information to the grantor and demanded quick resolution of the dispute. After unsuccessful settlement negotiations, the adverse possessor filed a quiet title action. *Id.* at 275. The grantees submitted a tender of defense to the grantor who conditionally accepted the tender. The grantor inadequately investigated the adverse possession

claim and failed to assist in the grantees' representation. The grantees' attorney defended the adverse possession claim. *Id.* at 276.

The trial court in Edmonson granted the adverse possessor's summary judgment motion and awarded them the disputed property. *Id.* The trial court also entered judgment in favor of the grantees and against the grantor for damages for breach of the covenant of quiet possession. *Id.* at 277. The Supreme Court affirmed the trial court and held that a grantor breaches the covenant to defend title when conditioning acceptance of the tender on controlling the grantees' defense. The Court reasoned that conditional acceptance effectively operates as a refusal of the tender. *Id.*

The trial court was presented with evidence that Beals repeatedly tendered defense of Lopez Francis' adverse possession claim to Campbell. CP 428-430, RP 217. The trial court was also presented with evidence that Campbell conditionally accepted the tender on several occasions and failed to defend title. CP 428-430, RP 218. Since neither Ms Marcy nor Mr. Campbell is a member of the Washington State Bar, Campbell could not condition acceptance of the tender on being allowed to act as Beals' *pro se* counsel in defense of their title since "non-attorney litigants may not represent other litigants." Church of the New Testament v. United States, 783 F.2d 771, 774 (9th Cir. 1986), *see also*, RCW 2.48.170, CP

429. Campbell repeatedly ignored the trial court's warnings that Campbell did not have standing to defend Beals' title *pro se*. RP 10.

Neither could Campbell condition acceptance of the tender on controlling Beals' defense or on Beals indemnifying Campbell for damages and attorney fees they incurred defending title. *See Edmonson*, CP 430, 453-454. Campbell did not and could not provide any evidence that Campbell defended Beals' title or provided anything but ineffective conditional responses to Beals' tenders of defense. RP 20-21.

Just as the grantor in Edmonson breached the duty to defend in good faith by conditioning acceptance of the tender on controlling the grantees defense, Campbell breached the duty to defend in good faith by putting similar, *and indeed more severe*, conditions on the apparent acceptances of the tender. Just as the Supreme Court found that the grantor in Edmonson breached the duty to defend title in good faith, the trial court rightfully held that Campbell's conditional acceptance of the tender, and failure to defend title, breached the covenant to defend. The trial court's order finding Campbell liable for breach of the covenant to defend should be affirmed.

B. The Trial Court's Damage Award Was Not More Than Beals Should Have Received As Damages.

1. Standard of review.

The rule in Washington, on the question of the sufficiency of evidence to prove damages, is: “the fact of loss must be established with sufficient certainty to provide a reasonable basis for estimating that loss.” Mason v. Mortgage America, Inc., 114 Wn.2d 842, 849-850, 792 P.2d 142 (1990) (citing Wilson v. Brand S Corp., 27 Wn. App. 743, 747, 621 P. 2d 748 (1980)). Mathematical exactness is not required. *Id.* at 850 (citing Golden Gate Hop Ranch, Inc. v. Velsicol Chem. Corp., 66 Wn.2d 469, 476, 403 P.2d 351 (1965)). The amount of damages is a matter to be fixed within the judgment of the fact finder. *Id.*, (citing Rasor v. Retail Credit Co., 87 Wn.2d 516, 531, 554 P.2d 1041 (1976)).

A trier of fact has discretion to award damages which are within the range of relevant evidence. *Id.* (citing Cultum v. Heritage House Realtors, Inc., 103 Wn.2d 623, 633, 694 P.2d 630 (1985)). An appellate court will not disturb an award of damages made by the fact finder unless it is outside the range of substantial evidence in the record, or shocks the conscience, or appears to have been arrived at as the result of passion or prejudice. *Id.* (citing Rasor at 531). Evidence before the trial court

indicated Beals' damages were *more than* the amount awarded to Beals.

There is no legitimate basis for lessening Beals' damages award on appeal.

2. The damages award for the disputed property's value and all of Beals' attorney fees prior to March 25, 2014 was based on credible testimony and the proper legal standard.
 - a. *The value of the property lost due to the Lopez Francis' adverse possession claim was \$18,446.52.*

Washington State's Supreme Court has made clear that "where covenants under the warranty deed are breached, an injured grantee is entitled to recover both damages for lost property, or diminution in property value, and attorney's fees incurred in defending title." Edmonson at 278 (citing Mastro at 163). In the present case, the trial court appropriately awarded Beals the value of the lost property based on the testimony of Brenda Sestrap, a license real-estate appraiser.

In Edmonson, the grantee's damages for lost property were calculated as "the amount...paid for the 165 square feet to which they lost title, including the enhancement of the value of that property *and interest*." Edmonson at 277. Similarly, in Mastro, a grantee's damages award was \$165,284.15 on a sales price of \$750,000.00. See, Mastro at 161-162. The rules and principles of these cases confirm that a grantee is to be reimbursed the amount paid to the grantor at the time of sale for the portion of the land to which title failed.

As professors Stoebuck and Weaver explain, where a “grantee is permanently deprived of possession of part of the land because title fails as to that part, the measure of damages is the proportion of the purchase price that the fair market value of that part bears to the fair market value of all the land.” 18 Wash. Prac., Real Estate § 14.4 (2d ed.). The purchase price stands for the value of the land instead of “fair market value” since if the value rose it would compel the grantor to pay back more than received, and if the value dropped, the grantee would get back less than paid. *Id.* Since the trial court sought to reimburse Beals the value they paid to Campbell for the lost property, it was right to award the Beals the value of the lost property at the time it was conveyed to Beals, \$18,446.52.

Ms Sestrap, a licensed real estate appraiser with 20 years of experience appraising property on Vashon Island, testified regarding her appraisal of the Beal Property as a whole and of the disputed property. RP 36. She provided credible testimony explaining the methodology supporting her professional opinion that the lost property’s value was \$18,446.52 as of November 2011. RP 43. The Court found Ms Sestrap’s testimony credible, persuasive, and indeed determinative in valuing the lost property. RP 254-257. Consistent with the Supreme Court’s rule in Edmonson, the trial court awarded the Beals the value they paid for the disputed property as damages.

Mr. Campbell, on the other hand, provided his unsupported opinion as a former owner that the disputed property was worth almost nothing, \$4,000.00 at most. RP 188. That opinion, beyond self-serving, is illogical. Campbell's estimate of \$4,000.00 as the "value" of nearly 10,000 square feet of property would result in a total site value of \$25,000.00 for the 62,000 square feet of Beal Property Campbell claimed to convey in 2011. If that were true, the "value" of the Beal Property's improvements would be the remainder of the \$274,000.00 purchase price, roughly \$249,000.00. Campbell provided no support for this valuation of the disputed property. Indeed, Campbell did not claim to have appraised the Beal Property or the disputed property.

Furthermore, contrary to the unsupported valuation Campbell provided at trial, Campbell valued the lost property at about \$21,000.00 in an email he sent to Beals in September 30, 2013. RP 185-186. That email was based on the assessed land value in the King County Records. EX 19. Lastly, the appraisal ordered by the Beals' lender, just before Beals' purchase, further supported Ms Sestrap's valuation, and was indeed, even greater than Ms Sestrap's. Ex. 3.

Based on the trial court's findings of Ms Sestrap's vastly superior methodology, training, experience and credibility in valuing property, and the other evidence of value in the record, the trial court concluded that the

Beals' damages for breach of the covenant of quiet possession was the value of the lost property as of the day of conveyance, \$18,446.52. RP 707-713.

As Washington's Supreme Court stated in Edmonson, Beals were entitled to what was awarded, the value of the lost property as damages. Campbell's argument for an award based on "diminution in value" is misplaced, both because Campbell provided no support for such a valuation and because, "when awarding damages for an action concerning real property, the decision as to which measure of damages to apply is one left to the trier of fact." Thompson v. King Feed & Nutrition Service, Inc., 153 Wn.2d 447, 459, 105 P.3d 378 (2005). There is no basis for second-guessing the trial court's damages award for the value of the lost property.

- b. *All Beals' attorney fees from the tender of defense on March 27, 2013, through March 25, 2014, were incurred defending title.*

The warranty to defend against another's claim to title under a statutory warranty deed means that, upon a grantee's tender of defense, a grantor must provide a good faith defense to title or face liability for breach of the warranty. Edmonson at 284. When the warranty is breached, the grantor must pay the grantee's attorney fees incurred in defending title. *Id.* Such attorney fees include "in the context of the warranty to defend, attorney fees proximately caused by the breach."

Buck Mountain Owner's Ass'n v. Prestwich, 174 Wn. App. 702, 731, 308 P.3d 644 (2013) (citing Edmonson v. Popchoi, 155 Wn. App. 376, 384, 228 P.3d 780 (2010)). All of Beals' attorney fees incurred from the tender of defense on March 27, 2013 through entry of the Agreed Judgment effectively settling the adverse possession and quiet title claims on March 25, 2014, were incurred defending title. RP 258-259. Certainly most if not all of them would not have been incurred by the Beals if Campbell had accepted and actually defended the Beals' title. Those fees were appropriately awarded to Beals by the trial court.

Campbell, for the first time on appeal, makes the frivolous argument that Beals' tender of defense was ineffective. This argument, in particular, stands out in a brief full of similar arguments since Campbell's counsel conceded at trial that, with regard to Beals' tender, "obviously, notice did occur." RP 22. Despite the "obvious notice" provided by the tender, Campbell continues the "kitchen sink" approach to litigation that has resulted in significant attorney fees arising from Campbell's failure to defend the Beals' title. Unfortunately for Beals, most of these fees have been incurred since March 25, 2014, and therefore, were not awarded to Beals as damages.

Reference to the law regarding proper tender confirms the lack of any basis for Campbell's argument of inadequate tender. A tender of

defense is equivalent to ‘vouching in’ by which a grantee notifies a grantor (1) of the pendency of a claim; (2) that if liability is found, the grantee will look to the grantor for indemnity; (3) that the notice constitutes a formal tender of the right to defend the action; and, (4) that if the grantor refuses to defend, they will be bound in subsequent litigation between grantor and grantee to the factual determinations necessary to the original judgment. See Mastro at 164-165. All four criteria need not be set forth in the tender. The grantor need only be notified of the claim and expectation of defense. See *id.* at 165-166.

Campbell was notified of Lopez Francis’ claim to the property, that Beals looked to Campbell for indemnity, that the notices constituted tenders of defense, and that Campbell would be bound in any subsequent litigation between Campbell and Beals to factual determinations necessary to resolve the claims with Lopez and Francis. CP 448, 469. Any of Beals’ letters tendering defense provided sufficient notice to Campbell, as was conceded at trial. RP 22. That Campbell repeatedly claimed to accept the tender also confirms adequate notice. RP 165. The trial court rightfully found that Beals effectively tendered the defense to Campbell on March 27, 2013, CP 710, and from that point on “the grantee is entitled to recover attorney fees under the warranty to defend.” Mastro at 163.

Attorney fees incurred defending title include Beals' costs and attorney fees defending against Lopez Francis' adverse possession claim; conducting an "investigation, through formal and informal means, into the merits of the tendered claim to determine whether a good faith defense exists;" and, making a "decision about how to proceed after taking into consideration the investigation results." Edmonson v. Popchoi, 155 Wn. App. 376, 386, 228 P.3d 780 (2010). Recoverable attorney fees also include those incurred by Beals in their quiet title action since "one who has a dispute with another over his title and brings an action to settle the title question might be said to be defending 'title,' even though he is not defending the lawsuit." 18 Wash. Prac., Real Estate § 14.4 (2d ed.). Since Beals might have been prejudiced by not doing so, it is "defense of title... to commence an action as plaintiff." 18 Wash. Prac., Real Estate § 14.4 (2d ed.). This view is consistent with awarding a grantee attorney fees incurred in ejectment actions. See Double L. Properties, Inc. at 158.

From proper tender on March 27, 2013, Beals spent considerable time and money defending title. RP 219. Beals researched defense of title and investigated the underlying title claims so as to make informed decisions on how to proceed to defend title – who would defend, what would such a defense include, and what steps should be taken to defend. *Id.* The only time spent "prosecuting" the breach of covenants claims

against Campbell prior to the March 25, 2014 settlement with Lopez Francis was the brief moment spent drafting the portion of the Complaint regarding the breach of covenant claims which was simply another attempt to bring the title issue to the front so Campbell would defend title. *Id.*

Both Ms Beal and Ms Holleman's testimony confirmed that all of Beals' efforts through March 25, 2014 were in defense of title. RP 102, 219. Beals were rightfully awarded all their attorney fees from March 27, 2013, through March 25, 2014 based on the trial court's conclusion that all those fees were incurred by Beals' in defense of title and arose due to "Mr. Campbell's conditional and essentially ineffective responses to the tender." RP 258. Contrary to Mr. Campbell's arguments to this Court, the trial court's attorney fees award only included fees that were incurred defending title and did not include any fees incurred by Beals proceeding against Campbell for breach of the statutory covenants. CP 710.

In addition to misrepresenting the trial court's damages award, Campbell ignores recent case law regarding attorney fee awards to grantees. Campbell is wrong in citing Mellor for the proposition that RCW 64.04.030 does not provide attorney fees to grantees that bring suit. *See Mellor v. Chamberlin*, 100 Wn.2d 643, 673 P.2d 610 (1983). Campbell misreads and misapplies Mellor. Mellor simply holds that a grantee is not entitled to attorney fees where the grantee fails to provide

the grantor with notice and an opportunity to defend title. This may be why Campbell now alleges improper tender. However, Campbell received ample notice and opportunity to defend. Instead of defending Beals title, Campbell actively hindered and obstructed Beals' defense.

Mellor is inapplicable to this case. In 2011, the Supreme Court itself clarified the meaning of Mellor when it stated that “Mellor stands only for the rule that the grantor cannot be found to owe attorney fees as a result of a breach of the duty to defend if the grantor never received notice or opportunity to fulfill the duty to defend.” Edmonson at 281.

Edmonson and Buck Mountain control. The trial court was right to award Beals all their attorney fees through March 25, 2014, as fees incurred defending title. This Court should affirm the trial court's award of damages for lost property and attorney fees incurred in defense of title through March 25, 2014.

VI. ARGUMENT ON CROSS-APPEAL

A. Beals' Damages Award Should Have Included Interest On The Lost Property's Value From The Day The Disputed Property Was Purportedly Conveyed.

Where covenants under the warranty deed are breached, an injured grantee is entitled to recover both damages for lost property, or diminution in property value, and attorney's fees incurred in defending title.

Edmonson at 278 (citing Mastro at 163). Damages for lost property

include the amount paid for the property to which title was lost, the enhancement of the value of that property, **and interest**. *Id.* at 277. Interest on the consideration paid on the land for which title failed is included as an item of damage for breach of covenants to reimburse the grantees for the years that the grantors had use of grantee's money. Foley v. Smith, 14 Wn. App. 285, 295-296, 539 P.2d 874 (1975). In the present case, the trial court erred when it held that, because the damages were not liquidated until the moment of oral ruling, CP 709, 7011, the Beals were not entitled to *any* interest on the \$18,446.52 paid to Campbell on November 28, 2011. This was in error because the Supreme Court had agreed that grantees should be awarded interest on the value of the lost property from the time of conveyance in Edmonson. Edmonson at 277.

Campbell conveyed title to the Beals by statutory warranty on November 28, 2011. CP 708. Beals lost 9,148 square feet of property that they paid Campbell for in 2011 due to Campbell's breach of the covenant of quiet possession. *Id.* Beals had paid Campbell \$18,446.52 for the lost property on November 28, 2011. CP 709. The law does not allow Campbell an interest free loan from Beals.

As a general rule, the rate of prejudgment interest on any forbearance of money is 12 percent per annum where no different rate is agreed to in writing between the parties. RCW 19.52.010. Since neither

the purchase and sale agreement nor the warranty deed, under which Campbell received funds in exchange for property not conveyed to Beals, included an alternative interest rate, Beals should be awarded 12 percent interest on the \$18,446.52 of Beals' funds that Campbell improperly held from November 28, 2011 until November 24, 2014.

Awarding Beals interest on the funds held by Campbell is consistent with the Supreme Court's ruling in Edmonson and with prejudgment interest being awarded based on the principle that a defendant "retaining money which ought to be paid to plaintiff should pay interest on the money, because the plaintiff loses the 'use value' of the money." Ernst Home Center, Inc. v. Sato, 80 Wn. App. 473, 495, 910 P.2d 486 (1996) (citing Hansen v. Rothaus, 107 Wn.2d 468, 473, 730 P.2d 662 (1986)).

Consistent with the law and this principle, Beals should be awarded interest on \$18,446.52 from the date the sale closed, November 28, 2011 to November 24, 2014. Such interest should be at 12 percent per annum pursuant to RCW 19.52.010 or, alternatively, RCW 19.52.020. The trial court should award Beals \$6,640.75 in interest on the \$18,446.52 of Beals' money that Campbell wrongfully held from November 28, 2011 to November 24, 2014. In the alternative, the Court of Appeals could award interest at an alternative rate. Since the Supreme Court in

Edmonson agreed that interest is an item of damages for breach of the statutory covenants, interest on the lost property's value should have been awarded to Beals.

B. Beals' Damages Award Should Have Included Beals' Attorney Fees Through August 29, 2014.

1. Beals should have been awarded attorney fees from March 25, 2014 through August 29, 2014, as fees proximately caused by Campbell's breach of the covenant to defend.

As the Supreme Court has made clear, when the warranty to defend is breached the grantor must pay the grantee's attorney fees incurred in defending title. Edmonson at 284. Such attorney fees include "in the context of the warranty to defend, attorney fees proximately caused by the breach." Buck Mountain Owner's Ass'n at 731. Awarding fees proximately caused by breach of the duty to defend as those incurred defending title makes sense because the "duty to defend must mean something more" than the other covenants of the warranty deed since it is "especially important...because the tract of land, title to which needs defending, may be of greater value to the grantee than its monetary value reflects." Edmonson at 279-80.

Damages for breach of the other covenants, when combined with an overly restrictive definition of what counts as fees incurred in "defense of title," would otherwise be insufficient where, as here, a grantor's bad

faith attempts to evade the duty to defend radically increases a grantee's attorney fees. It is the abnormal nature of this case, and the extreme bad faith shown by the grantor, that justifies awarded Beals their attorney fees through August 29, 2014 as fees proximately caused by Campbell's repeated attempts to evade the duty to defend.

Proximate cause is "a cause which, in a direct sequence, unbroken by any superseding cause, produces the injury complained of and without such injury would not have happened." 16 Wash. Prac., Tort Law And Practice § 5:1 (4th ed.). Proximate cause is composed of two distinct elements: (1) cause in fact and (2) legal cause. *Id.* Cause in fact is established by showing that "but for the defendant's actions the plaintiff would not be injured." 16 Wash. Prac., Tort Law And Practice § 5:2 (4th ed.). Legal cause is established if the relationship between the injury and defendant's conduct is "proximate" enough to justify imposition of responsibility on the defendant. 16 Wash. Prac., Tort Law And Practice § 5:13 (4th ed.).

Beals would not have incurred most of the attorney fees they incurred from the Agreed Judgment of March 25, 2014 through August 29, 2014 but for Campbell's attempts to evade the duty to defend. Campbell second summary judgment motion, noted shortly after entry of the Agreed Judgment that had presumably settled the title issues,

requested that the court enter an order holding that Campbell had defended title and dismissing Campbell from the lawsuit – ultimately free of responsibility for breaching the covenants. In reality Campbell had failed to defend title and had just signed an Agreed Judgment conceding title to the disputed property to Lopez and Francis. CP 351.

Campbell’s motion dealt almost exclusively with the legitimacy of the adverse possession claim and the requirements of the duty to defend. *Id.* Campbell’s motion was the cause-in-fact of nearly all Beal’s attorney fees through the August 29, 2014 hearing on the cross-motions for summary judgment. But for Campbell’s efforts to avoid and evade the duty to defend, the substantial attorney fees incurred by Beals through August 29, 2014, would have never been required. Indeed, the trial court recognized this when it surmised at trial that all Campbell had done was “create a bigger mess” and that “if he had hired an attorney or, frankly, just gotten out of the picture completely, I’m pretty sure we wouldn’t be here right now.” RP 259.

Campbell’s repeated and flagrant efforts to avoid and evade the duty to defend, through August 29, 2014, was a breach of the covenant that justifies awarding Beals their attorney fees through August 29, 2014 as attorney fees proximately caused by Campbell’s breach of the duty to defend. Beals should be awarded attorney fees of \$31,802.00 from March

25, 2014 to August 29, 2014 as fees proximately caused by Campbell's breach of the covenant to defend. EX 42.

2. Alternatively, Beals should have been awarded attorney fees through August 29, 2014, under the doctrine of equitable indemnity.

Where the acts or omissions of a party to an agreement or event have exposed the other party to litigation with a third party unconnected to the initial agreement or event, equity allows the court to award attorney's fees to the innocent party as an element of consequential damages in an action against the party exposing the plaintiff to litigation. 14A Wash. Prac., Civil Procedure § 37:14 (2d ed.). In this case, equitable indemnity is an alternative method through which Beals should have been awarded their attorney fees through August 29, 2014.

Campbell's acts exposed Beals to litigation with Lopez Francis and Beals were forced to argue title issues, and regarding the duty to defend, through August 29, 2014 as a result of Campbell's attempts to evade the duty to defend. Beals should have been awarded their attorney fees through August 29, 2014, as consequential damages under the doctrine of equitable indemnity as an alternative to those fees being awarded for being proximately caused by Campbell's attempts to evade the duty to defend.

In Brock v. Tarrant the buyers of real property brought claims against the sellers and realtors involved in the sale. Before trial, the

buyers settled with the sellers and the buyer's real estate agent and assigned the claims against the seller's real estate agent to the sellers. At trial, the court ruled for the seller's agent and awarded them attorney fees against the sellers who appealed contending that attorney fees should not have been awarded in seeking indemnity. Brock v Tarrant, 57 Wn. App. 562, 571-573, 789 P.2d 112 (1990).

The appeals court affirmed the attorney fees award for the entire trial, including the indemnity portion, even though, typically, "fees are not recoverable in separate indemnity actions by the innocent defendant against the wrongdoer." The court reasoned that attorney fees related to indemnity were justified since the seller's agent had been "required to prepare for trial as though the Brocks [i.e. the buyers] remained in the litigation." *Id.* at 571-573. In other words, the seller's agent was entitled to attorney fees for the entire trial since issues that were previously dealt with were reargued at a later stage of the proceeding, forcing the seller's agent to expend additional attorney fees arguing those same issues.

Beals were similarly forced to brief and argue title issues, along with the duty to defend, through the August 29, 2014 summary judgment motion despite the March 25, 2014 Agreed Judgment. Beals should, therefore, be awarded their attorney fees through August 29, 2014. Campbell's insistence on arguing title issues and Campbell's evasion of

the duty to defend so intertwined the issues and work product that no reasonable means of segregating attorney fees between the title and covenant issues was possible between March 25 and August 29, 2014.

While Campbell argued that Beals should not be awarded attorney fees incurred “prosecuting” breach of covenant claims, Campbell cites no valid case law in support. Even if there were law Campbell could cite, a court may dispense of segregation of fees where the claims are so related and intertwined that no reasonable segregation of time spent on the various claims can be made. *See Boguch v. Landover Corp.*, 153 Wn. App. 595, 224 P.3d 795 (2009). Since Campbell forced Beals to argue title issues and regarding the duty to defend through August 29, 2014, and since the title and covenant claims arose out of the same core facts, Beals should receive their attorney fees of \$31,802.00 through the August 29, 2014 summary judgment hearing as an equitable remedy for Campbell’s repeated attempts to evade the duty to defend.

C. Beals Should Be Awarded Attorney Fees On Appeal Due To The Frivolous Nature of Campbell’s Appeal.

As this Court has stated, for purposes of awarding attorney fees on appeal under either RAP 18.1 or 18.9(a), an appeal is frivolous and a recovery of fees is warranted if no debatable issues upon which reasonable minds might differ are presented and issues are so devoid of merit that no

reasonable possibility of reversal exists. Harrington v. Pailthorp, 67 Wn. App. 901, 913, 841 P.2d 1258 (1992), *review denied*, 121 Wn.2d 148 (citing Marriage of Greenlee, 65 Wn. App. 703, 710, 829 P.2d 1120 (1992)). An appeal of summary judgment is frivolous, and supports an award of appellate attorney fees, where appellants' arguments could not have resulted in reversal because they either lack merit, rely on a misunderstanding of the record, require consideration of evidence outside the record, or were not adequately briefed. Stiles v. Kearney, 168 Wn. App. 250, 268, 277 P.3d 9 (2012).

In Harrington, this Court awarded a respondent attorney fees on appeal because the appellant persisted in his action despite a lack of any facts or law to support the appeal. In the present case, Campbell requests that this Court reverse the trial court's finding of breach of the covenant of seisin and covenant of quiet possession despite absolutely no evidence in the record to contradict the evidence that Lopez and Francis had adversely possessed the disputed property no later than 2008 and despite Campbell's conceding the adverse possession at trial. CP 385, 390, 395, RP 181.

Campbell also frivolously argues that Beals' tender was improper despite conceding that the tender was proper at trial. RP 22. Campbell further requests that this Court reverse the trial court's order finding that Campbell breached the covenant to defend by asserting that they did

defend title. No evidence supports Campbell's claim that they defended title or provided anything but ineffective conditional responses to the tender. RP 20-21.

Campbell's brief is rife with misstatements of the law, the facts and the trial court's decision. For example, the trial court's award of attorney fees was only for fees incurred defending title, CP 710, contrary to Campbell's assertion that the trial court awarded non-recoverable attorney fees. Furthermore, the trial court did not apply the wrong legal standard in awarding damages based on the value of the property lost due to the adverse possession claim. The trial court followed the rule as announced by Washington's Supreme Court in Edmonson. Had Campbell bothered to cite Edmonson in his brief, which Beals have repeatedly cited to Campbell, perhaps this frivolous appeal may have been avoided. Since it was not, Beals should be awarded their attorney fees on appeal pursuant to RAP 18.1 and 18.9. Campbell's appeal was completely devoid of merit.

VII. CONCLUSION

Beals respectfully request the following relief:

1. Affirm the trial court's order granting Beals' motion for partial summary judgment as to Campbell's liability for breaching the covenant of seisin, covenant of quiet possession and covenant to defend.

2. Affirm the trial court's order awarding Beals' damages of \$18,446.52 for the value of lost property and \$21,310.00 in attorney fees incurred defending title through March 25, 2014.

3. Reverse the trial court's order finding that Beals were not entitled to interest on the value of the lost property and award Beals \$6,640.75 for interest on the \$18,446.52 value of the lost property from November 28, 2011 to November 24, 2014 at the rate of 12 percent per annum, or at some other rate the court deems equitable.

4. Reverse the trial court's order limiting Beals' attorney fees to fees incurred defending title through March 25, 2014, and award Beals \$31,802.00 in attorney fees incurred from March 25, 2014 through August 29, 2014 as fees proximately caused by Campbell's attempts to evade the duty to defend or, in the alternative, under the doctrine of equitable indemnity.

5. Award Beals their costs pursuant to RAP 14.1.

6. Award Beals their attorney fees on appeal pursuant to RAP 18.1 and RAP 18.9.

Respectfully submitted this 17th day of April, 2015.

Winslow Law Group, PLLC

A handwritten signature in black ink, appearing to be 'J.B. Ransom', written over a horizontal line.

By: ~~J.B. Ransom, WSBA #11941~~
Ashton T. Rezayat, ~~WSBA #44419~~
Attorneys for Respondents/Cross-Appellants

XIII. APPENDIX

Findings of Fact Challenged on Cross-Appeal

13. Beals defended title to their property and incurred reasonable attorney fees defending title from March 27, 2013 through March 25, 2014 in the amount of \$21,310.00. All Beals' attorney fees incurred from March 25, 2014 were incurred defending title and constitute damages for Campbell's breach of the covenant to defend.

14. Beals should be awarded interest at the statutory rate of twelve percent (12%) from the date the damages became liquidated; that is, the date of trial, November 24, 2014, on the value of the land lost and effectively rendered useless to the Beals due to Campbell's breaches of the covenant of seisin and covenant of quiet enjoyment (\$18,446.52) and the attorneys' fees incurred by Beals due to Campbell's breach of the covenant to defend (\$21,310.00).

Conclusions of Law Challenged on Cross-Appeal

9. Beals should not be awarded interest on the monies paid to Campbell for the lost and effectively lost land (i.e. \$18,446.52) from November 28, 2011, the date of purchase, to the date of entry of judgment.

10. Beals should be awarded judgment of \$21,310.00 as damages for the attorneys' fees they incurred defending title due to Campbell's breach of the duty to defend.

CERTIFICATE OF SERVICE

On April 17th, 2015, I caused to be served upon the below named pro se defendants, at the address stated below, via the method of service indicated, a true and correct copy of the foregoing document and attachments thereto.

Richard D. Campbell, Pro Se Via Email to rdcampbell@frontier.com
Rebecca Lee Marcy, Pro Se
21421 NE 92nd Place
Redmond WA 98053

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

EXECUTED at Seattle, Washington on April 17th, 2015.



JULIE C. KEATON