

NO. 35307-5-II

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

RONALD W. DAWES and W. ANN DAWES, husband and wife,
Respondents,

v.

DOUGLAS FIELD and MARY ANN FIELD, husband and wife,
Appellants,

BRIEF OF APPELLANTS

FILED
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INTRODUCTION

For more than 20 years before this lawsuit began, the Fields and Daweses assumed that the Common Road dividing their lots was the property boundary, as did everyone else in the neighborhood. Yet after 22 years, the Daweses sued the Fields to establish their ownership of the area south of the Common Road, which had historically been considered the Fields' front yard.

The Fields prevailed resoundingly, the trial court finding that despite claiming otherwise, the Daweses knew that the Road ran the full length of the Fields' and Daweses' lots and that the Fields were the rightful owners of the disputed area south of the Common Road because the Daweses acquiesced in the Common Road as the true boundary for more than 10 years – the statutory period. The court expressly found the Daweses' factual assertions unbelievable and their claims lacking any credible basis.

Yet the court refused to award the Fields any attorneys' fees, forcing them to bear their own fees – about \$200,000 – incurred in addressing the Daweses' unbelievable, un-credible and frivolous claims. The Fields should not have to pay for proving what everyone, including the Daweses, knew to be true. The Court should reverse and remand for an award of fees.

ASSIGNMENTS OF ERROR

1. The court erred in denying the Fields fees under CR 11 and RCW 4.84.185. CP 1126, C/L 12.
2. The court erred in denying the Fields damages and fees incurred in defending against the lis pendens. CP 1125-26, C/L 8.
3. The court erred in denying damages for the destruction of the Fields' shrubs and trees. CP 1126, C/L 11.
4. The court erred in denying the Fields' motion for reconsideration regarding fees. CP 1163.
5. The court erred in entering a judgment requiring the Fields to pay their own costs and attorneys' fees. CP 1114, 1166-67.

ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Are the Fields entitled to attorneys' fees under CR 11, where the Daweses submitted false declarations to defeat summary judgment and subsequently conceded the falsity at trial?
2. Are the Fields entitled to attorneys' fees under RCW 4.84.185, where the entire trial resulted from the Daweses' false statements about the Common Road's western terminus and

stubborn pursuit of the disputed area south of the Common Road, when they had already conceded mutual recognition and acquiescence of the Road for 15-22 years?

3. Did the Daweses file the lis pendens without substantial justification, where they had already acquiesced in the Common Road as the true boundary for 15-22 years?

4. Are the Fields entitled to damages where Ronald Dawes poisoned trees in the disputed area south of the Common Road with full knowledge that the Fields claimed the property as their front yard and with no credible basis for refuting the Fields' claim?

STATEMENT OF THE CASE

The statement of the case is presented chronologically with particular attention to the trial court's findings of fact.

A. Background.

This case involves two real property disputes in a small, rural neighborhood located west of the Hansville Highway in the Kingston area. Exs 29, 62.¹ The neighborhood is bordered by the Hansville Highway to the east and the Pope timberlands to the

¹ Exhibit 62, an aerial view of the neighborhood, is attached to this brief as Appendix A.

west, and divided down the center by a “Common Road” running east-to-west from the Highway to the Pope land. *Id.*; CP 1119, F/F 3. There are four houses north and four houses and an empty lot south of the Common Road. Ex 62.

The parties, Ronald and Ann Dawes, and Douglas and Mary Ann Field,² own lots across the Road from one another, both bordering the Pope land to the west. Ex 62. The Daweses’ property is north and the Fields’ property is south of the Common Road. *Id.* The Fields’ eastern neighbors are David and Susan Bennett³ and the Daweses’ eastern neighbor is Gary Steele. RP 645; Ex 29.

The first dispute involves the Common Road’s western terminus. The Daweses and Douglas Field purchased their lots, which were then undeveloped, in 1978.⁴ RP 53, 55, 1012. The parties agree that when they purchased, the Common Road ran from the Hansville Highway at least as far as the Fields’ first

² First names are used where necessary to avoid confusion.

³ The Fields and Bennetts disputed their east/west boundary but that matter settled prior to trial. RP 36.

⁴ Douglas and Mary Ann married in 1984. RP 1095.

driveway near their eastern boundary. RP 54, 1019. The Fields claim that the Road continued west to the Pope land. RP 1019.

The second dispute involves the area south of the Common Road, in what has historically been considered the Fields' "front yard." Ex 67; RP 1181-82. The Fields claim that all neighbors own up to a centerline in the Common Road, subject to an easement on the last 30-feet of their property paralleling the Road. CP 314-15; RP 1181-82. The Daweses claim that the Common Road is located entirely on their property, that their property line is 30-feet south of the Common Road, and that the 30-foot strip is subject to an easement. CP 25, 28. The Daweses claim that south of their boundary there is another 30-foot strip, owned by the Bennetts and Fields, which is also subject to an easement. CP 28. In short, they claim to own the Common Road and a 30-foot strip south of the Common Road, and to have easement rights though the Fields' yard and home. Ex 67.

As discussed below, the trial court resolved both of these disputes in the Fields' favor. CP 1119-22, F/F 3-17.

B. The Common Road has run from the Hansville Highway to the Pope land since the neighborhood's inception.

The trial court found (CP 1119-20):

4. The Common Road has existed as a road at all times since 1978. . . .

5. At all times, the Common Road was usable, and was used by the Fields and the Daweses. The Daweses used the western portion of the Common Road, an average of at least seven times per year to access their shed on the southwest area of their property. . . .

6. The Common Road could not and did not end, five or ten feet west of the eastern property line of the Field property, as the Daweses asserted in testimony and in numerous affidavits and declarations. Stereoscopic photographs from 1978, 1981, 1984, 1985, 1989, 1992, 1994, 1995, and 2003 show without a doubt the existence of the Common Road to its western terminus, which is just shy of the boundary with Pope and Talbot.

When Douglas Field purchased the property in 1978, the Common Road extended from the Hansville Highway to just about the Pope boundary, where it ended in a turn around. RP 1019. The Road was “full [and] wide,” and able to accommodate heavy equipment. RP 805, 1023. The Road was never covered in brush, and Douglas Field graveled the Road when needed.⁵ RP 1022-23.

Douglas used the Common Road to access his western property continuously from the time he purchased. RP 1021. After the foundation for the Fields’ house was laid in 1980, the Common Road was the only way to access the back of the property. RP

⁵ Douglas Field only graveled the Road when it needed it, describing himself as “low income.” RP 1023-24.

1021. Douglas carried on milling and stonecutting operations on his western property while he was building his home. RP 796, 1017, 1020. He also had a burn pile at the western border – he was “always using it for something.” RP 1022.

When Mary Ann moved into the Fields’ home in 1984, the Common Road extended all of the way to the turn around at the Pope land. RP 1189-90. The Road was compacted dirt and possibly some imbedded gravel, just like it appeared in front of the Bennetts’ house. *Id.* The Common Road always continued all of the way to the Fields’ western boundary. *Id.*

Recognizing that both the Fields and the Daweses had an obvious interest in establishing where the Common Road ended, the trial court relied on unbiased neighbors, loggers, and even a UPS driver, all of whom testified that the Common Road extended to the Pope land. RP 1622-24.

Neighbor Sandra Emde purchased in 1993. RP 603-05. After moving in, the Emdes walked their dogs west on the Common Road, past the Fields’ house to a large clearing. RP 605-06, 1622-23. From the clearing, the Emdes saw the Fields’ shed south of the Common Road and Edward Dawes’ trailer north of the Road. *Id.*;

Ex 67. The Common Road ended “at least” 30 feet past the Fields’ house where the shed was located.⁶ CP 606.

UPS driver Richard Hanson delivered to the Fields and Daweses and drove the same route for over 20 years. RP 1623. As long as Hanson can remember, the Common Road continued “quite a ways past” the Fields’ house. RP 610-12. When the Fields were not home and there was no dry place to leave packages, Hanson delivered packages to the Fields’ shed located west of the house down the Road. RP 612-13; Ex 29. The Common Road ended at the western boundary in a “cul-de-sac” large enough to accommodate turning around Hanson’s delivery truck. RP 612-13, 616, 1623.

According to Gary Steele, one of the original owners who purchased in 1969 or 1970, the Common Road always existed from the Hansville Highway to the Pope land. CP 123; RP 645, 649-50, 1623. The Road was not as well maintained toward the western

⁶ Neighbor Ronald Nelson, who owned from 1970 until 1993, also testified that that the Common Road extended from the Hansville Highway to the Pope land. CP 171, 173. Richard DesRuisseau, who purchased in 1983 and later sold to the Bennetts, also testified that the Common Road ran all of the way to the Pope land. CP 1317, 1321.

boundary because not as many people drove on it, but it was there from the beginning. *Id.*

Glenn Kelly, who worked on the Pope land and helped construct the Fields' home, used the Common Road to access the Pope land. RP 791, 792-3, 1623; Ex 67. In fact, "just about everybody" who worked on the Pope land used the Common Road for access.⁷ RP 791-92, 794. The Common Road ends "way after" the Fields' house in a cul-de-sac abutting the Pope land, large enough to turn around a logging truck. RP 793-95.

The Daweses claimed, however, that the Common Road ended just west of the Fields' eastern boundary, turning sharply south toward the Fields' home. RP 65-66, 424, 706-07; CP 26, 28; Ex 67. The Daweses claimed that west of there, the Common Road was covered in "knee-high" shrubs, weeds, and grass. RP 66, 424. Ronald conceded that the Road was drivable past the Fields' eastern boundary in the summer, but claimed that it was not passable in the winter as it was "mostly mud." *Id.*

⁷ Logger John Dennehy also used the Common Road to access the Pope land from the Hansville Highway. RP 802-04. Employees parked at the end of the Common Road, right at the Field/Pope boundary. RP 805.

As discussed fully below, contrary to their declarations, the Daweses conceded during trial that the Common Road continues west far past the Fields' eastern boundary. *Infra* Argument § A.

The court was also persuaded by photographic evidence “show[ing] without a doubt the existence of the Common Road to its western terminus . . . just shy of the boundary with Pope.” CP 1120, F/F 6. Terry Curtis, the Department of Natural Resources' expert on aerial photographs, reviewed photographs of the Common Road from 1978 to 2003. RP 815-16, 831. According to Curtis, the Common Road has “always gone far beyond” the Fields' eastern boundary. RP 870.

Although the tree canopy in the area was heavy in 1978, even then it is possible to see what appears to be a clearing in the canopy where the Common Road continued west past the Fields' eastern boundary. Ex 176. By 1984, the Common Road was “clearly” visible from the air and Curtis had “no doubt” that from 1984 on, the Common Road was in fact a “drivable” and “active road,” not a path of some sort. RP 869-70. By 1994, Curtis could tell that the shed in the southwestern corner of the Daweses' lot was “accessed by a vehicle on a regular basis.” RP 851; Ex 66. It simply is “not possible” that the Road terminated five-to-ten feet

west of the Fields' eastern boundary as the Daweses claimed.

Compare RP 870 with CP 26-28; RP 66, 424, 706-07.

C. All neighbors understood that their properties ran up to the Common Road and that the last 30 feet of their lots were subject to an easement.

The trial court found (CP 1119-22):

3. . . . At all times between 1978 and at least 1993 it was uniformly believed by all residents that the Common Road formed the common boundary line between the Dawes and Field properties, and neighboring properties situated to the north and south of the road. The Daweses, the Fields, the Bennetts, Edward Dawes, Richard DesRuisseau, who sold his property to the Bennetts, and Gary Steele, all asserted and understood that the parties owned up to the roadway, and all residents, including the Daweses, Bennetts and Fields, uniformly acted in accordance with that understanding. . . .

7. Until at least 2000, the Daweses and Fields believed that their respective properties abutted one another with the north property line of the Field property believed to form the south property line of the Dawes property. The Daweses' contentions that, prior to 2000, they believed the road to be located on their property are not believable.

17. No credible evidence supports a claim that the Daweses used any property south of the Common Road prior to 2000. . . .

1. Douglas and Mary Ann Field

The Fields have always understood that the Common Road was the boundary line between the properties north and south of the Road. CP 264, 314-15. When Douglas purchased the property, he was told that the Common Road was centered on a

60-foot easement and that utilities were buried underneath the center of the Common Road. CP 314-15. Douglas was given an “Agreement” referenced in his real estate contract, in which the original owners awarded easements to one another for the Road, water pipes, and power lines.⁸ CP 315, 322-29. A map attached to the Agreement shows the Common Road situated on the center of an easement dividing the properties north and south. CP 329. The Agreement was signed by the original owners in 1970, and recorded in 1972. CP 315, 327, 329.

The Fields have always treated the area south of the Common Road as their “front yard.” RP 931, 981-85, 1181-82. Douglas used trees and stumps from the area south of the Common Road to build the house and make a gate. RP 1029. While working in the Pope land, Douglas brought home shakes and piled them in the disputed area, covering a large part of the area. RP 1030. Douglas used the area as a staging ground, and peeled and stacked logs in his second (western) driveway. RP 1029-30. He also used part of the area for milling, and allowed some friends to use the area for rock cutting. RP 1178-79.

⁸ The Agreement and map are attached as Appendix B.

Sometime in about 1985-86, Douglas planted six wild rhododendrons in the disputed area. RP 979, 1031. Mary Ann planted a curly leafed pine, a sassafras tree, and strawberries, and also tried roses, but they did not thrive. RP 1033, 1177-78. The Fields put in a duck pen and built a fort for the children that overlapped into the disputed area south of the Road. RP 1035, 1178-79. The children played and gardened in the disputed area “all the time.” RP 933-34.

Prior to the dispute, the Fields never saw the Daweses use the area south of the Common Road. RP 936, 994, 1182.

2. Ronald and Ann Dawes

Ronald claims that he did not know where the boundary lines were located when he purchased the property, and did not inquire.⁹ RP 151-52. He understood, however, that there was a 60-foot easement between the properties. *Id.* In his deposition, Ronald denied discussing the easement with anyone and thought that he got “the idea” about it from his tax records. RP 153-55. At trial, Ronald recalled that his real estate agent told him about the

⁹ As discussed below, the recorded easement Agreement gives the Daweses constructive notice that the Common Road is their southern boundary and the Fields’ northern boundary. *Infra* Argument § B.

easement and that the easement was referenced in a document attached to the deed. *Id.*

For 15 years after purchasing the property, Ronald was not concerned about whether the Common Road represented the correct boundary line between the properties. CP 622-23. In fact, he never thought about it at all. *Id.* There were no problems in the neighborhood regarding boundary lines and everyone respected one another's property. *Id.*

In 1993, the Daweses' northerly neighbor surveyed his property and staked off the boundaries. CP 622. Ronald then made an effort to determine the Daweses' boundaries, measuring 330 feet, which he believed to be the length of his property (RP 74), from the northerly neighbor's boundary marker. CP 622. Assuming that his measurements were accurate, the Daweses suspected that their property might extend south of the Common Road. CP 404; RP 74-75.

The Daweses talked "briefly" about the suspected boundary, but did not tell anyone else. CP 355, 404. They did not take any action because the Common Road had been there for "some time" and was not causing any problems. CP 404; RP 75. The Daweses saw "no reason no make an issue of it." *Id.*

The Daweses acknowledge that they did not do anything about their suspicion for the next six-to-seven years, until 2000. CP 357, 404; RP 75; 1039. Ronald did not make any improvements to the area south of the Common Road, and did not exclusively occupy it. RP 565-66. Rather, he concedes that “everybody else along the road” occupied the area south of the Common Road. *Id.*

3. Edward Dawes

Edward Dawes resided on the Daweses’ property for short periods in 1987 and 1989, and visits frequently. RP 330-32; 344-45. Although Edward is not familiar with the boundaries, he thought that the “rule of thumb” was that the Daweses owned north and the Fields owned south of the Common Road. RP 355-56

Illustrating this understanding, Edward moved his trailer from the southern border of the Daweses’ property when the Fields complained that it was too close to the property line. RP 333. Edward built a shed in the southwest corner of the Daweses’ property and placed a trailer south of the shed sometime in 1987. RP 332; Ex 67. Both the shed and trailer were north of the Common Road. RP 333. The Fields approached Ronald about the trailer’s location, claiming that it was impeding access to their property south of the Road. RP 1027-28. Edward moved the trailer

60-70 feet north of the Common Road, where it has remained since. RP 333.

4. David and Susan Bennett

Like the Fields, the Bennetts thought of the area south of the Common Road within their east/west boundaries as their “front yard.”¹⁰ RP 224. The Bennetts always assumed that the Common Road was their boundary, and believed that the Daweses assumed the same. RP 225, 228-29. The Bennetts maintained the area south of the Common Road, and the Daweses never claimed that they owned the Bennetts’ “front yard.” RP 227-29. No one thought that Daweses owned property south of the Common Road until after the survey in December 2000. RP 225-26.

5. Richard DesRuisseau

DesRuisseau was the previous owner before the Bennetts. CP 1318-19. He told the realtor who sold his home that the Common Road was the northern property boundary, which was his understanding from the previous owners. CP 1319. DesRuisseau never saw the Daweses do anything south of the Road on what they claimed to be their property after the 2000 survey. CP 1327.

¹⁰ The Daweses’ property is also north of the Bennetts’ across the Common Road. Ex 67.

6. Gary Steele

Steele owns the property abutting the Daweses on the east. CP 123. Steele, one of the original owners, purchased his lot in March 1969 or 1970, at which time the Common Road had only recently been cleared. CP 123-24; RP 645. Steele's realtor told him that there was a 60-foot easement centered on the Common Road running west to the Pope land. CP 124.

It was apparent to Steele that the Fields were claiming all land south of the Common Road within their east/west boundary. CP 128-29. Until the present dispute, there was no evidence that the Daweses were claiming land south of the Common Road. *Id.*

7. Other Neighbors

In addition to the neighbors upon whom the trial court expressly relied, others also agreed that the Common Road marked the north/south boundary dividing the properties. Diane and Ronald Nelson owned the property south of the Common Road adjacent to the Highway, from 1970 to 1993. CP 173. According to the Nelsons, the Common Road is centered on a 60-foot easement (30-feet on each owner's property), and the Road's centerline is the north/south property boundary. CP 173-74. Based upon discussions with neighbors, including the Daweses, the Nelsons

believe that all of the neighbors understood that the Common Road was centered on the boundary line. CP 174.

Gary Egger, who rented from the Fields in 1996 (CP 572), also understood that the property boundaries ran to the Road's centerline. CP 485. Egger mowed the lawn and cut brush as far as the Common Road as he was required in the lease to maintain the Fields' yard. *Id.*

D. In 2000, the Daweses began claiming that they owned property south of the Common Road, in what had historically been considered the Fields' front yard.

To Douglas' knowledge, the Daweses first questioned the boundary line in 1999 or 2000. RP 1039. Ronald mentioned having "lost" some property, but indicated that the Common Road had been there too long to do anything about it. RP 1041. Ronald started filling in the turnaround north of the Fields' main driveway and put rocks north of the Bennetts' new fence. RP 1041-42. Shortly thereafter, Ronald hired a bulldozer to clear the area south of the Common Road near the Fields' western boundary. *Id.* Ronald had the land cleared from the southern edge of the Common Road, 55 feet south into what the Fields had always considered their property. RP 1042-43.

After the Daweses bulldozed the area south of the Common Road, the Fields decided to gravel the Road to prevent further destruction. RP 1043-44. The Fields put in 4-6 inch base rock, which Douglas had previously discussed with Ronald to resolve the gravel washing away in the rain. RP 1044. Ronald became “pretty excited” when the dump truck started dumping the rocks, screaming that it was his property and that he didn’t want the rock there. *Id.* Douglas went over to talk to Ronald the next day, but Ronald told him to talk to his lawyer. *Id.* Soon thereafter, Douglas received a letter from Ronald’s lawyer. Ex 99; RP 1044-45.

Douglas described what followed as “warfare.” RP 1044. After the dispute started, the Fields saw Ronald out in the area south of the Common Road four-to-five days a week for a couple of hours each day. RP 945-46, 995. Ronald cut down foliage and spray painted lines. RP 948-49, 995. The Fields found trash in their yard, and Ronald concedes that he threw wood into the Fields’ duck pen. RP 551, 949, 950, 985, 998-99. On a few occasions, the Fields returned home to find Ronald running from their front yard. RP 948-49, 982-83, 998.

Ronald concedes that he sprayed “Roundup” herbicide around the western and southern borders of the disputed area

south of the Common Road. RP 147-48. He claims that he sprayed it only around boundary markers and a few tree trunks, that Roundup is not a poison, and that “you could almost drink the stuff right out of the bottle.” RP 149, 478.

After Ronald sprayed Roundup, the Fields’ whole front yard turned brown all the way down to the Pope property. RP 943, 981, 996-97. The Roundup did not just kill “weeds,” but “huge ferns,” shrubs, and trees. *Compare* RP 150 with RP 981, 1049, 1147-48. The poisoning was near the duck pen and the children’s fort and the Fields stopped eating the duck eggs and prohibited the children from playing in the fort as they feared that it might be dangerous. RP 943-44, 981, 997, 1050-51, 1260-61. The poisoning did not extend to the north edge of the Common Road and did not extend into the Bennetts’ yard. RP 944, 1049, 1247-48.

The Fields found nails in their tires nine times in a two-year period. RP 950, 1256-57. Ronald could not “recall” having nailed the Fields’ tires (RP 513-14):

Q. Do you recall being asked by your attorney about whether you nailed the Fields’ tires? Do you recall being asked that, sir?

A. Recently?

Q. At this trial.

A. No – yes. Yes, I’m sorry.

Q. And I believe the – correct me, if I’m wrong – but you testified that to the best of your knowledge, you didn’t think you did.

Do you remember answering the question in that fashion?

A. I believe so.

Q. Was there some reason you qualified your answer that to the best of your knowledge you didn’t think you did?

A. Well, I’m not sure what nailing is. I know people do nail tires to docks and things.

Q. So is it your testimony that you may have done something with a nail with tires, but you’re not sure what was meant by the question?

A. I don’t think – I don’t recall anything involving nails and tires, really.

Q. But it’s possible that you had used some nails in connection with the Field’s tires in some fashion, sir?

A. Not that I know of.

Natalie Field, who was 15 at trial, testified that when she was riding her bicycle in the area south of the Common Road, Ronald made eye contact with her and accelerated his truck toward her. RP 953, 1252-53. She fell from her bike, and Ronald swerved toward her. *Id.* Natalie immediately went home crying and told Mary Ann what had happened. RP 1252-53. From that point forward, Natalie felt unsafe in the Fields’ home. RP 960. She

developed a habit of getting up in the middle of the night to make sure that the doors were locked. RP 961, 1055-56, 1253-54. Natalie saw a doctor for her fears. RP 960-61. Ronald denied this event as well. RP 1500-01.

The parties entered a mutual restraining order in September 2001. CP 42-45. Ronald ceased obsessively coming into the area south of the Common Road, but his “harass[ment]” continued in other ways. RP 1140, 1273. For example, Ronald continued to watch the Fields from the Pope land and the Bennetts’ “legally described” property, where he could stand only six feet from the Fields’ house.¹¹ RP 1146-47, 1274-75.

Ronald’s behavior continued to affect the Fields’ daily lives. The Fields were so worried and stressed that they talked about selling the house. RP 958-59, 1057-58, 1249. Their eldest son Atticus would come home at night to find Mary Ann crying. RP 985-86. Mary Ann would not even let the children outside to garden or play. RP 931, 959, 985-86, 1275-76.

¹¹ The Bennetts’ “legally described” property line is within what has historically been considered the Fields’ eastern boundary. *Compare* RP 1146-47 *with* Ex 29.

Mary Ann eventually saw her medical doctor, Dr. Symond, for her anxiety related to the dispute. RP 1283-84. Dr. Symond told Mary Ann that her health was becoming “seriously” compromised, and prescribed Lorazepam for the anxiety. RP 1285, 1287. When the Fields returned home from a vacation in September 2004, Mary Ann was hospitalized twice with high blood pressure and chest pains. RP 1302. Dr. Symond told Mary Ann to move, get out of the house, or get psychological counseling. RP 1304. Mary Ann sought counseling in 2005. RP 1305.

Procedural History

The Daweses had the property surveyed in May 2000 to locate their southern boundary (CP 357) and filed suit in July 2001, claiming nuisance, trespass and conversion. CP 1, 5-6. The Fields counterclaimed, arguing that they had adversely possessed the area south of the Common Road. CP 10-12. The Daweses filed a *lis pendens* in June 2002. RP 1121.

The Fields subsequently moved for partial summary judgment to quiet title in the area south of the Common Road, claiming adverse possession and mutual recognition and acquiescence of the Common Road as the true boundary. CP 498, 514-22. Opposing summary judgment, the Daweses filed

declarations and pleadings claiming that the Common Road ended abruptly just west of the Fields' eastern boundary and that the area to the west was covered in brush, weeds and wild grass.¹² CP 26, 551, 621. The Daweses also stated that they were not aware that the Common Road might not be the north/south boundary until 1993 (CP 622-23), about 15 years after Douglas and the Daweses purchased. RP 56, 1012. They conceded that they did nothing about the incorrect boundary line until 2000. CP 357, 404; RP 75, 1039. The Fields moved for CR 11 sanctions, arguing that the Daweses submitted false testimony and that their claims were not well grounded in fact. CP 684-99.

The trial court denied the Fields' motion for partial summary judgment, finding questions of material fact. CP 902-04. After a 10 day trial, the court ruled in the Fields' favor on both property disputes, quieting title of the area south of the Common Road to the Fields and vacating the lis pendens. CP 1113. Contrary to the Daweses' "numerous affidavits and declarations," the court found

¹² The Common Road's terminus is directly relevant to the Fields' mutual recognition and acquiescence claim, which requires a clear boundary line. *Infra* Argument § E. If the Common Road ended where the Daweses claimed, it would not be a clear boundary line, defeating the Fields' claims. *Id.*

that: (1) the Common Road did not end just inside the Fields' eastern boundary (CP 1120, F/F 6); (2) the Road has run from the Hansville Highway to the Pope land since the neighborhood's inception in 1978 (CP 1119-20, F/F 4); (3) the Common Road was usable "[a]t all times"; and (4) the Daweses used it to access the southwest corner of their property. CP 1120, F/F 5.

As to the areas south of the Common Road, the trial court found that "[n]o credible evidence supports a claim that the Daweses used any property south of the Common Road prior to 2000." CP 1122, F/F 17. Rather, "all residents," including the Daweses, "uniformly believed" that the Common Road was the north/south boundary line. CP 1119, F/F 3. The court flatly rejected the Daweses' contention that they knew that the Common Road was actually on their property before 2000, finding that it was "not believable." CP 1120, F/F 7.

The Fields sought attorneys' fees under CR 11 and RCW 4.84.185, arguing that the Daweses' pleadings were not well grounded in fact and that the suit was frivolous. CP 1131-35. The Fields also sought damages for the destruction of their property and damages and attorneys' fees with respect to the lis pendens under RCW 4.28.328(3), arguing that the Daweses had no substantial

justification for filing the lis pendens. CP 1135-39. Finally, the Fields claimed intentional infliction of emotional distress. CP 1141-43. The court refused to award the Fields any damages or attorneys' fees (CP 1114) and the Fields appeal.

ARGUMENT

The trial court resolved both property disputes in the Fields' favor under the doctrine of mutual recognition and acquiescence. CP 1111-28. The Daweses had no believable or credible basis for claiming that the Common Road terminated at the Fields' eastern boundary, and conceded that they acquiesced in the Common Road as the true boundary for at least 15 years. Their claims were and are frivolous, and the Court should reverse for an award of fees.

The mutual recognition and acquiescence doctrine supplements adverse possession when boundaries are disputed. *Lilly v. Lynch*, 88 Wn. App. 306, 316, 945 P.2d 727 (1997). Where the parties have defined boundaries in good faith, and the parties thereafter acquiesce in the boundaries for ten years, the boundaries are considered the "true dividing line and will govern." *Lilly*, 88 Wn. App. at 316 (citing *Mullally v. Parks*, 29 Wn.2d 899, 906, 190 P.2d 107 (1948)); *Campbell v. Reed*, 134 Wn. App. 349,

363, 139 P.3d 419 (2006). A party seeking to establish boundaries by mutual recognition and acquiescence must show a clear boundary line, and an agreement establishing the boundary or “mutual recognition and acceptance of the designated line as the true boundary line.” *Lamm v. McTighe*, 72 Wn.2d 587, 593, 434 P.2d 565 (1967). Whether the boundaries established by mutual recognition and acquiescence are the correct boundaries is “immaterial.” *Lamm*, 72 Wn.2d at 592; *Mullally*, 29 Wn.2d at 906; *Lilly*, 88 Wn. App. at 316.

As the trial court correctly found, this matter is “classic” mutual recognition and acquiescence. RP 1629. The Court should reverse the refusal to award fees and remand.

A. The Fields are entitled to attorneys’ fees under CR 11, where, contrary to the Daweses’ declarations and pleadings in opposition to summary judgment, the Daweses subsequently conceded that the Common Road continues past the Fields’ home to the Pope land.

The Fields are entitled to fees under CR 11 with respect to the Common Road’s western terminus because the Daweses submitted false declarations to defeat partial summary judgment on this issue. Opposing summary judgment, the Daweses claimed that the Common Road ended 5-10 feet west of the Fields’ eastern boundary. At trial, however, the Daweses conceded that the Road

continued west to the Pope land, just as the Fields have maintained throughout. The Daweses have even used the Common Road since 1978 to access the southwest corner of their property. CP 1119-20, F/F 4, 5. The Daweses' claim on this point was false, which is far worse than lacking factual grounds required under CR 11. If CR 11 has any teeth at all, it must require sanctions where a party submits false declarations to the court. The court abused its discretion in denying fees on this point.

A court may award attorneys' fees incurred due to a failure to comply with CR 11, where (1) the claims are filed in bad faith or for an improper purpose, or are not well grounded in fact; or (2) the claims are not warranted by existing law; and (3) the attorney who signed the pleading has failed to conduct a reasonable inquiry into the claims' factual or legal basis. ***Skimming v. Boxer***, 119 Wn. App. 748, 754, 82 P.3d 707, *rev. denied*, 152 Wn.2d 1016 (2004); ***Manteufel v. Safeco Ins. Co. of Am.***, 117 Wn. App. 168, 176, 68 P.3d 1093, *rev. denied*, 116 Wn.2d 1047 (2003). This Court reviews the award or denial of CR 11 sanctions for an abuse of discretion. ***Manteufel***, 117 Wn. App. at 176. The trial court abuses its discretion if it "relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or

bases its ruling on an erroneous view of the law.” ***Gildon v. Simon Prop. Group, Inc.***, 158 Wn.2d 483, 494, 145 P.3d 1196 (2006); see also ***In re Guardianship of Johnson***, 112 Wn. App. 384, 388, 48 P.3d 1029 (2002).

CR 11 gives the trial court a measure of discretion, providing that for a violation the court “may” impose an appropriate sanction. This is a wise provision, making clear that we do not want to open a new wave of ancillary CR 11 litigation by forcing trial courts to impose a sanction for any potential violation of CR 11, no matter how unintentional or trivial. But discretion must be exercised reasonably and in a manner that furthers the purposes of the rule.

The leading Washington case finding an abuse of discretion for the refusal to order appropriate sanctions is ***Wash. State Physicians Ins. Exch. & Ass’n v. Fisons Corp.***, 122 Wn.2d 299, 858 P.2d 1054 (1993). In ***Fisons***, as here, the trial court declined to order sanctions for clearly improper conduct. In ***Fisons***, the Supreme Court found an abuse of discretion, as the Court should here. The ***Fisons*** Court announced the following guidelines:

[C]ertain principles guide the trial court’s consideration of sanctions. First, the least severe sanction that will be adequate to serve the purpose of the particular sanction should be imposed. The sanction must not be so minimal, however, that it undermines the purpose of discovery. The

sanction should insure that the wrongdoer does not profit from the wrong. The wrongdoer's lack of intent to violate the rules and the other party's failure to mitigate may be considered by the trial court in fashioning sanctions.

The purposes of sanctions orders are to deter, to punish, to compensate and to educate.

122 Wn.2d at 355-56 (footnote citations omitted). Although ***Fisons*** involved a different sanctions rule, CR 26(g), the principles are the same. Indeed, all but one of the authorities the ***Fisons*** Court cites for the above factors arise under CR 11. ***Bryant v. Joseph Tree, Inc.***, 119 Wn.2d 210, 225, 829 P.2d 1099 (1992); ***In re Guardianship of Lasky***, 54 Wn. App. 841, 855, 776 P.2d 695 (1989); ***Miller v. Badgley***, 51 Wn. App. 285, 303, 753 P.2d 530, *rev. denied*, 111 Wn.2d 1007 (1988); Schwarzer, ***Sanctions Under the New Federal Rule 11 - A Closer Look***, 104 F.R.D. 181, 200 (1985).

To defeat the Fields' motion for partial summary judgment that, among other things, that the Common Road has always run to the Pope land (CP 488-527), the Daweses filed declarations that the Common Road ended just west of the Fields' eastern boundary:

- ◆ The Common Road ended at the Field property, approximately in line with the end of the current house. The land to the west was covered with brush, weeds, and wild grass. CP 621 (Ronald Dawes, declaration in opposition to motion for partial summary judgment).

- ◆ The driveway ends by turning south toward the Fields' house. CP 26 (Ann Dawes, 2001 declaration).
- ◆ The road ended by turning into the Field property, and the ground was covered with "natural forest growth" on the other side. The grass and brush was two-three feet high. CP 638 (Ann Dawes, declaration in opposition to motion for partial summary judgment).
- ◆ The gravel road went as far as the far driveway leading up to the Field home. The rest of the area was forest and underbrush. CP 643 (Edward Dawes, declaration in opposition to motion for partial summary judgment).

Although the Fields claimed that Ann Dawes testified falsely in her 2001 declaration when she stated that the Common Road ended at the Fields' eastern boundary (CP 499, 640), Ann maintained the same position in her declaration opposing summary judgment, stating that "neither a driveway nor roadway extended west" of the Fields' eastern boundary. CP 640.

The Daweses also submitted declarations from their other son Anthony and David Bennett, claiming the same thing (CP 38-39, 648) and took the same position in their pleadings opposing partial summary judgment. CP 547-52. Based on these declarations and pleadings, the trial court denied summary judgment, finding material issues of fact. CP 902-04. The Daweses maintained the same position in their trial brief, and even

in their response to the Fields' subsequent motion for attorneys' fees under CR 11. CP 890, 1038.

Ronald's, Ann's and Edward's declarations all attach the same map showing the Common Road turning abruptly into the Fields' property toward the eastern corner of their home, just inside the eastern boundary. CP 627, 641, 646. This map appears to be taken from the 2000 survey that the Daweses and Bennetts ordered. *Compare id. with* CP 190, 200. The Daweses asked the surveyor "not [to] depict . . . the actual location of [the Common Road] any farther west than the Bennett property." CP 188.

Ronald concedes that the map attached to the declaration contains "pencil marks" that were "not put in by ADA," the survey company. RP 448. One such "rough pencil mark[]" is the Common Road turning abruptly into the Fields' eastern boundary, rather than continuing on to the west, as depicted on the ADA map. *Compare* CP 200 *with* CP 627, 641, 646.

Moreover, the aerial photographs show that the Common Road simply does not end in the manner depicted on the map attached to the Daweses' declarations (RP 870):

[The map] depicts the road ends at the east end of the Field home, and it does not. It's always gone far beyond that.

The Daweses' declarations and pleadings were false and the Daweses completely contradicted them at trial. Contrary to his declaration, Edward testified that the Common Road extends to the southwest corner of the Daweses' property near the Pope land. RP 348-49; Ex 67. Edward drew a map when preparing his declaration, but it is not the map attached to his declaration, which he denied having seen until shortly before trial. RP 346-47. Edward conceded that the map attached to his declaration incorrectly shows (1) the Common Road ending at the Fields' eastern boundary; (2) the Road curving into the Fields' property; and (3) the Fields' eastern driveway only – they have a second driveway about 45 feet to the west. RP 345-46, 347-49.

Edward agreed that the Common Road continues well beyond the Fields' eastern boundary, west past the Fields' house to "right around the point where [Edward's] trailer was located," on the southwest corner of the Daweses' property near the Pope land.¹³ RP 340, 348-49; Ex 67. In short, Edward conceded that the Common Road terminated approximately 80-feet west of the "end of road" on the map attached to his declaration. RP 351-52.

¹³ In the map attached to Edward's declaration, the trailer is shown in the southwest corner of the Daweses' property. CP 646.

Although not as forthcoming as Edward, Ann also contradicted her declarations. During her deposition, Ann acknowledged that Edward drove down to his trailer on the southwest corner of the Daweses' property, yet also denied ever seeing a vehicle drive down the Common Road west of the Fields' home. CP 403, RP 711-12. During trial, however, Ann claimed that her "knowledge grew" and she learned that vehicles had driven down the Common Road about seven times a year for the past 20 years. RP 711-12.

In an effort to explain her declaration statements that the Common Road terminated at the Fields' eastern boundary, Ann testified that the "definition of road" confuses her. RP 725-26. Ann claimed that when she said that the Common Road terminated, she meant that it ceased being a "roadway in the sense of a fully useable roadway that was being used on a regular basis." RP 726. She did not qualify her meaning in her declarations. RP 726-27. The difference between a road that terminates completely and a road that "peter[s] out," was to Ann a "semantic nicety." RP 726.

Finally, Ronald also admitted that the map attached to his declaration is not accurate. RP 445-47. Ronald agreed that the Common Road continues west past the point at which the map,

marked “end of road,” shows the Road turning abruptly into the Fields’ property by their eastern boundary. RP 447-48.

When asked why he inaccurately represented the Road’s western terminus, Ronald accused counsel of “talking legalese,” but eventually stated that he did not “recall” why he submitted an inaccurate declaration (RP 448-49):

Q. But you understood that you were representing to the Court under oath that that was an accurate representation, to the best of your ability, of where the road ended, sir, didn’t you?

A. I believe you’re talking legalese, and I really don’t understand it. . . .

Q. Well, you understand your declaration was being used to advise the Court of what you, under oath, believed the facts to be; right?

A. Well, I believe that, yes.

Q. And yet, why did you allow a map to be submitted to the Court that you didn’t believe was accurate?

A. I don’t recall.

The trial court correctly found that the Daweses were well aware that the Common Road continued west past the Fields’ house to the Pope land, contrary to their “numerous” declarations and pleadings. CP 1119-20, F/F 4, 5, 6. Yet the trial court refused to award fees under CR 11. CP 1126. That was an abuse of discretion under the *Fisons* factors, discussed above.

First, the purpose of CR 11 sanctions is to prevent the assertion of groundless and meritless claims and assertions. The trial court's action must be sufficient to further the purposes of the rule. It is clear from the findings of fact that the Daweses made incredible and insupportable assertions – under oath – to defeat the Fields' motion for summary judgment. CP 1119-22. Their claims were not well grounded in fact, but in falsehoods the Daweses propagated. *Skimming*, 119 Wn. App. at 754. The Daweses completely contradicted their false declarations at trial, yet continued to maintain their unfounded position, despite their own testimony to the contrary. *Compare* CP 890 with RP 725-27. In light of its findings, the trial court's refusal to impose sanctions undermines CR 11. There is no point in trying to deter groundless pleadings if the trial court fails to take any action in response.

Second, the sanction must insure that the wrongdoer does not profit from the wrong. The Daweses apparently hoped that their litigation tactics would grind down the Fields and financially prevent the Fields from defending themselves. This was ultimately successful in the sense that it ground down the Fields financially, although a failure in that the Fields never gave up.

Third, “[t]he wrongdoer’s lack of intent to violate the rules and the other party’s failure to mitigate may be considered by the trial court in fashioning sanctions.” The Daweses certainly intended to file groundless declarations – their declarations were false. Some of these false declarations were repudiated at trial and others Ronald Dawes claimed he could not explain or could not remember. The Fields tried to mitigate the damages by filing their motion for summary judgment and asking for CR 11 sanctions as part of the motion (CP 684), putting the Daweses on notice that there could be consequences to their conduct.

The trial court also failed to consider the purposes of sanctions, which are “to deter, to punish, to compensate and to educate.” *Fisons*, 122 Wn.2d at 356. Denying any sanction in the face of the Daweses’ conduct fails to further any of these purposes. Instead, the denial of CR 11 sanctions tends to encourage further improper misconduct: “Misconduct, once tolerated, will breed more misconduct and those who might seek relief against abuse will instead resort to it in self-defense.” *Id.* at 355 (quoting Schwarzer, 104 F.R.D. at 205).

No judge enjoys the “difficult and disagreeable task” of imposing sanctions. *Fisons*, 122 Wn.2d at 355. But CR 11

imposes an obligation to sanction such misconduct as in this case. The Court should reverse and remand for entry of an appropriate sanction under CR 11.

B. The Fields are entitled to attorneys' fees under CR 11, where (1) the Daweses acquiesced in the Common Road as the true boundary for 22 years; and (2) there is no "credible" or "believable" evidence that the Daweses thought their property extended south of the Common Road before 2000.

The Daweses all but concede that they acquiesced in the Common Road as the north/south boundary for at least 15, if not 22 years. The trial court flatly rejected the Daweses' claims that they knew that the Common Road was actually on their property, finding that (1) it is "not believable" that before the 2000 survey, the Daweses thought the Common Road was actually on their property (CP 1120, F/F 7); (2) there is "[n]o credible evidence" that the Daweses used any portion of the disputed areas south of the Common Road (CP 1122, F/F 17); and (3) the testimony supporting their only claimed use of the disputed area was "not credible." *Id.* Finding that the Daweses' claims were not credible or believable is worse than finding that their claims lacked factual grounds required under CR 11. In light of these findings, the court abused its discretion in failing to award CR 11 sanctions.

Moreover, summary judgment would have been appropriate on this issue, but for the false declarations creating a fact question on the Common Road's western terminus. *Supra* Argument § A. Here too, the Daweses used their false declarations to evade summary judgment and unnecessarily prolong the litigation.

Summary judgment is appropriate only when the pleadings, declarations and depositions show that “there is no genuine issue as to any material fact” and “the moving party is entitled to a judgment as a matter of law.” CR 56(c); ***Cascade Auto Glass, Inc. v. Progressive Cas. Ins. Co.***, 135 Wn. App. 760, 765, 145 P.3d 1253 (2006). The court reviews the denial of summary judgment *de novo*. ***Tiffany Family Trust Corp. v. City of Kent***, 155 Wn.2d 225, 230, 119 P.3d 325 (2005). As discussed in full above, attorneys' fees are appropriate under CR 11, where (1) the claims are filed in bad faith or for an improper purpose, or are not well grounded in fact; or (2) the claims are not warranted by existing law; and (3) the attorney who signed the pleading has failed to conduct a reasonable inquiry. ***Skimming***, 119 Wn. App. at 754; ***Manteufel***, 117 Wn. App. at 176.

The Daweses should be bound by the Agreement establishing that the Common Road is the north/south boundary.

CP 314-15, 322-29. The Daweses had constructive notice of the Agreement, recorded in 1972. *Dickson v. Kates*, 132 Wn. App. 724, 737, 133 P.3d 498 (2006) (“If a restriction is recorded, any subsequent purchaser is assumed to have constructive notice”). The Agreement clearly shows that the each property north and south of the Common Road ends where it borders the Road. CP 329. In other words, the Agreement shows that the Daweses’ lot terminates north of the Road, not south of the Road in the Fields’ front yard as the Daweses claimed. *Compare* CP 329 *with* CP 28.

Thus, mutual recognition and acquiescence was established by agreement and it does not matter whether the Daweses acquiesced in the Common Road as the north/south boundary. *Lilly*, 88 Wn. App. at 317. This alone entitles the Fields to CR 11 fees. The Daweses are bound by this Agreement and had no well-founded basis for their claim.

In any event, the Daweses all but conceded that they acquiesced in the Common Road as the north/south boundary for at least 15 years. In numerous pleadings and declarations, the Daweses repeatedly acknowledged that they did not believe that the Common Road was on their property until 1993. CP 547, 622, 1038. Rather, for 15 years after the Daweses and Fields

purchased, “there were no problems as to the location of boundary lines.” CP 622. This amounts to an admission that the Common Road established the true boundary line for the statutory period of ten years. *Lilly*, 88 Wn. App. at 316-17.

In addition to admitting that they had “no problems as to the location of the boundary” for 15 years, the Daweses also conceded that when they discovered that the boundaries may not be correct, they did nothing for seven more years. CP 404; 622-23. The Daweses claimed that in 1993, they discovered that the Common Road might be on their property, but admitted that they did nothing about it. *Id.* They did not order a survey to confirm or refute their suspicions. *Id.* They did not tell the Fields, or the Bennetts, both of whom would have been encroaching on their property if the Daweses had been correct. *Id.* They did not tell anyone else in the neighborhood, all of whom assumed that the Common Road was the north/south boundary. *Id.*; CP 1119, F/F 3.

Rather, the Daweses did not say or do anything because they were not concerned about the location of the Common Road, and had “no problems as to the location of boundary lines.” CP 622. As the trial court correctly noted, the Daweses’ failure to

contest the boundaries in 1993 shows further acquiescence in the Common Road as the true boundary. RP 1628.

Thus, from the motion for partial summary judgment forward, the Daweses admitted that they had acquiesced in the Common Road as the true boundary for at least 15 years, and likely 22 years. If the Daweses had not manufactured questions of fact as to the Common Road's western terminus, summary judgment would have been appropriate, and the parties would not have wasted time and money litigating the disputed area south of the Common Road. This establishes the Fields' right to attorneys' fees under CR 11 for defending the Daweses' claims as to the area south of the Common Road. The Court abused its discretion.

Moreover, the factual basis of the Daweses' claims is not credible or believable. The Daweses conceded that they did not exclusively occupy or place anything permanent or semi-permanent in the area south of the Common Road. RP 433-34, 566. The Daweses also admitted that their only claimed use of the area south of the Common Road was sky viewing. CP 358; RP 434. The court rejected this claim, finding that Ronald's testimony was "not credible." CP 1122, F/F 17.

Ronald claimed that four-to-five times every summer, he set up a telescope in the disputed area south of the Common Road for sky viewing. CP 358; RP 137-38, 443. Ronald also agreed, however, that he claimed to have used the disputed area about 15 times each year for sky viewing.¹⁴ RP 438-39.

The court found that Richard DesRuisseau's testimony that Ronald used his property – not the Fields' property – for sky viewing, was more credible than Ronald's. CP 1122, F/F 17; RP 1626. DesRuisseau lived next door to the Fields before selling his home to the Bennetts in 1988. CP 1317-18. Ronald asked DesRuisseau if he could use an area on DesRuisseau's property for sky viewing because the Fields' property had too many trees (120-130 feet tall) that blocked the view of the southern sky, and Ronald felt like sky viewing at the west end of the Common Road was encroaching on Douglas who was always out there building

¹⁴ There was also confusion as to whether Ronald began sky viewing in the disputed area in 1978 or eight years later in 1986. RP 439-44. Ronald stated in his deposition that he started sky viewing in the disputed area in about 1986, but stated in his declaration that he started the sky viewing in 1978. *Compare* CP 359; RP 442-43 *with* CP 621-22; RP 439-40. When asked why he first testified that he began sky viewing in 1978, Ronald's only response was "beats me." RP 444.

something or driving up and down the Road.¹⁵ CP 1328-30. DesRuisseau sat with Ronald many times while he was sky viewing. CP 1328-29.

In sum, the Daweses are bound by the Agreement depicting the Common Road as the north/south boundary and acquiesced in the same for at least 15 years. Any claim to the contrary is not credible or believable, and the Court abused its discretion in denying the Fields fees on this issue.

C. The Fields are entitled to attorneys' fees under RCW 4.84.185, where the Daweses' contentions were frivolous and asserted without reasonable care.

The Daweses had no reasonable factual basis for their claims or defenses to the Fields' claims. They acquiesced in the Common Road as the true boundary for 22 years, and admitted that the Road extended west to the Pope land. The sole claim of use of the disputed area was not even believable, and legally insufficient to support their claims in any event. The Court should reverse and remand for an award of fees.

¹⁵ The aerial photographs show a clearing at the back of DesRuisseau's property ideal for sky viewing. RP 859. The area south of the Common Road where Ronald claimed to have set up his telescope is not suitable as the southern sky is blocked by tall trees. RP 862-65.

Under RCW 4.84.185, a trial court may award attorneys' fees incurred in opposing an action that is "frivolous and advanced without reasonable cause." Fees are appropriate only if the action is frivolous as a whole. **Jeckle v. Crotty**, 120 Wn. App. 374, 387, 85 P.3d 931 (2004). "An action is frivolous if it 'cannot be supported by any rational argument on the law or facts.'" **Jeckle**, 120 Wn. App. at 387. The Court reviews the refusal to award fees for an abuse of discretion. *Id.*

The Daweses' action was entirely frivolous and the court abused its discretion in denying the Fields fees under RCW 4.84.185. The Daweses' claim that the Common Road terminated at the Fields' eastern boundary is without any factual support whatsoever, where the Daweses conceded at trial that the Road continued far west of the Fields' eastern boundary. *Supra* Argument § B. Further, the Daweses acquiesced in the Common Road as the north/south boundary from 1978 until 2000 – their arguments to the contrary are "not believable." CP 1120, F/F 7.

The Daweses' claim that they established ownership in the area south of the Common Road by adverse possession is also frivolous. CP 1122, F/F 17. The Daweses could not possibly have established possession for the required period because they did not

make an overt claim of ownership until 2000.¹⁶ *Id.* They conceded that their only claimed use of the area south of the Common Road was sky viewing 15 times per year. RP 434, 438-39. This is not “exclusive,” “uninterrupted” use (***Campbell*** 134 Wn. App. at 361) and in any event, the court found that Ronald’s claims about sky viewing were “not credible” and that “the southern sky is not reasonably ascertainable from the location at which [Ronald] claimed to have observed.” CP 1122, F/F 17.

The Daweses’ claims as to title of the area south of the Common Road are frivolous because record title is immaterial. Record title cannot overcome the Daweses’ mutual recognition and acquiescence in the Common Road for 20 years – double the statutory period. *Infra* Argument § D. Remaining claims, such as nuisance and trespass are also frivolous because they depend on a well-grounded claim of ownership, which the Daweses could not and did not articulate.

The entire trial was caused by the Daweses’ false declarations in response to summary judgment and relentless

¹⁶Adverse possession requires (1) exclusive, (2) actual and uninterrupted, (3) open and notorious, and (4) hostile possession for a ten year period. ***Campbell***, 134 Wn. App. at 361.

pursuit of the area south of the Common Road, despite their admissions that they acquiesced in the Common Road as the north/south boundary until 2000. It is an abuse of discretion to require the Fields to bear their own costs and fees incurred in responding to these frivolous claims, and the Court should reverse and remand for an award of fees.

D. The Fields are entitled to attorneys' fees under RCW 4.28.328, where the Daweses did not show a substantial justification for filing the lis pendens.

The trial court abused its discretion in refusing to award fees for the lis pendens because the Daweses did not have substantial justification for filing it, where they had acquiesced in the Common Road as the true boundary for 22 years.

RCW 4.28.328(3) allows an "aggrieved party" who prevails in defense of an action in which a lis pendens was filed, to collect actual damages and attorneys' fees, unless the claimant "establishes a substantial justification for filing the lis pendens." *Richau v. Rayner*, 98 Wn. App. 190, 197, 988 P.2d 1052 (1999). The Fields sought fees under RCW 4.28.328(3), and as the Fields prevailed in the underlying action, the Daweses had the burden to show "a substantial justification" for filing the lis pendens. *Richau*, 98 Wn. App. at 197.

The Daweses did not have a “substantial justification” for filing the lis pendens because their defenses to the Fields’ mutual recognition and acquiescence claim are not credible or believable. CP 1120, F/F 7; CP 1122, F/F 17. In other words, they had no credible or believable grounds for believing that the property was not the Fields’. *Id.* Absent a non-frivolous defense on this point, the lis pendens was improper.

Yet the trial court refused to award fees under RCW 4.28.328(3), stating that it would have done so but for the fact that both parties disputed legal title to the disputed area south of the Common Road and both mistakenly believed that the party who previously owned the Daweses’ lot, James Selley, had legal title to the disputed area. CP 1125-26, C/L 8. The Daweses cannot establish ownership of the disputed area south of the Common Road because record title cannot overcome the Fields’ ownership by mutual recognition and acquiescence. *Lamm*, 72 Wn.2d at 592, *Lilly*, 88 Wn. App. at 316. Rather, when there is mutual recognition and acquiescence, the true boundary is “immaterial.” *Id.* The same is true of adverse possession – the nature of these companion doctrines is that they allow a party who does not have record title to establish ownership against the true owner.

In short, the court's only rationale for denying fees under RCW 4.28.328(3) is misplaced and there is no reasonable basis for the court's ruling. The Fields are entitled to fees and the Court should reverse.

E. The Fields are entitled to damages under RCW 64.12.030 because Ronald Dawes destroyed vegetation in the area south of the Common Road.

RCW 64.12.030 permits a party to recover treble damages for injury to shrubs and trees on their property. Ronald poisoned the area south of the Common Road when he was well aware that the Fields claimed the area as their own front yard. The court abused its discretion and refusing to award damages.

The court refused to award damages under RCW 64.12.030, concluding that Ronald's actions "may arguably be consistent with a claim of ownership, based upon a misunderstanding about the legal title." CP 1126, C/L 11. But as discussed above, the Daweses' claim to ownership by record title is not an excuse for their actions because Ronald poisoned the area south of the Common Road in May 2001 (RP 1249), long after mutual recognition and acquiescence had already occurred. *Supra* Argument § D. In other words, Ronald did not have a reasonable claim of ownership when he poisoned the Fields' front yard.

Ronald's actions are also compensable because he destroyed vegetation on the disputed area with full knowledge that the boundary was disputed. *Mullally*, 29 Wn.2d at 911. When Ronald poisoned the Fields' trees, he knew that the Fields claimed the property south of the Common Road as their own. CP 1119, F/F 3; CP 1120, F/F 7. As such, Ronald knew that ownership of the property was disputed, and the Fields are entitled to damages. 29 Wn.2d at 911.

CONCLUSION

This entire trial was made necessary by the Daweses' false declarations. The Daweses lied to the court and stubbornly pursued claims for which they had no factual basis. The Fields should not have to pay their fees incurred in responding to these frivolous claims, and the Court should reverse and remand for fees.

DATED this 3rd day of May, 2007.

Wiggins & Masters, P.L.L.C.



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CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed, or caused to be mailed, a copy of the foregoing BRIEF OF APPELLANT postage prepaid, via U.S. mail on the 3rd day of May 2007, to the following counsel of record at the following addresses:

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Attorney for Appellants

STATE OF WASHINGTON
COUNTY OF KING
MAY 4 2007 11:53 AM
BY: [Signature]
COUNSEL OF RECORD

4.28.328. Lis pendens--Liability of claimants--Damages, costs, attorneys' fees

(1) For purposes of this section:

(a) "Lis pendens" means a lis pendens filed under RCW 4.28.320 or 4.28.325 or other instrument having the effect of clouding the title to real property, however named, including consensual commercial lien, common law lien, commercial contractual lien, or demand for performance of public office lien, but does not include a lis pendens filed in connection with an action under Title 6, 60, other than chapter 60.70 RCW, or 61 RCW;

(b) "Claimant" means a person who files a lis pendens, but does not include the United States, any agency thereof, or the state of Washington, any agency, political subdivision, or municipal corporation thereof; and

(c) "Aggrieved party" means (i) a person against whom the claimant asserted the cause of action in which the lis pendens was filed, but does not include parties fictitiously named in the pleading; or (ii) a person having an interest or a right to acquire an interest in the real property against which the lis pendens was filed, provided that the claimant had actual or constructive knowledge of such interest or right when the lis pendens was filed.

(2) A claimant in an action not affecting the title to real property against which the lis pendens was filed is liable to an aggrieved party who prevails on a motion to cancel the lis pendens, for actual damages caused by filing the lis pendens, and for reasonable attorneys' fees incurred in canceling the lis pendens.

(3) Unless the claimant establishes a substantial justification for filing the lis pendens, a claimant is liable to an aggrieved party who prevails in defense of the action in which the lis pendens was filed for actual damages caused by filing the lis pendens, and in the court's discretion, reasonable attorneys' fees and costs incurred in defending the action.

4.84.185. Prevailing party to receive expenses for opposing frivolous action or defense

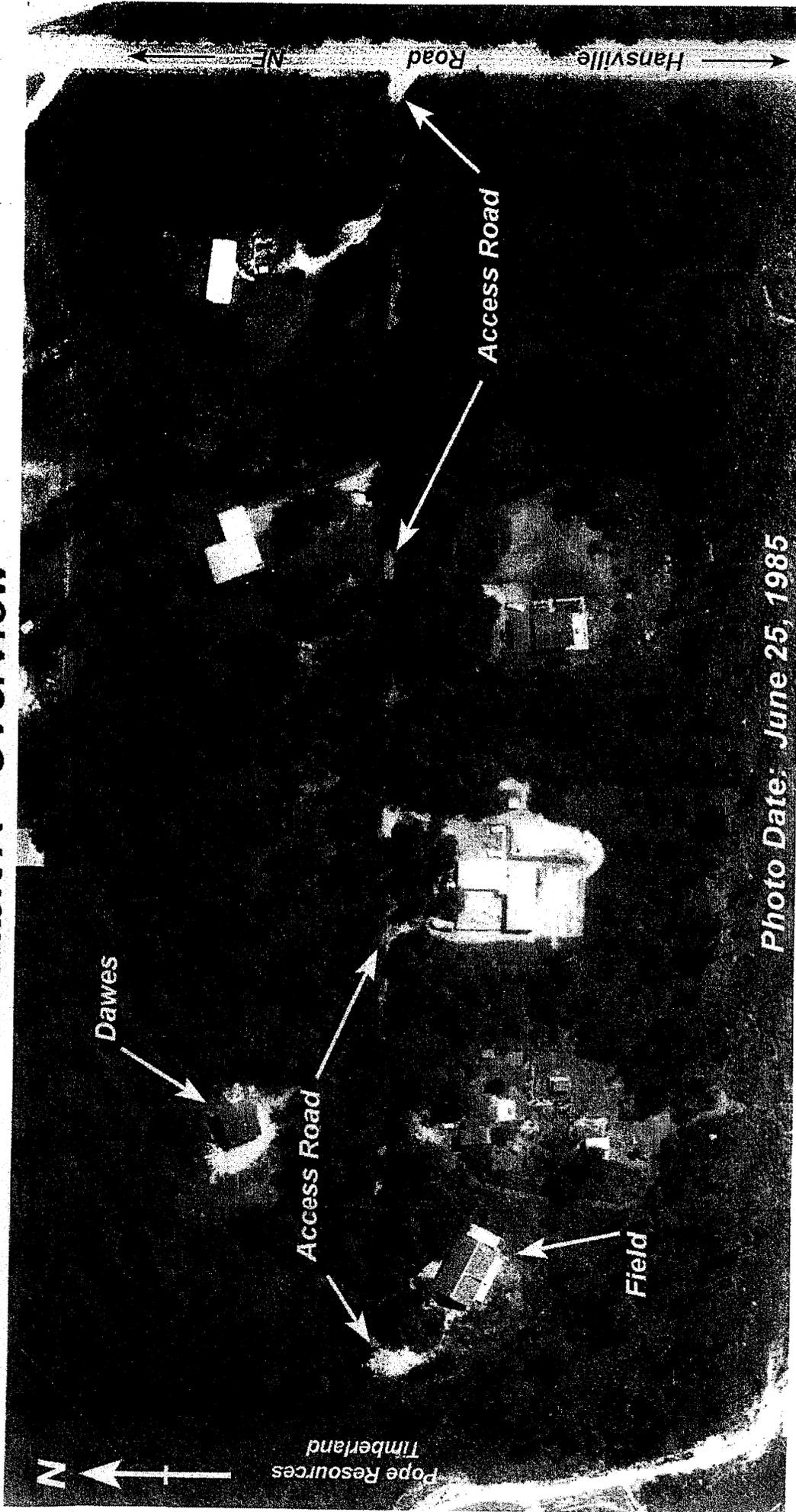
In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense. This determination shall be made upon motion by the prevailing party after a voluntary or involuntary order of dismissal, order on summary judgment, final judgment after trial, or other final order terminating the action as to the prevailing party. The judge shall consider all evidence presented at the time of the motion to determine whether the position of the nonprevailing party was frivolous and advanced without reasonable cause. In no event may such motion be filed more than thirty days after entry of the order.

The provisions of this section apply unless otherwise specifically provided by statute.

64.12.030. Injury to or removing trees, etc.--Damages

Whenever any person shall cut down, girdle or otherwise injure, or carry off any tree, timber or shrub on the land of another person, or on the street or highway in front of any person's house, village, town or city lot, or cultivated grounds, or on the commons or public grounds of any village, town or city, or on the street or highway in front thereof, without lawful authority, in an action by such person, village, town or city against the person committing such trespasses or any of them, if judgment be given for the plaintiff, it shall be given for treble the amount of damages claimed or assessed therefor, as the case may be.

Exhibit A - Overview



A G R E E M E N T

1028545

THIS AGREEMENT, dated this 1st day of September, 1970, by and between EDWARD U. ERICKSON, a single man, hereinafter referred to as First Party; WILLIAM J. FLAHERTY, JR. and MARGARET A. FLAHERTY, his wife, hereinafter referred to as Second Party; ARTHUR M. STEELE and ZELMA A. STEELE, his wife, and GARY ARTHUR STEELE, his son, hereinafter referred to as Third Party; RONALD A. DAVIS, a single man, hereinafter referred to as Fourth Party; DAVID G. SCOVILL and ELAINE C. SCOVILL, his wife, hereinafter referred to as ~~PROVIDED~~ Fifth Party; KENNETH R. RENEGAR and GENEVA I. RENEGAR, his wife, hereinafter referred to as Sixth Party; and RONALD L. NELSON and DIANE B. NELSON, his wife, hereinafter referred to as Seventh Party,

W I T N E S S E T H :

WHEREAS, the parties hereto are owners, contract vendors or contract purchasers of the various parcels of real property as shown on the attached map, marked Exhibit "A", dated September 1, 1970, which said map is attached hereto and made a part of this agreement, and

WHEREAS, said parties are desirous of creating and defining an easement for roadway, water pipe lines, and power transmission lines over said real property, and further,

WHEREAS, said parties are desirous of utilizing the water from the well on Parcel A as shown on attached map for the benefit of all of said parcels, and of determining rights and obligations in connection therewith,

NOW, THEREFORE, IN CONSIDERATION of the mutual covenants herein contained, the parties do agree as follows:

1. That the parties hereto do create, grant and convey, one to the other, an easement for them and each of them, their heirs and assigns, their guests and invitees, for a roadway for ingress and egress to their various properties over the following described real property in Kitsap County,

The North 30 feet of the South half of the South half and the South 30 feet of the North half of the South half, Section 4, Township 27 North, Range 2 East, W.M., Kitsap County, Washington; ALSO, an easement for a public well, 100 feet in radius around existing well, as shown on said attached map.

2. That the parties do further grant, one to the other, the right to run a water pipe line from the well on Parcel A, along the above-described roadway, and to hook into the same from their parcels of property; PROVIDED: that the said line and all extensions and attachments thereto shall be buried at a sufficient depth so as not to interfere with the use of said roadway for ingress and egress; and FURTHER PROVIDED: that in the event any of the parties hereto, their successors or assigns, must interrupt service of the water to any other party or parties hereto, their successors or assigns, he shall not so do without first giving at least forty-eight (48) hours notice of said interruption to the affected party or parties, and then the interruption shall be only long enough to allow the new hook-up, but in no event longer than 4 hours.

3. That in the event one of the parties, his successors or assigns, must disturb the condition of the roadway in order to hook up to the water system, he shall notify all persons entitled to use the said road under this agreement if such use will be impossible during the hook-up time, giving them adequate time to make any necessary arrangements to remove cars, etc., he shall have the roadway back in usable shape within one (1) hour of completion of the water line hook-up, and he shall thereafter, in timely manner, restore said roadway to the shape it was in prior to his disturbing it.

4. That the parties do agree that the water from said well shall be used only for domestic purposes, that it shall be divided into ten (10) shares, that each share shall be used for no more than one single family residence, and that the parties, their successors and assigns, are entitled to shares as follows:

Two (2) shares for First Party for Parcel A
One (1) share for First Party for Parcel D
One (1) share for Second Party for Parcel B
One (1) share for Third Party for Parcel C
One (1) share for Fourth Party for Parcel E
One (1) share for Fifth Party for Parcel F
One (1) share for Sixth Party for Parcel G
Two (2) shares for Seventh Party for Parcel H

5. It is understood and agreed that First Party has transferred one of the shares assigned to Parcel A to JAMES E. TESTER and IDA MAE TESTER, his wife, residing on property adjacent to parcel A on the North side of [REDACTED] after shall be known as Eighth Party. Said parties hereby agree to abide by the rules and regulations as set forth hereto.

6. That the costs of maintenance, operation and repair of said well and water system shall be borne by the parties in direct proportion to the use they are making of the water; that is, each residence being served by the well shall pay an equal amount of said costs. In order that sufficient funds may be available to pay power bills and any necessary repairs, it is agreed that each party to this agreement shall pay Three Dollars (\$3.00) per month to a Treasurer to be elected by the parties hereto; said Treasurer and a committee of two (2) other parties hereunder to be elected shall be responsible for payment of electrical bills and necessary emergency repairs. All parties hereunder shall meet once yearly on the first day of September of each succeeding year to elect new committee members to set any rules or by-laws needed for the administration of this well.

7. As Eighth Party now has two (2) separate single family residences connected but are owners of only one (1) share, they shall pay an extra maintenance charge equal to the cost of one (1) residence. This additional use is permitted on a temporary basis only, and may be terminated at any yearly meeting of the Committee, or at any time when shortage of water may develop.

8. That the parties do further grant to Puget Sound Power & Light Company, the right to install, maintain, replace, remove, and use an electric line, including all necessary poles or towers, wires and fixtures, and to keep

IN WITNESS whereof the parties do hereto set their hands and seals on the day and year first above written.

Edward U. Erickson
William J. Flaherty

Margaret A. Flaherty
Arthur M. Steele

John A. Steele

Gary A. Steele

Ronald J. Davis

David M. South

Elaine C. Scovill

Kenneth R. Ringar

Geneva D. Ringar

Ronald L. Nelson

Diane B. Nelson

Jane E. Tester

Ida Mae Tester

Tract F Davis
1 1/2 acres

FIELD

Tract D Selley
2 1/2 acres

DAWES

Tract E Scovill
1 1/2 acres

BENNETT

Tract G Renevier
2 1/2 acres

Tract C (ex Harris) Steele

Tract H Nelson
3 acres 2 water rights

Tract I Flaherty

Tract A Erickson 1 1/2 acres
(originally 2 water rights
but sold one with property
to South (Tester)).

3/4" TEE WITH
STOP & CHECK VALVE

1/2" CLASS 160 ENDOT PVC
3" CLASS 160 ENDOT PVC

ROAD
EASEMENT

100' radius

81772