

NO. 49433-7-II
COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

RODNEY RICH and SANDRA RICH,

Appellants,

vs.

ERIC RASMUSSEN, M.D. and JANICE RASMUSSEN,

Respondents.

REPLY AND RESPONSE BRIEF OF
APPELLANTS RODNEY AND SANDRA RICH

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I. INTRODUCTION

In their Opening Brief, the Riches established grounds for reversal of the summary judgment quieting title in the Rasmussens and requiring removal of encroachments. The facts viewed favorably to the Riches support their claim of mutual acquiescence and their equitable defenses to the quiet title action. The Rasmussens fail to address the evidence and authorities that support reversal. The Court should reverse.

The Rasmussens assign error to the Superior Court's order on reconsideration denying their request for attorney fees. The Superior Court was correct to deny the Rasmussens attorney fees under statutory authority that—in the plain words of the Legislature—applies to claims of adverse possession. The Riches never asserted adverse possession. The Rasmussens never briefed adverse possession or prevailed on it. The statute does not authorize an award of fees to the Rasmussens for prevailing against the Riches' claim of mutual acquiescence. No error is shown.

II. REPLY IN SUPPORT OF THE RICHES' APPEAL OF THE SUMMARY JUDGMENT

A. Summary of reply

The Riches presented ample authority demonstrating that the evidence—taken in the light most favorable to the Riches—warranted a trial of their mutual acquiescence claim and their equitable defenses of

laches and equitable estoppel. The Rasmussens fail to engage the Riches' arguments or authorities, preferring instead to knock down straw men and avoid discussion of the authorities on which the Riches rely, such as *Spath v. Larsen*, 20 Wn.2d 500 (1944) and *Lloyd v. Montecucco*, 3 Wn. App. 846 (1996). The Rasmussens ignore these cases and fail to address the Riches' distinction of the result in *Merriman v. Cokeley*, 168 Wn.2d 627, 630 (2010). The Rasmussens also argue the evidence as if to a trier of fact. The evidence can be viewed to support the elements of the Riches' mutual acquiescence claim. The evidence also supports their equitable defenses to the quiet title action. Because the facts viewed favorably to the Rasmussens support their mutual acquiescence claim and equitable defenses, summary judgment was improvidently granted.

B. The elements of mutual acquiescence are met by the evidence taken in the light most favorable to the Riches

In their Opening Brief, the Riches set forth a compelling examination of the case law illustrating how their evidence satisfies each element of their mutual acquiescence claim. *See* OB 13-23. The Rasmussens fail to respond effectively, needlessly arguing what does *not* constitute adequate demarcation of the boundary line: landscaping, the tight-line, or the nylon string. *See Respondents' Brief* ("RB") at V.B.1.a(ii)-(iv). The Riches never argued that these items demarcate the

boundary line. Evidence regarding these items and their placement is relevant to the issue of mutual recognition of the agreed-upon line by the parties over twenty years. The boundary line is demarcated by the concrete wall running for 60% of the shared boundary line and by the two prominent, above-ground markers establishing the rest of the boundary line: the end of that concrete wall at the top of the cliff and the Rasmussens' deck corner at the bottom. This is the line to which Eric and Rodney orally agreed in 1993 and that they recognized thereafter for over twenty years. This demarcation satisfies the law.

1. No authority demonstrates that the Riches' evidence establishing the boundary line is inadequate.

According to the case law, the Riches have offered sufficient evidence for a trier of fact to conclude that in 1993 the parties expressly agreed to a shared boundary line demarcated by the concrete wall, the tip of that wall and the corner of the Rasmussens' deck. The Riches demonstrated that these physical demarcations are sufficient under the law. They are "certain," "well defined," and "in some fashion physically designated upon the ground, e.g., by monuments, roadways, fence lines, etc." These designations are also fixed and unchanging. They are also prominent and visible.

The Riches have shown, for example, that this evidence is

consistent with the standards and guidance in *Merriman*. See OB 14-15. It meets the plain language of *Merriman*, which expressly recognizes that monuments rather than a fence can physically designate the boundary. *Merriman* does not require a continuous line or fence. The Riches distinguished the result reached in *Merriman*, where “widely spaced markers” had become overgrown and buried and were not visible, unlike in this case. The Rasmussens made no comment on this argument and did not demonstrate why the result in *Merriman* is not distinguishable. It is.

The Riches also rely prominently on *Spath v. Larsen* and *Lloyd v. Montecucco*. See OB 15-19. The Rasmussens entirely fail to discuss these authorities or argue that they do not support reversal. They do. These authorities further establish that a boundary line to be sufficient need not be continuous. They further establish that two fixed points can establish a boundary line. They establish that case law requires no maximum distance between the markers. They show that, to satisfy the law, a boundary line should be sufficiently demarcated *in the circumstances*. *Lloyd v. Montecucco* is particularly persuasive where, like in this case, a family maintained their property from the end of a fence that stopped at the edge of a bluff, down the steep bank to a bulkhead. In that adverse possession case, both the Superior Court and the Court of Appeals approved projecting the line from the end of the fence down the steep

bank to the bulkhead because it was reasonable in the circumstances. The Rasmussens' failure to address *Spath v. Larsen* and *Lloyd v. Montecucco*, or to remark on the Riches' distinction of the result in *Merriman*, should be fatal to their defense of the summary judgment.

The evidence also shows that the demarcation that Eric and Rodney agreed to was so certain and well-defined that all of the Riches' improvements precisely observed it. The Rasmussens do not respond. Additionally, the evidence of the agreement is strong. Eric concedes that Rodney and he expressly discussed the property line in 1993. He concedes that they addressed the top of the cliff where the concrete wall was built and specifically agreed that the new wall once built would be the property line. He also concedes he and Rodney went down to the beach and addressed the cliff. While Eric stops short of conceding that they made an agreement about this shorter portion of the line, his actions in the next twenty years support that they did. Further, that they reached an agreement is consistent with Rodney's like interactions with his other neighbors, who all testified that Rodney openly and directly contacted them about adjoining property lines before starting any work along the line. *See* OB 5-6, citing testimony of neighbors Raquer, Hammel and Sciacca. This testimony is not irrelevant, as the Rasmussens contend, but helps establish the credibility of Rodney's account that his agreement with

Eric addressed the entire boundary line, including the cliff. For purposes of the appeal, this Court must assume that Eric and Rodney reached this agreement. Further, Eric and Rodney expressly and mutually dispensed with the need for a survey. OB 5, citing CP 328:1-3, CP 261:16-21, CP 382 ¶ 8. And Eric confirmed his subsequent express consent to Rodney starting work on the terraces based on “shooting a line” up the cliff from the corner of the Rasmussens’ deck. OB 16-17 citing CP 317:24-318:7 (“When he [Rodney] was starting [work on the terraces in 2007] he said, do you think I ought to shoot a line? And I said, well, if you can be within one foot of the property line, like we are at the top, I’m okay with that.”); CP 320:2-6 (same). All of this evidence substantiates the claim.

The Rasmussens’ argument that a fence *could* have been built on the cliff, *see* RB 17, 24-25, does not advance their defense of the summary judgment. The Riches never said it was impossible to build a fence down the cliff. The Riches have asserted only that the steep cliff was not well suited to a fence and that selecting the two prominent points—as Eric and Rodney did according to Rodney’s account—was reasonable under the circumstances and established the demarcation. As already stated, the law does not require a fence, contrary to the Rasmussens’ implication.

The Rasmussens have ignored the Riches’ arguments and case authorities. The summary judgment is inconsistent with the law and with

the facts viewed favorably to the Riches.

2. A trier of fact could find mutual recognition of the line for twenty years.

The Riches in their Opening Brief detailed evidence that supports the remaining two elements of mutual acquiescence: (1) mutual recognition of the boundary (2) for more than ten years. OB 20-23. In addition to ignoring the Riches' legal arguments and evidence regarding the demarcated boundary line, the Rasmussens also ignore this evidence. They stress their interpretation of the evidence. A trier of fact, however, could find these elements satisfied.

Recognition is first shown—and persuasively so—by evidence of the express agreement in 1993. As noted in the Opening Brief (OB 20) and not disputed by the Rasmussens, mutual acquiescence does not require an express agreement, but where an express agreement is present, the agreement constitutes evidence of the mutual recognition. In this case, that began in 1993 and was not recanted until 2012 at the earliest. The evidence of mutual recognition, therefore, dates from 1993. This alone would be sufficient. Additional evidence exists, including evidence of both parties maintaining vegetation up to that agreed line starting in 1993, the placement by the Riches in 1994 of the tight-line on their side of the line, installation of landscaping by the Riches up to the line, the

Rasmussens' apology for the placement of their yard waste on the Riches' side of the line (in the area they now claim), the Rasmussens' rebuilding of their deck in 2002-03 in its same location serving as the bottommost marker, the Riches' installation of a concrete and stone wall at the bottom of the bank in 2008 or 2009 right up to that agreed line with no dissent from the Rasmussens, followed by the full and complex terracing just back from the agreed line that began in 2007 and continued to 2012. *See* OB 7-11, 21. No matter how the Rasmussens might argue for a different conclusion before a trier of fact, this evidence can support a conclusion that the Rasmussens acquiesced in the boundary line from 1993 to at least 2013, when the Rasmussens had a negative reaction to the top terrace and obtained a survey, or to 2015 when they initiated this action.

The Rasmussens now argue that the stairs installed by the Riches in 2001-2002, to which it is undisputed the Rasmussens did not object and acquiesced in their location (*see* OB 21), do not encroach. RB 31. This is news to the Riches. The exhibits, specifically CP 148, show that the corner of the first landing crosses the survey line. The Rasmussens' argument that this portion do not encroach presents a question of fact, which does not support summary judgment. Whether this portion encroached or not is also not determinative of whether the Riches introduced sufficient evidence to support mutual acquiescence over ten

years to the entire boundary line. There is ample evidence.

That these parties reached and observed an agreement about the boundary is also supported by their long history of friendship. They spent much time with each other. CP 287:18-293:4. The Rasmussens were consistently aware of Rodney's work on the bank, offering support and encouragement. *Id.* The Rasmussens did not merely tolerate the Riches' activities. The work and its location were consistent with their express agreement unchanged over the years. Only in 2012 did the Rasmussens blindside the Riches with the survey and their present complaints based on their dislike of the top terrace, which does not encroach.

3. The Rasmussens rely on mutual acquiescence cases that went to trial, which cases do not support summary judgment.

The Rasmussens did not fully address the authorities relied upon by the Riches. They attempt to rely almost exclusively on *Merriman*, which arose from a trial verdict that was affirmed. When verdicts are reached, the appellate courts will not disturb findings of fact that are supported by substantial evidence even where a trier of fact could have reached a different result. Here, the Riches were denied a trial. They submitted sufficient evidence to have their claim of mutual acquiescence proceed to trial. This Court should reverse.

C. The equitable defenses to the quiet title action are supported by evidence and are distinct from the Riches' affirmative claim

The Riches did not rely solely on asserting mutual acquiescence to avoid summary judgment of the Rasmussens' quiet title claim. They also asserted equitable defenses directly to that claim. The defenses of equitable estoppel and laches stand on their own and warrant a resolution on their merits. *See* OB 24-31. This Court should reject the Rasmussens' unsupported argument that these defenses are foreclosed if the mutual acquiescence claim fails. *See* RB 34, 37. The Rasmussens also respond by arguing their own interpretation of the evidence, for example, arguing that they acted with sufficient promptness to avoid laches. *See* RB 34, 36. This is unavailing to preserve the summary judgment, representing only one interpretation of the evidence. The defenses are legally adequate and should proceed to trial and a determination on the merits.

The Rasmussens ask the Court to ignore the evidence that supports the Riches' defenses, arguing that these defenses are somehow off limits because the Riches also raised the claim of mutual acquiescence. *See* RB 34, 37. The Rasmussens assert, without authority, that recognition of the defenses would "circumvent the requirements of a claim for mutual recognition and acquiescence" or "excuse" failure to comply with its elements. RB 34, 37. This argument fails. No case law shows that a

party who fails to prove a mutual acquiescence claim is disqualified from raising laches or equitable estoppel in a quiet title action. The Rasmussens' argument that these defenses are foreclosed as an impermissible end-run around mutual acquiescence is unsupported. The equitable defenses exist independently of the mutual acquiescence claim. The Riches cited authority demonstrating that the defenses can apply. *See* OB 25-30. This includes numerous cases recognizing application of these defenses to bar real property claims. *Id.* The Rasmussens fail to address or rebut this authority.

Like they did before the Superior Court, the Rasmussens argue that *Brost v. L.A.N.D.*, 37 Wn. App. 372, 375 (1984), supports the summary judgment. RB 35. This decision is off-point. It concerns whether laches can successfully bar an action short of the applicable statute of limitations. The Riches already addressed why *Brost* does not support the summary judgment, pointing out that no statute of limitations applies to quiet title actions like this so the rationale and concern identified in *Brost* do not apply. *See* OB 30-31. This Court should reject the Rasmussens' contrary argument, which is not compelling and attempts to misapply *Brost*.

The Rasmussens also argue the evidence, for example, arguing that laches cannot apply because they had no obligation to speak until "the Riches' construction became an issue in 2013." RB 36. That the Riches'

construction did not “become an issue” until 2013 is the Rasmussens’ subjective view. All the improvements that must be removed according to the Superior Court’s summary judgment were installed before 2013. A trier of fact could easily conclude that the Rasmussens had an obligation to speak earlier, such as any time after 1993 to recant the agreement or when the Riches installed the stairs in 2001-2002, the complex terracing on the lower portion of the bank beginning in 2007, or the concrete and stone wall at the bottom of the bank in 2008 or 2009. The Rasmussens waited until long after all of this work was fully completed before speaking. And they assisted with and praised the work. Additionally, Rodney relied on his agreement with Eric and the lack of subsequent objection to spend \$250,000 on the significant improvements. Regardless of the outcome of the mutual acquiescence claim on appeal or on remand at trial, the evidence supports the defenses of equitable estoppel and laches to prevent quieting title in the Rasmussens.

This Court should remand the equitable defenses for a determination on the merits.

III. RESPONSE OPPOSING THE RASMUSSENS’ APPEAL OF THE SUPERIOR COURT’S PROPER DENIAL OF THEIR REQUEST FOR ATTORNEY FEES UNDER AN INAPPLICABLE STATUTE

A. Summary of response

The law does not authorize a fee award to the Rasmussens.

Attorney fees will not be awarded absent authorization. *Rettkowski v. Dep't of Ecology*, 128 Wn.2d 508, 514 (1996). The Rasmussens assert authorization by RCW 7.28.083(3), which provides for a fee award to the prevailing party “in an action asserting title to real property by adverse possession.” No party asserted adverse possession in this case. The plain words of the statute cannot be interpreted to provide a fee award for defeating the Riches’ claim of mutual acquiescence. The Superior Court was correct on reconsideration to deny an award as a matter of law. This Court should affirm.

While the Superior Court initially awarded fees (CP 472:10-14), the Riches moved for reconsideration because the law provided no basis for a fee award where the Riches had not pleaded, and the Rasmussens had not prevailed against, an adverse possession claim. *See* CP 554-68, 579-81 (Motion); CP 592-99 (Reply Brief). The Superior Court reconsidered based on the law, holding, “The Court finds that RCW 7.28.083(3) does not permit an award of attorney’s fees based upon the claims raised in this case.” CP 621. The Rasmussens do not argue that the Superior Court lacked authority to reconsider. The Rasmussens argue only that the Superior Court made a mistake of law because the law allowed it to award fees either because: (1) the Riches claimed adverse possession, or (2) the statute should be expanded to allow for an award in mutual acquiescence

cases. RB 38-39. This Court should reject both arguments.

B. This Court should reject, as the Superior Court did, the Rasmussens' unsupportable assertion that the Riches raised and lost a claim of adverse possession to justify a fee award under RCW 7.28.083(3)

Because RCW 7.28.083(3) allows fee recovery to the prevailing party in an action asserting title to real property by adverse possession, the Rasmussens argue that the Riches claimed adverse possession. RB 38-39 (“Because the Riches pursued a claim for adverse possession, the Superior Court was correct in its initial ruling that an award pursuant to RCW 7.28.083(3) was authorized.”). This argument is flawed. As the Superior Court rejected the argument, this Court should.

The Rasmussens offer no standard of review. This Court might review for abuse of discretion the Superior Court’s determination that adverse possession was not at issue because the Superior Court was in the best position to determine the parties’ claims and arguments. *Wash. State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 339 (1993) (deference is owed to judicial actor who is better positioned to decide the issue in question). Even under a *de novo* standard, the conclusion is correct that the Riches did not assert adverse possession.

The Rasmussens attempt to show that the Riches asserted adverse possession based on a single reference in the Answer to RCW 7.28.010 (at

CP 24 ¶ 3.21). The Rasmussens argue “[t]hat is the statute governing adverse possession claims,” and that, because the Riches referenced RCW 7.28.010, they necessarily claimed adverse possession. RB 39. This argument fails for multiple reasons. First, RCW 7.28.010 is not exclusively addressed to adverse possession claims, but is a broad statute establishing who can maintain a *quiet title action*, the action that the Rasmussens brought. It is not directed exclusively at adverse possession, but references any “right of possession” asserted to defend against a quiet title action. *See* RCW 7.28.010. The statute also establishes the ten-year prescriptive period, the reason the Court of Appeals in *Cole v. Laverty*, 112 Wn. App. 180, 184 (2002), cited it as authority for the ten-year prescriptive period.

The Riches cited RCW 7.28.010 in their Answer to assert that they claimed a contradictory right of possession based on an agreed or common boundary line over ten years (“Second Counterclaim: Declaratory Judgment as to Common Boundary Line And/Or Decree of Quiet Title”), as follows:

3.21 Defendant/Counterclaimants are “persons interested” in their deed and ownership as defined by RCW 7.24.020, and have a valid interest in their property and a right of possession as defined by RCW 7.28.010. They are entitled to entry of a declaration or decree that (1) the boundary is not that shown on Plaintiffs’ survey referenced in Plaintiffs’ complaint (Exhibit 3) and (2) the agreed line is the boundary line between the Rasmussen

and the Rich properties.

CP 24:24-25:3. This paragraph relates to their mutual acquiescence claim, directly stating that “the agreed line is the boundary line between the Rasmussen and the Rich properties,” not the line shown in the survey. Similarly, the preceding paragraphs 3.19 to 3.20 relate to the mutual acquiescence claim, as do the following paragraphs 3.22 to 3.27. CP 24-27. The factual and legal allegations do not make out a claim of adverse possession, but one of mutual acquiescence. The content of the Answer debunks the Rasmussens’ argument.

That the Riches did not assert adverse possession is further demonstrated by their direct statement to that effect. The Riches told the Superior Court when opposing summary judgment: “[T]he Riches refuse to make adverse possession claims based on the events and in light of the Parties’ prior relationship. They never sought to be adverse or hostile.” *See* CP 163:1-3 (Defendant’s Response in Opposition to MSJ). This is consistent with the Rasmussens’ interpretation of the Complaint, demonstrated by the complete absence of any briefing on, or mention of, adverse possession in the Rasmussens’ motion for summary judgment. CP 48-66.¹ The Motion addressed exclusively “the counterclaim” for

¹ The Rasmussens opened their motion for summary judgment establishing that they sought dismissal of the mutual acquiescence

mutual acquiescence, failing to even address the equitable defenses. *Id.* The Rasmussens neither briefed nor moved against an adverse possession claim in their summary judgment materials. *Id.* It should be obvious that they are not entitled to an attorney fee award for “prevailing” against such a claim.

This Court should reject the Rasmussens’ position that they prevailed on an adverse possession claim. The record demonstrates that they did not. No error is shown.

C. RCW 7.28.083(3)’s prevailing party fee provision applies to claims of adverse possession, not to the Riches’ mutual acquiescence claim

The Rasmussens argue in the alternative that, even if the Riches did not assert an adverse possession claim, the Court should interpret RCW 7.28.083(3) to authorize fees for successful defense of a mutual acquiescence claim because it is equivalent to an adverse possession claim. RB 40-42. The proper interpretation of RCW 7.28.083(3) presents an issue of law reviewed *de novo*. *Rettkowski, supra*, 128 Wn.2d at 514-

counterclaim, stating, “The Riches have asserted a counterclaim seeking to apply the doctrine of mutual recognition and acquiescence, claiming that a well-defined property line was agreed-upon for more than ten years.” CP 48. They make absolutely no mention of an adverse possession claim. *See also* CP 60:10-20 (Rasmussens’ characterization of the Riches’ Answer as containing a single counterclaim with no mention of adverse possession); CP 60 (Rasmussens’ Issues Presented addressing dismissal of “the Riches’ counterclaim” of mutual acquiescence with no mention of adverse possession).

15 (whether statute provides for fee award is an issue of statutory construction reviewed *de novo*). The Court should reject the argument, which contravenes the plain language of the statute. The argument is also contrary to case law that distinguishes mutual acquiescence from adverse possession. It is contrary to legislative history where the Legislature displayed an understanding that the two common law doctrines were different. It also does not fall within the rationale expressed by the Court of Appeals in its unpublished decision *Erbeck v. Springer*, 191 Wn. App. 1049 (2015), which decision is not precedential. The argument is unpersuasive and this Court should reject it.

First, applying the fee statute to successful defense of a mutual acquiescence claim would be inconsistent with the rules of statutory construction. Such an interpretation would contravene the plain language of the statute. “Statutory terms are given their plain and ordinary meaning.” *In re Higgins*, 120 Wn. App. 159, 164 (2004). Statutes should not be read in a way that “nullifies [the] legislative choice.” *In re Leach*, 161 Wn.2d 180, 187 (2007). “Courts may not read into a statute matters that are not in it and may not create legislation under the guise of interpreting a statute.” *Kilian v. Atkinson*, 147 Wn.2d 16, 21 (2002). “When a statute is clear and unambiguous on its face, there is no need to resort to methods of statutory construction.” *Rettkowski, supra*, 128

Wn.2d at 516.

Here, RCW 7.28.083 exclusively addresses adverse possession claims and does not refer to mutual acquiescence claims, stating,

7.28.083. Adverse possession -- Reimbursement of taxes or assessments -- Payment of unpaid taxes or assessments -- Awarding of costs and attorneys' fees.

(1) A party who prevails against the holder of record title at the time an action asserting title to real property by adverse possession was filed, or against a subsequent purchaser from such holder, may be required to:

(a) Reimburse such holder or purchaser for part or all of any taxes or assessments levied on the real property during the period the prevailing party was in possession of the real property in question and which are proven by competent evidence to have been paid by such holder or purchaser; and

(b) Pay to the treasurer of the county in which the real property is located part or all of any taxes or assessments levied on the real property after the filing of the adverse possession claim and which are due and remain unpaid at the time judgment on the claim is entered.

(2) If the court orders reimbursement for taxes or assessments paid or payment of taxes or assessments due under subsection (1) of this section, the court shall determine how to allocate taxes or assessments between the property acquired by adverse possession and the property retained by the title holder. In making its determination, the court shall consider all the facts and shall order such reimbursement or payment as appears equitable and just.

(3) The prevailing party in an action asserting title to real property by adverse possession may request the court to award costs and reasonable attorneys' fees. The court may award all or a portion of costs and reasonable

attorneys' fees to the prevailing party if, after considering all the facts, the court determines such an award is equitable and just.

RCW 7.28.083(3) (emphasis added). Subsection 3 unambiguously states that the party prevailing "in an action asserting title to real property by adverse possession" may request fees. It unambiguously does *not* include mutual acquiescence actions. No interpretation is necessary. On its face, the provision does not apply to mutual acquiescence claims.

In addition, the law does not view mutual acquiescence claims as the same as, or "equivalent to," adverse possession claims. The Rasmussens' contrary argument is not only unsupported, it contradicts case law that distinguishes mutual acquiescence from adverse possession. In *Teel v. Stading*, the Court of Appeals noted the differences between mutual acquiescence and adverse possession, stating,

Additionally, although a mutual understanding and agreement of an incorrect boundary line may be relevant in a boundary line acquiescence claim, it is not relevant in adverse possession claims.

155 Wn. App. 390, 395 (2010). In addition to this substantial difference that agreement or acquiescence is material to mutual acquiescence but not material to adverse possession, other differences are plain. Mutual acquiescence has only three elements and must be proved by clear and convincing evidence. *Merriman, supra*. Adverse possession has at least four elements (although sometimes differently stated) and requires a

preponderance of the evidence. *See Teel, supra*, at 393-94. The doctrines are not equivalent.

Legislative history is not relevant unless the statute is ambiguous. *State ex rel. M.M.G. v. Graham*, 159 Wn.2d 623, 632-33 (2007). A statute is ambiguous only if it can be reasonably interpreted in more than one way and we do not try to discern “an ambiguity by imagining a variety of alternative interpretations.” *Id.*, citing *W. Telepage, Inc. v. City of Tacoma*, 140 Wn.2d 599, 608 (2000). The statute is not ambiguous. Mutual acquiescence is simply not included. The Legislature could easily have included mutual acquiescence, but it did not.

If the statute is ambiguous, the Rasmussens’ argument is contrary to legislative history that recognizes the two common law doctrines as different. *See* CP 612-16 at 615 “Burden of Proof” (House Bill Analysis 2011 regarding adoption of HB 1026). The House Bill Analysis makes reference to mutual acquiescence as a theory “related to” adverse possession. The House Bill Analysis shows that the Legislature intended to address adverse possession in HB 1026, and contains a suggestion that the Legislature could adopt for adverse possession the different standard of proof applicable to mutual acquiescence claims. *Id.* In the final version the Legislature declined to make this change, which would have made the claims more similar. This history shows that the Legislature understood

that mutual acquiescence was not a claim equivalent to adverse possession, but was a “related” claim with differences. The Legislature was familiar with the different terminology. The Legislature maintained the distinctions between the claims, declining an option to make the claims more similar. This history further supports the conclusion that the Legislature did not intend to include mutual acquiescence claims in RCW 7.28.083(3).

The Court need not consider the unpublished decision *Erbeck v. Springer*, 191 Wn. App. 1049, 2015 WL 9274096 (Wash. App. Div. 1, 2015), because the Rasmussens failed to comply with GR 14.1 by failing to identify the case as nonbinding authority or cite to GR 14.1. *See* RB 40. “When citing to an unpublished opinion under GR 14.1, either in an appellate court or a trial court, a party must do more than simply identify the opinion as unpublished. The party must point out that the decision has no precedential value, is not binding on any court, and is cited only for such persuasive value as the court deems appropriate.” *Crosswhite v. Dep’t of Soc. & Health Servs.*, 197 Wn. App. 539, 544 (2017), citing GR 14.1. “The party should also cite GR 14.1.” *Id.* The Rasmussens did not include this mandatory content in their brief. As *Crosswhite* demonstrates, the Court of Appeals should not consider the unpublished decision based on these failures.

If the Court does consider *Erbeck*, the Court pursuant to GR 14.1 should accord the decision little persuasive value. *Id.* Most significantly, *Erbeck* is distinguishable. The *Erbeck* court expressed the rationale that because a claim for a *prescriptive easement*—not mutual acquiescence—requires the identical proof as adverse possession, it was “equivalent” and therefore fell within RCW 7.28.083(3). Here, mutual acquiescence has different elements and a different standard of proof. It should not be considered “equivalent.” The rationale of *Erbeck* does not apply here. Further, *Erbeck* is not persuasive because it disregards the plain language of RCW 7.28.083(3) and is inconsistent with principles of statutory interpretation already cited above.

For all of these reasons, this Court should affirm the decision of the Superior Court to deny the Rasmussens an attorney fee award requested under RCW 7.28.083(3). The Superior Court’s conclusion is correct that the statute does not provide a basis for an award in this action.

IV. THE RASMUSSENS DID NOT REQUEST FEES ON APPEAL AND THEREFORE MAY NOT RECEIVE ANY

This Court should not award attorney fees to the Rasmussens incurred on appeal even if they prevail. This is self-evident, because they did not request fees incurred on appeal in their first brief. The Riches present this argument to avoid any subsequent confusion, or if the

Rasmussens attempt to fix their omission in their Reply Brief.

A party must request fees on appeal by devoting a section of its first brief to the request. RAP 18.1(a)-(b). The Court of Appeals enforces this rule, routinely denying fees for lack of compliance. *See Gronquist v. Dep't of Licensing*, 175 Wn. App. 729 (2013); *Gardner v. First Heritage Bank*, 175 Wn. App. 650 (2013); *Gray v. Bourgette Constr., LLC*, 160 Wn. App. 334 (2011). It is not sufficient if a party requests fees in a subsequent brief. *Estate of Haselwood v. Bremerton Ice Arena, Inc.*, 166 Wn.2d 489 (2009).

The Rasmussens requested reversal of the Superior Court's denial of a fee award in their brief. RB 38-42 at Section V.E. They nowhere devote a section of their brief to a request for fees incurred on appeal, as required. Even in Section V.E. they nowhere request fees incurred on appeal. For lack of compliance with RAP 18.1, this Court should not award fees on appeal even if it were to conclude that RCW 7.28.083(3) allowed the Superior Court to award them, which it should not.

V. CONCLUSION

The Riches are entitled to a resolution on the merits of their mutual acquiescence claim and equitable defenses. The law does not support the summary judgment. This Court should reverse and remand.

Additionally, the Rasmussens have not shown the Superior Court

erred when it denied their request for an award of fees under RCW 7.28.083(3). The right to fees granted by that statute to a party prevailing in an adverse possession action does not apply here.

Dated: April 10th, 2017.

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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on the 10th day of April, 2017, I caused the document to which this certificate is attached to be delivered for filing as follows:

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SCHWABE WILLIAMSON & WYATT, PC
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