

No. 49433-7-II

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

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RODNEY RICH AND SANDRA RICH,  
Appellants/Cross-Respondents,

v.

ERIC O. RASMUSSEN, M.D. AND JANICE M. RASMUSSEN,  
Respondents/Cross-Appellants.

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**RESPONDENTS'/CROSS-APPELLANTS' OPENING BRIEF**

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## I. INTRODUCTION

This is a quiet title case. Respondents Eric Rasmussen, M.D., and his wife Janice Rasmussen sued to quiet title to a shared property line with their neighbors to the south, Appellants Rodney Rich and Sandra Rich. The Riches claimed title to a triangular portion of the Rasmussens' property on a steep slope to the edge of Puget Sound based on assertions of adverse possession and mutual recognition and acquiescence to an agreed boundary line for over ten years.

The Riches' own testimony established that, between 1993, when the claimed oral agreement allegedly occurred, and 2007, most of the hill to the beach was vegetated with blackberries and ivy and at no time did the Riches ever demarcate the claimed property line.

Beginning in 2007, Mr. Rich began terracing the hill, which terraces were completed in 2013. The improvements, which encroach onto the Rasmussens' property by as much as 12.7 feet, were not intended to demarcate the property line.

Since 1993, the Riches have installed a series of three successive tight-lines for drainage purposes. They claim the tight-lines establish a certain, well-defined and physically designated property line. However, the tight-lines were never intended to reflect the property line; their location moved over time; they were not on a straight line; the Riches never discussed them with the Rasmussens; and they were not readily visible.

After the Rasmussens obtained a survey in August 2013, they sought to resolve the dispute and then commenced an action in the Superior Court for Kitsap County in June 2015.

Because, by the Riches' own admissions, their actions and improvements failed to establish a boundary line that was certain, well-defined and in some fashion physically designated upon the grounds, and mutual recognition of the line for ten years, the Superior Court correctly granted the Rasmussens summary judgment, dismissing the Riches' claims to equitable title to the Rasmussens' property and quieting title in accordance with the legal description and surveyed property line.

## **II. ASSIGNMENT OF ERROR ON DENIAL OF AWARD OF ATTORNEY FEES**

The Superior Court erred as a matter of law in ruling that RCW 7.28.083(3) does not authorize an award of attorney fees and costs to the Rasmussens as the prevailing party.

## **III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

1. Does RCW 7.28.083(3) authorize an award of attorney fees and costs to the Rasmussens as the prevailing party where the Riches asserted counterclaims citing the adverse possession statute, RCW 7.28.010?

2. Does RCW 7.28.083(3) authorize an award of attorney fees and costs to the Rasmussens as the prevailing party where the Riches asserted a counterclaim for mutual recognition and acquiescence?

#### IV. COUNTER-STATEMENT OF THE CASE

##### A. Summary.

The Rasmussens and Riches hold fee simple title to neighboring high-bank waterfront residences facing the western shore of Bainbridge Island overlooking Port Orchard Bay in Puget Sound (the Rasmussens' property lies immediately to the north of the Riches' property). The Rasmussens' property is commonly known as 11721 Sunset Avenue NE, Bainbridge Island, and legally described as

Lots 16, 17 and 18, Block 4, Venice Second Addition,  
According to Plat Recorded in Volume 3 of Plats, Page 134  
in Kitsap County, Washington; Together with Second Class  
Tidelands Adjoining.

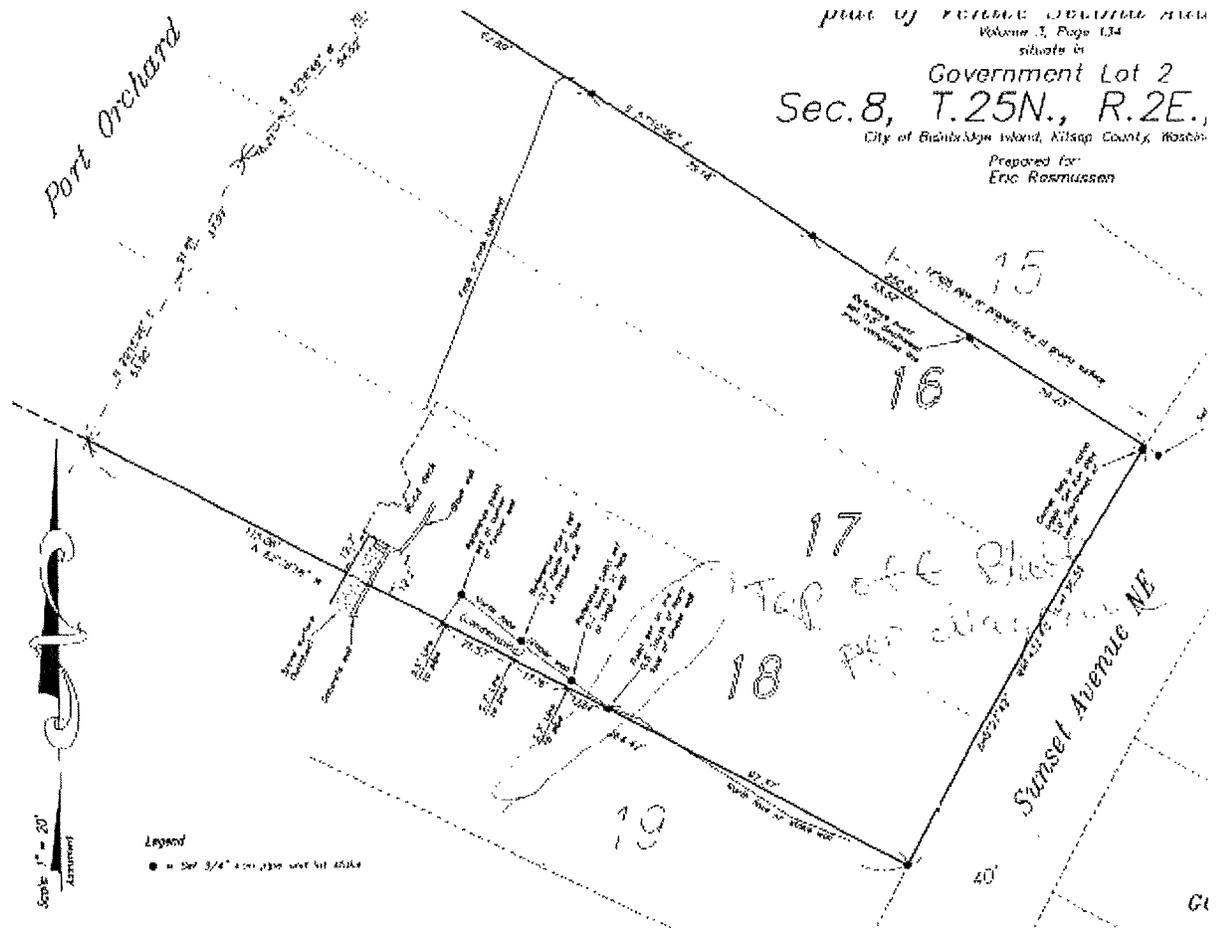
CP 152, 155. The Riches own Lot 19, commonly known as 11691 Sunset Avenue NE, immediately to the south of the Rasmussens' property. CP 152, 155. Sunset Avenue abuts the parties' properties on the east. CP 152. The western portions of the parties' properties contain a steep bank to the waterfront.

The Riches constructed a series of terraced structures on the bank of their property, on the western portion of their property, prompting the Rasmussens to obtain a survey, which shows the structure to encroach up to 9.5 feet onto their property (and a cement wall at the beach encroaches by 12.7 feet).

The Riches claim that the Rasmussens have mutually agreed to, and acquiesced in, a property line to the north of the surveyed line, and claim a triangle of the Rasmussens' property under the doctrine of mutual

recognition and acquiescence. However, the Riches' improvements encroaching the property line all occurred well within 10 years of the commencement of this action.

The following is a portion of deposition Exhibit 28, in which Mr. Rich noted on a survey the location of the top of the bluff. The beach, on Port Orchard Bay, is to the west, and Sunset Avenue is to the east. The encroachments at issue in this lawsuit are within a triangle of land from the top of the bluff to the west.



CP 146.

**B. The claimed oral property line agreement at issue in this appeal.**

From the time the Riches acquired their property in 1993 until 2012, there were no written communications between the parties regarding their shared property line. CP 75. However, there were discussions between Mr. Rich and Dr. Rasmussen in 1993, when the Riches first acquired their property.

**1. The parties agreed to the location of the property line on the eastern half of their properties, away from the bluff to the beach.**

Dr. Rasmussen and Mr. Rich agreed to a property line on the eastern half of the joint property line – not the area at issue in this appeal. After the Riches purchased their property, Dr. Rasmussen walked the property line with Mr. Rich to review where the Riches proposed to build a concrete wall along a laurel hedge separating the two properties, between the road to the east and the top of the bluff, just beyond the midpoint of the properties. CP 74:8-22. Dr. Rasmussen agreed that the wall would become the property line from the street to the edge of the bank. CP 295:18-21. (Ms. Rich never discussed the property lines with the Rasmussens until after the Rasmussens obtained a survey of their shared property line in 2013. CP 134:10-15.) While the Riches emphasize this undisputed agreement, this line is not at issue in this appeal. That area is not even visible from the area beyond the lip of the bluff, in the area of the contested property. See CP 140, 142, 144. No improvements were made to the contested area between 1993 and 2007. CP 84:11-14; 107:16-19.

**2. The claimed agreement on a property line from the bluff to the beach.**

At the bluff of the high bank properties, just beyond the midpoint of the properties, to the west, there is “a pretty steep hill” descending to the beach. CP 79:15-18; 252. Mr. Rich testified that he and Dr. Rasmussen walked to the beach to discuss the common property line after the Riches acquired their property. CP 251:10-17. They did not walk along the common property line. Rather, they went down the stairs on the Rasmussens’ property; there was no path to the beach on the Riches’ property. CP 251:18-25.

According to Mr. Rich, he asked where the property line was and Dr. Rasmussen “told me he did not know exactly where it was.” CP 76:5-9. Mr. Rich testified first that Dr. Rasmussen indicated he believed the property line was “near the deck” and then testified he would “retract that” and testified Dr. Rasmussen told him the he believed the property line “[a]t the end of his deck.” CP 76:16-77:6.

Mr. Rich testified that “we agreed” the property line would begin on the western end “at the end of the [Rasmussens’ waterfront] deck.” CP 76:16-22. This supposed agreement was not documented in writing. CP 78:18-22; 109:18-110:4. Mr. Rich never prepared even an informal map depicting the property line. CP 78:23-25. There are no witnesses to corroborate the supposed agreement claimed by Mr. Rich. CP 79:1-7.

At his deposition, Dr. Rasmussen testified he and Mr. Rich “did not define a distinct property line” at the beach and, when asked whether

he had stated that the edge of the deck would be the property line, he testified, “[a]bsolutely not.” 297:4-7, 18-21. Dr. Rasmussen explained he had “guessed” where the property line might be and then built his deck “further north.” CP 298:1-4. While the Rasmussens vigorously dispute any agreement with the Riches as to the common property line along the bluff to the water, solely for purposes of the Rasmussens’ successful motion for summary judgment and this appeal, they do not contest the Riches’ contention that such an agreement occurred.

**C. The Riches did not physically demarcate what they claim was the agreed-upon property line at the time of the claimed agreement.**

The Riches did nothing at the time of the claimed agreement to physically demarcate the new property line. CP 78:15-17; 79:8-14.

**D. For at least 14 years, the bluff was vegetated mostly with blackberry bushes and ivy.**

Mr. Rich acknowledged that, at the time of the supposed property line agreement in 1993, “most” of the hill to the beach was vegetated with “blackberries and ivy.” CP 79:19-22. The first time he planted on the hill was in 2007. CP 84:11-14. **Thus, for 14 years, the vegetation on the bluff, in the area of the claimed common property line, remained unimproved.** CP 140, 142, 144.

**E. The Riches have never demarcated the claimed property line by a line of vegetation.**

The Riches have never installed landscaping along the claimed property line. Mr. Rich testified as follows:

Q. And was -- did you ever put in any landscaping along the common property line?

A. No. I don't believe so, no.

CP 82:12-14. And Ms. Rich testified as follows:

Q. But there was no line of vegetation along the common property line, was there?

A. No.

CP 136:7-9.

**F. The Riches' claimed demarcation of the disputed property line by construction improvements all occurred within eight years of commencement of this action.**

An aerial photograph from August 2006 depicts the vegetation between the two properties leading to the beach at that time. CP 138. Mr. Rich testified the photograph accurately depicts the vegetation between the two properties leading to the beach in August 2006. CP 108:18-25. The Riches' property did not have stairs to the beach at that time. CP 138.

More recently, between 2007 and 2013, working his way up the bluff, Mr. Rich constructed a series of landscaped terraces. The work included regrading the bluff, removal of native vegetation, installation of significant wooden structural supports, and construction of a timber wall extending the new entertaining area in a raised elevation in the vicinity of what had been a ravine. Mr. Rich testified that, "2007 would be that first time – time that I built a terrace near the property line." CP 107:16-19 (bold and underlining added).

Despite knowing that Dr. Rasmussen was uncertain as to where the property line was, Mr. Rich never obtained a survey of the common

property line before embarking on his major construction activities. CP 195:5-22. Nor did he seek a permit from the City of Bainbridge Island. CP 224:6-11.

Mr. Rich landscaped as he progressed up the hill. Thus, the first time Mr. Rich first planted on the hill in 2007. CP 84:11-14. “As [the Riches] terraced up the bank over the years, the landscaping would go up with every terrace,” beginning at the bottom and “proceed[ing] up the bank” as construction continued “in subsequent years....” CP 117:5-22; 119:20-22.

After some initial construction work on the bank in 2007, Mr. Rich stopped work for 2008 and 2009 and he “resumed work in 2010.” CP 118:8-20. He did not reach the top of the retaining bank with construction and plantings until 2013. CP 183:23-184:22. Mr. Rich described the uppermost tier variously as a large “entertainment platform” or a “garden”. CP 92:8-15. However, even then, as noted above, the Riches never placed landscaping along what they considered to be the common property line. CP 47:12-14.

The City of Bainbridge Island has commenced an action against the Riches, seeking removal of the structure and seeking imposition of fines. *City of Bainbridge Island v. Rich*, Kitsap Cause No. 15-2-01669-7; CP 431:11-17.

**1. The stairs installed by Mr. Rich in 2001 and 2002 are not parallel to the property line and do not encroach on the Rasmussens' property.**

The Riches assert they “installed stairs on their hillside in 2001/2002” as evidence that the parties mutually recognized the claimed property line, and further note that Dr. Rasmussen “made no objection to the location of the...stairs constructed in 2001.” App. Br. 21. The stairs were constructed on the Riches' side of the surveyed property line and are not parallel to the claimed property line. App. B; CP 148; 436:12-437:3.

**G. The Riches' concrete wall at the beach.**

Mr. Rich personally installed a concrete wall running north-south along the waterfront in 2008 and 2009. CP 87:16-21, 86:7-11. Mr. Rich explained he did so “[t]o secure the bank.” 86:1-17. There had been two previous slides, including one on the Riches' property that destroyed the Rasmussens' stairs to their beach. CP 90:18-21. The Riches' concrete retaining wall connects to a previously-installed rock wall installed on the Rasmussen property. CP 87:22-88:7. It also extends approximately eight to ten feet onto the property of the Riches' neighbor to the South. CP 66:18-25.

**H. The Riches claim to have installed nylon string in 2007 but it was never used to demarcate the property line.**

Mr. Rich claims to have installed a “nylon masonry line” from the top of the bluff to the beach, at the end of the Rasmussens' deck in order to “establish[] the property line...” CP 96:3-97:2, 94:4-18. Yet, in his sworn declaration, Mr. Rich contradicted himself, stating, “I have never

used a 'string' to delineate a property line with the Rasmussens.” CP 384:22-23. In either event, Mr. Rich does not believe he told the Rasmussens he was installing the line. CP 97:6-13. Mr. Rich testified he did not think it was important to call the string to the Rasmussens' attention “because it was on our property.” CP 102:17-19. Mr. Rich conceded the string was “thin” and unmarked by anything such as pink construction tape to call attention to it. CP 100:5-8, 102:9-12. The Riches did not take any photographs of the string. CP 102:4-8. Mr. Rich never pulled a string the entire length from the east end of the common property line to the west end on the beach. CP 99:2-9.

While the existence of the string is contested, even if we assume for the sake of argument that it existed, Mr. Rich does not claim to have installed the string until 2007, 14 years after Mr. Rich claims to have agreed on the property line with Dr. Rasmussen and eight years before commencement of this action. CP 96:17-97:2.

**I. The Riches' tight-line never was used to establish the common property line.**

The Riches also cite to the location of a tight-line as evidence that, for more than 20 years, the parties “observed” the common boundary. App. Br. 7. The tight-line was never intended to reflect the property line; its location moved over time; it is not on a straight line; the Riches never discussed it with the Rasmussens; and it was not readily visible.

Mr. Rich confirmed on three occasions the tight-line – actually three separate tight-lines that moved over time – was never intended to

establish the common property line. CP 106:5-10; 226:5-9; 94:4-18. And Ms. Rich testified that she did not think it reflected the common property line. CP 135:19-25.

Mr. Rich submitted a declaration claiming the first tight line “was placed in 1993 about two or three fees [sic; feet] just inside the agreed boundary line.” CP 382:22-23. At his deposition, Mr. Rich testified that he initially installed a tight-line in 1994. CP 120:10-13; 121:15-19. It travels from their house, under their lawn, to the bluff, and down the hill to Puget Sound. CP 121:2-22. A landslide in 2000 ripped out the tight-line and Mr. Rich installed a new one. CP 122:12-20. He replaced it again in 2007 or 2008. CP 123:6-14. He claims “the new tightline is on the agreed property line.” CP 382:18. However, while the Riches claim the agreed property line is a straight line, the current tight-line is not on a straight line. CP 130:10-131:3; 449:1-3; 144.

Mr. Rich did not feel it was necessary to bring the tight-line to the Rasmussens’ attention because it was on the Riches’ property. CP 224:24-225:2.

Mr. Rich installed the original tight-line by weaving it through the blackberry bushes and ivy down the slope. CP 225:14-17. He testified the ground is “a couple feet underneath” the “blackberries and ivy”. CP 445:17-18. He claims the tight-line was visible for the “first year, year and a half, until the undergrowth totally went over it,…” CP 267:20-25. When Mr. Rich was shown photographs of the bluff, he was unable to tell

where the tight-line was situated. CP 126:17-24; 127:11-21; 140; 142; 453:7-12; 446:8-13. For example, he indicated that the tight-line was in the location of the following photograph but he could not locate it because there was “too much foliage....” CP 446:8-13, 453:7-25.



**J. The aerial photographs analyzed by renowned aerial photogrammetrist Terry Curtis illustrate the lack of a clear demarcation between the properties.**

Terry A. Curtis, a well-credentialed certified photogrammetrist for over 36 years and currently Photogrammetry Supervisor with the

Washington State Department of Natural Resources, obtained and examined aerial photographs that depict the vicinity of the two parcels, from which he established that there was “no visible ‘line’ of use or vegetation/landscaping difference separating the two properties until the 2010 photograph, when some obvious plantings on the Rich side are visible near the mid-slope of the bluff, which have a fairly straight northern ‘edge’.” CP 156:13-15, 157-61.

**K. The Rasmussens’ concerns with the Riches’ structures prompted the Rasmussens to obtain a survey, which established the encroachment of the Riches’ improvements.**

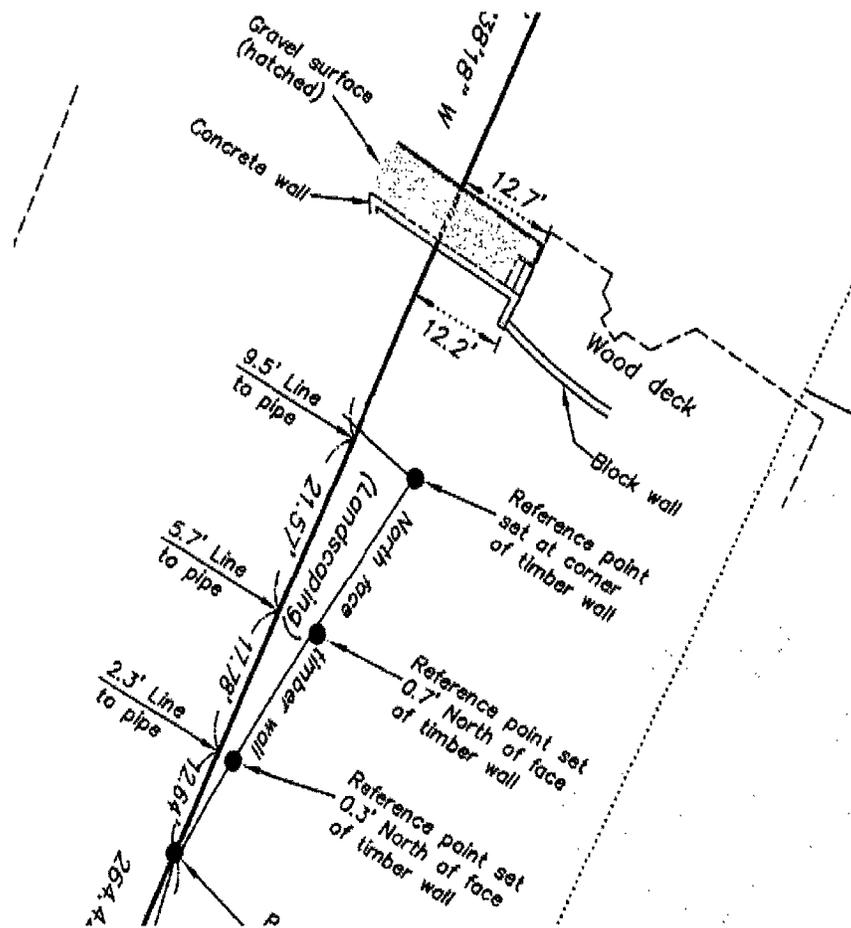
At the beginning of Mr. Rich’s construction of terraces on his property, Dr. Rasmussen was happy to see work being performed to provide stabilization for the bank, which had recently suffered a slide that destroyed the Rasmussens’ stairs to the beach. CP 309:5-7; 90:18-25. Another slide did not go onto the Rasmussens’ property. CP 233:1-3. Mr. Rich reassured the Rasmussens that, by his terracing of his property, “we were stabilizing the bank, that it would be better.” CP 233:9-16. Dr. Rasmussen testified he “never perceived it as a determination of the property line. I perceived it as a stabilization of the bank.” CP 309:15-18.

However, towards the end of Mr. Rich’s construction efforts, the structure became “so vertical” that it concerned Dr. Rasmussen. His concerns included the lack of structural support and the possible harm that could be caused by the Riches’ newly constructed structures (as there had been two slides on the unstable bluff); that the improvements appeared to encroach onto the Rasmussens’ property; that they interfered with the

Rasmussens' privacy and views; and that any encroachment could impact their ability to sell their property. CP 309:19-23; 302:15-303:2. Mr. Rich recalled the Rasmussens "were upset" that the "upper garden terrace" was "infringing on their privacy." CP 104:11-13. Mr. Rich testified this discussion occurred after the Rasmussens explained their intent to obtain a survey. CP 103:17-104:17.

Mr. Rich did not have a written plan for his improvements. CP 125:9-15. When Dr. Rasmussen met with Mr. Rich to express his concerns about the magnitude of the Riches' improvements, Mr. Rich told Dr. Rasmussen his plans had "evolved" and he was "committed" to the project. CP 310:9-312:3 (Rasmussen); CP 125:16-126:16, 441:15-19 (Rich).

The Rasmussens then obtained and duly recorded a survey of the common property line from a licensed surveyor. The survey was finalized on August 21, 2013. CP 152, 149:20-26. The survey revealed that the newly installed timber wall supporting the Riches' new entertainment area angled from the common property line to an encroachment of 9.5 feet onto the Rasmussens' property. CP 150:17-19, 152. The survey further revealed that additional improvements by the beach, including the concrete wall constructed in 2008 and 2009, extended as much as 12.7 feet onto the Rasmussen Property. *Id.*



CP 152.<sup>1</sup>

Mr. Rich acknowledges his improvements extend significantly across the property line as surveyed. CP 98:22-99:1. The Riches' Answer to the Complaint does not dispute the survey reflects these encroachments. CP 5 ¶ 3.9; CP 17 ¶ 3.9. While the Riches' Answer disputed the accuracy of the survey, they never offered a conflicting survey and, when asked whether he was contesting the accuracy of the survey, Mr. Rich testified, "I've never said it wasn't accurate." CP 17 § 3.9; CP 124:22-24. When, in

<sup>1</sup> The unsigned unofficial copy is shown because the copy is clearer. The content appears to be identical to the signed version that appears in the Clerk's Papers.

2015, the City of Bainbridge Island directed the Riches to obtain a topographical map depicting their terracing in 2015, the map they had prepared for them relied on the Rasmussens' survey to establish the location of the common property line. CP 148; 436:12-437:13.

**L. The Rasmussens placed a fence along the surveyed property line, contrary to the Riches' argument that a fence could not be installed.**

Asserting that what the Riches call the "cliff is not suited to a wall or fence," the Riches erroneously imply a fence could not have been installed along the property line. App. Br. 15. Mr. Rich testified the Rasmussens "put a fence on the property line" following the survey. CP 236:11-14. Mr. Rich also referred to the fence as "a barrier." CP 236:16.

**M. The Rasmussens promptly commenced their action after seeking to negotiate a resolution to the property-line dispute.**

Between the time the Rasmussens obtained the survey of the parties' common property line in August 2013 and the commencement of this action June 15, 2015, the parties engaged, directly and through their counsel, in extensive communications regarding the property line dispute in an effort to resolve their dispute. CP 102:20-104:17; 430:26-431:10; 310:7-312:15; 314:4-315:25. The Rasmussens also consulted with representatives of the City of Bainbridge Island in an effort to see whether the City would take steps to abate the Riches' encroachment, on the ground that the Riches failed to obtain a building permit for their structure and on the ground that they failed to adhere to set-back requirements in their construction. CP 431:11-15.

**N. The nonparty declarations submitted by the Riches.**

The Riches rely on a number of declarations of nonparties as providing “extensive evidence.” App. Br. 12. Those declarations are largely notable for what is absent from them.

**1. The Hayden declaration.**

Michael T. Hayden formerly owned the Riches’ property from 1968 to 1991. Nowhere does Hayden assert in his declaration there was an understanding with the Rasmussens as to the common property line, despite living next door to them for six years (the Rasmussens purchased their property in 1985). CP 338-41; CP 4, Cplt ¶ 3.1; CP 16, Answer ¶ 3.1. Nor does Hayden assert the common property line was demarcated in any fashion. To the contrary, only two unofficial stakes existed when he sold the property, and these were on the south property line, not the line shared with the Rasmussens. CP 340:10-22. And “one of the markers may have been shifted” as a result of a landslide before the Rasmussens acquired their property. CP 340:25-341:1. Further, Hayden did not discuss property lines with the Rasmussens prior to this lawsuit. CP 341:8-9.

**2. The Schilling declaration.**

The declaration of Leo Schilling also contains no material facts. Schilling resides two properties to the south of the Riches. CP 401:24-25. Thus, he is three properties removed from the Rasmussens’ property. He offers no evidence pertaining to the property line in issue.

**3. The Raquer declaration.**

The declaration of Joseph Raquer also contains no material facts. Raquer resides to the south of the Riches. CP 373:22. As such, his property line is not in issue. The Riches appear to have convinced him that the Rasmussens seek to alter his property line. CP 374:10-18. The only property line at issue in this action is the common property line between the Rasmussens and the Riches. CP 6:1-6.

**4. The Hammel declaration.**

Tom Hammel owned the property now owned by the Raquers, to the south of the Riches' property. CP 333:25-26. His brief declaration offers no comments regarding the Rasmussens' common property line with the Riches.

**5. The Sciacca declaration.**

Michael Sciacca offers no observations regarding the property line in issue and states in his declaration, "I take no position on the merits of this litigation." CP 407:23. He too owned property to the south of the Riches' property, property lines that are not in issue in this case. CP 407:25-26.

**O. The Complaint And Counterclaim.**

In their Complaint, the Rasmussens asserted a cause of action for quiet title/ejectment, and separately asserted causes of action for trespass and waste. CP 5-7. With their Answer, the Riches asserted a Counterclaim alleging that the property line changed by operation of law pursuant to the doctrine of mutual recognition and acquiescence, citing in

their pleading the holding in *Merriman v. Cokeley*, 168 Wn.2d 627, 630-31, 230 P.2d 162 (2010). CP 26-27, ¶3.27. The Riches alleged that, “[t]he north face of the concrete wall, north face of the timbers [timber terracing], and a line running down to the southern extent of the wooden deck [the Rasmussens’ deck along the water] represent the actual boundary because those well-defined improvements have been recognized as the mutual property line for over ten years.” CP 26:18-22.

**P. The Superior Court’s order granting summary judgment.**

By Order entered August 22, 2016, the Superior Court for Kitsap County, the Honorable Jennifer A. Forbes presiding, granted the Rasmussens summary judgment dismissing the Riches’ claim of mutual recognition and acquiescence and quieting title to the disputed property in the Rasmussens, consistent with the legal title to their property, and directed the Riches to remove their structures and other improvements from the Rasmussens’ property. CP 454-56. The Court also awarded the Rasmussens their reasonable attorneys’ fees and costs pursuant to RCW 7.28.083(3). CP 456:10-14. The Riches moved for reconsideration. CP 554-69. That motion was denied with regard to the quiet title issues, and granted as to the award of attorney fees and costs on the ground that RCW 7.28.083(3) does not permit an award of attorney’s fees based on the claims asserted. CP 621-22.

The Riches appealed the grant of summary judgment and the Rasmussens cross-appealed the Superior Court’s denial on reconsideration of their application for an attorney fee award. CP 573-78; 624-29.

## V. ARGUMENT

### A. The Standard Governing This Motion.

The purpose of summary judgment is to avoid a useless trial on issues where there is no genuine issue of any material fact. *LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975). While the initial burden is on the moving party to show that there is no genuine issue as to a material fact, once the moving party satisfies its burden, the nonmoving party must present evidence that demonstrates that facts are in dispute. *Baldwin v. Sisters of Providence in Wash. Inc.*, 112 Wn.2d 127, 132, 769 P.2d 298 (1989). When the motion is supported by evidentiary materials, the non-moving party must allege specific facts sufficient to raise a genuine issue for trial, and may not rest on mere allegations in the pleading. *LaPlante*, 85 Wn.2d at 158. A party moving for summary judgment can meet its burden by pointing out to the trial court that the non-moving party lacks sufficient evidence to support its case. *Guile v. Ballard Cmty. Hosp.*, 70 Wn. App. 18, 21, 851 P.2d 689 (1993). If a plaintiff's (or here, counterclaim plaintiff's) response "fails to make a showing sufficient to establish the existence of an element essential to his case," then a defendant's motion for summary judgment should be granted. *Atherton Condo. Apartment-Owners Ass'n Bd. of Dir. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990).

This Court engages in a de novo review of the trial court's ruling, as this appeal is from a grant of summary judgment. *Lilly v. Lynch*, 88 Wn. App. 306, 311, 945 P.2d 727 (1997).

**B. The trial court correctly granted summary judgment dismissing the Riches' counterclaim for mutual recognition and acquiescence.**

The trial court correctly dismissed the Riches' counterclaim for mutual recognition and acquiescence, and correctly quieted title by confirming the property line remains unchanged from the surveyed property line reflecting the legal descriptions of the parties' properties.

The parties agree that the seminal case of *Merriman v. Cokeley*, 168 Wn.2d 627, 630-31, 230 P.2d 162 (2010) sets forth the governing legal standard for claims of mutual recognition and acquiescence. The Riches' own testimony establishes the legal deficiency of their counterclaim under the test set forth in *Merriman*.

Under *Merriman*,

A party claiming title to land by mutual recognition and acquiescence must prove (1) that the boundary line between two properties was "certain, well defined, and in some fashion physically designated upon the ground, *e.g.*, by monuments, roadways, fence lines, etc."; (2) that the adjoining landowners, in the absence of an express boundary line agreement, manifested in good faith a mutual recognition of the designated boundary line as the true line; and (3) that mutual recognition of the boundary line continued for the period of time necessary to establish adverse possession (10 years).

*Id.*, at 630-31. The party claiming title by mutual recognition and acquiescence must prove each element of the claim "by clear, cogent, and convincing evidence." *Id.* at 630, citing *Lilly v. Lynch*, 88 Wn. App. 306, 316-17, 945 P.2d 727 (1997). The holding in *Merriman* stands for the proposition that the doctrine of mutual recognition and acquiescence can be invoked only where it is readily apparent where the parties perceived

the line to be. A fence accomplishes that. So too does a road. Other periodic monuments can also accomplish the purpose. All are endorsed by the Court in *Merriman*. None was present here. The Court was particularly clear as to the requirement for such obvious markers where, as here, the vegetation is overgrown and unruly. *Id.*, at 631. In our case, the Superior Court correctly found that the facts presented here do not satisfy the test articulated in *Merriman*.

The facts in *Merriman* are instructive. As here, at issue in that case was a triangular piece of land. *Id.* at 630. In 1993, after surveying his property, an owner installed wooden posts at the two ends of a surveyed property line and a metal stake halfway along what was thought to be the property line. *Id.* at 629. Over the next nine years, “blackberries, weeds, and ivy grew in the area.” *Id.* In 2002, that same owner installed a barbed wire fence with steel posts along the same property line. *Id.* His neighbors, the Merrimans, obtained another survey in 2006, which found there had been an error in the earlier survey that had improperly favored the extent of their property. *Id.* at 630. They then asserted a claim for mutual recognition and acquiescence. The trial court rejected the claim following a bench trial. That ruling was reversed by the Court of Appeals in a divided ruling and the Supreme Court again reversed, reinstating the trial court’s ruling. *Id.* The facts presented here similarly compel a finding that the Riches have failed to satisfy the test for application of the doctrine of mutual recognition and acquiescence.

**1. The boundary line between two properties was not “certain, well defined, and in some fashion physically designated upon the ground, e.g., by monuments, roadways, fence lines, etc.,” as required by *Merriman*.**

In *Merriman*, the Supreme Court set a high bar for a party seeking to acquire title under the doctrine of mutual recognition and acquiescence, requiring that the property line be “certain, well defined, and in some fashion physically designated upon the ground, e.g., by monuments, roadways, fence lines, etc.,...” *Id.*, at 630. Here, the property line was none of those things. It was not certain, not well-defined, and not physically designated upon the ground.

**a. The property line was not physically designated on the ground.**

The Riches’ own testimony confirms they did not physically designate the supposed property line on the ground in a fashion required by *Merriman*.

**(i) The Riches did not demarcate the property line by a fence.**

Implicitly recognizing that the classic means of demarcating a property line is by means of a fence, the Riches try to explain away the absence of a fence or a wall by mischaracterizing the hill as a “cliff” and, on the basis of that mischaracterization, asserting that the “cliff is not suited to a wall or fence.” App. Br. 15. The argument is belied by Mr. Rich’s own Counterclaims, which allege the Rasmussens erected a “wire fence on the Rich side of the agreed line” and testimony that the Rasmussens “put a fence on the property line” after the 2013 survey. CP

22:23; 236:11-14. Mr. Rich also referred to the fence as “a barrier.” CP 236:16. The holding in *Merriman* is unambiguous: to prevail on a claim of mutual recognition and acquiescence, the property line must be physically designated by “monuments, roadways, fence lines,....” *Id.*,168 Wn.2d at 630. The Riches could have marked the claimed property line with a fence. They did not.

**(ii) The Riches did not designate the property line by landscaping along the property line.**

The Riches’ own testimony makes clear they never designated the claimed property line by landscaping;

- Ms. Rich testified that there was no line of vegetation along the common property line. CP 136:7-9.
- Mr. Rich did nothing at the time of the claimed property line agreement to physically demarcate the new property line. CP 78:15-17; 79:8-14.
- At the time of the supposed property line agreement in 1993, “most” of the hill to the beach was vegetated with “blackberries and ivy.” CP 79:19-22.
- Mr. Rich never planted any landscaping along the common property line. CP 82:12-14.
- The first time he planted on the hill was in 2007, 14 years after the claimed agreement, and eight years before commencement of this action. CP 84:11-14.

**(iii) The tight-line was not on the property line; moved over time; was not on a straight line; and was not intended to reflect the property line.**

As they did before the trial court, the Riches cite to the location of a “tight-line” as evidence that the parties “observed” the common boundary. CP: 175:9-11; App. Br. 7. For the following five separate reasons, this argument is belied by the facts and the tight-line fails to satisfy the standard established in *Merriman*:

1. The Riches never intended the tight-line to reflect the property line. Mr. Rich twice testified the tight-line was never intended to establish the common property line. CP 106:5-10; 226:5-9. Ms. Rich concurred. CP 135:19-25.

2. The Riches never told the Rasmussens the tight-line was a means of demarcating the common property line. CP 224:24-225:2.

3. The tight-line’s location moved over time. According to Mr. Rich, the tight-line was not initially placed on the perceived property line but, rather, “about two or three fees [sic; feet] just inside the agreed boundary line.” CP 382:22-23. It has been replaced twice because of slides and the current tight-line, installed in 2007 or 2008, is now, according to Mr. Rich, “on the agreed property line.” CP 122:12-20; 123:6-14; CP 382:18.

4. Contrary to Mr. Rich’s contention that the current tight-line is on the claimed property line, the tight-line is not on a straight line. When shown a photograph of the “replacement tightline” following a slide

in 2007, Mr. Rich agreed it is not on a straight line. CP 130:10-131:3; 449:1-3; 144.

5. The tight-line was not readily visible. Mr. Rich installed the tight-line by weaving it through the blackberry bushes and ivy down the slope and it was not visible throughout the years of its existence because of the vegetation. CP 225:14-17; 445:17-18; 267:20-25; 126:17-24; 127:11-21; 140; 142; 453:7-12.

**(iv) The Riches did not delineate the property line by a string Mr. Rich claims to have strung along the property line.**

The Riches also assert they “used a string ‘as a reference point’” along the property line. App. Br. 8. For a host of reasons, the claimed existence of the string (which is contested) is not supportive of the Riches’ claim for mutual recognition and acquiescence. First, contradicting the Riches’ position, by Mr. Rich’s own admission, he “never used a ‘string’ to delineate a property line with the Rasmussens.” CP 384:22-23. This makes sense, as a piece of string, without more, is hardly a certain, well-defined means of physically designating a property line upon the ground, and is clearly inadequate under *Merriman*. Nor does Mr. Rich believe he told the Rasmussens he was installing the line. CP 97:6-13; 102:17-19. But even if the parties had agreed to the use of a string to delineate the property line, Mr. Rich does not claim to have installed the string until 2007, 14 years after Mr. Rich claims to have agreed on the property line with Dr. Rasmussen and only eight years before commencement of this action. 96:17-97:2. Thus, its existence is temporally immaterial.

**(v) The Riches' argument that two supposedly prominent points is sufficient to establish a new property line is inconsistent with *Merriman*.**

The Riches argue, without citation to any authority, that “[t]he law allows a boundary line that consists of two fixed and prominent points.” App. Br. 16. That is decidedly not the law when it comes to a claim of mutual recognition and acquiescence on property with overgrown vegetation.

In *Merriman*, the Court held that,

where the disputed area is overgrown, more than isolated markers are required to prove a clear and well-defined boundary. A fence, a pathway, or some other object or combination of objects clearly dividing the two parcels must exist.

*Id.* at 631. There, the Court held that the three markers used to designate the property line did not constitute a clear and well-defined boundary. *Id.* at 632. Here, as in *Merriman*, the disputed area was indisputably overgrown with blackberry bushes and ivy. CP 79:19-22; 84:11-14; 140; 142; 144. Yet the Riches propose it is sufficient to use the end of the concrete wall on the upper part of the property (a wall that did not yet exist when Dr. Rasmussen and Mr. Rich walked the property line) and the edge of the Rasmussens' deck on the beach to establish the common property line. App. Br. 14-15. Moreover, in this case, looking up from below, one cannot even see the concrete wall on the upper portion of the property that the Riches claim forms one of the two “prominent points” of

the line they seek to extend by projection to the west. CP 140, 142, 144.

The Riches' argument cannot be reconciled with the holding in *Merriman*.

There is no dispute that Dr. Rasmussen and Mr. Rich agreed on the common property line as to the upland, eastern portion of the properties in discussing where Mr. Rich sought to build (and did build) a concrete wall 24 years ago. That wall closely approximates the surveyed property line over an area that is not in dispute. The Riches now seek to use that agreement to argue that the property line from the bluff down to the beach is simply an extension of the same line, and that the Court should use projection to fill in the missing portions. The problem with this is that the two areas are discrete, as reflected by the fact that, from the bluff to the beach, Mr. Rich's terracing improvements and the claimed property line suddenly veer away from the actual property line, and the county records, and from the agreed line along the eastern portion of the properties. CP 95:15-24, 148, 152 (Apps. A and B). The line to the beach cannot be rationalized as simply a projection of an agreed-upon straight line, because it diverges from the line to the east.

The Riches do not seek simply to project the existing line. Rather, they are asking this Court to allow them to shift the direction of the common property line to their benefit. This they cannot do under *Merriman* without far more evidence than two claimed "prominent points" that, the evidence suggests, were not so prominent as to avoid a major redirecting of the line.

**2. The parties did not manifest a mutual recognition of the designated boundary line as the true line.**

As there is no evidence of the existence of a certain, well-defined, and in some fashion physically designated property line, there is no evidence of a mutual recognition of that property line. The parties cannot mutually agree to a property line that was never demarcated in some fashion. The requirement in *Merriman* for a certain and well-defined physical designation upon the ground ensures that the parties to an agreement have clarity as to what is being agreed upon. Here, the complete absence of clear markers on the ground negates a claimed mutual recognition of a designated boundary line. Where the boundary line is nothing more than blackberry bushes and ivy on a steep hillside, the required clarity inherent in the clear, cogent, and convincing evidentiary standard to allow a conveyance of an equitable interest in another's property is missing.

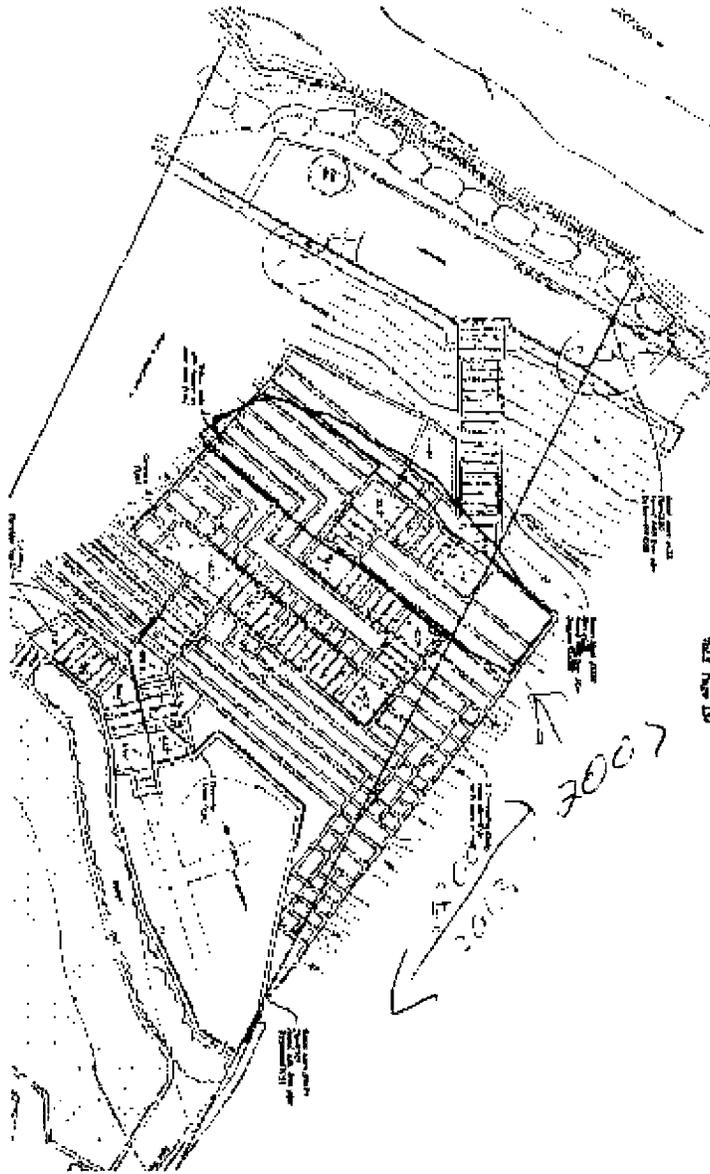
The evidence to which the Riches point in their brief on appeal underscores the legal insufficiency of their claim. They cite five actions as evidence that the parties manifested mutual recognition of a designated boundary line. App. Br. 21. None supports their position.

They point to the tight-line, yet the Riches never intended the tight-line to reflect the property line; never told the Rasmussens the tight-line was a means of demarcating the common property line; the tight-line moved over time; and it was covered by blackberry bushes and ivy. CP 106:5-10; 226:5-9; 135:19-25; 224:24-225:2; 382:22-23; 122:12-20;

123:6-14; 382:18; 130:10-131:3; 449:1-3; 144; 225:14-17; 445:17-18;  
267:20-25; 126:17-24; 127:11-21; 140; 142; 453:7-12.

The Riches also rely on the fact that they landscaped their side of the property line. Yet, again, they admitted there was no line of vegetation along the claimed property line, and the first time Mr. Rich planted on the hill was in 2007, 14 years after the claimed agreement, and eight years before commencement of this action. CP 136:7-9; 82:12-14; 84:11-14. That is not evidence of a mutual recognition of a common property line as our Supreme Court contemplated in *Merriman*.

The Riches also claim that the existence of stairs that Mr. Rich constructed on the hillside in 2001 and 2002 manifest a mutual recognition of the designated boundary line. App. Br. 21. They made no such claim in Superior Court. CP 166:15-23. A review of the Riches' topographical map explains why (see below). The stairs are not aligned with the claimed property line, and do not cross the surveyed property line. *See* App. B, CP 148; CP 436:12-437:3. A failure to object to those angled stairs, situated entirely on the Riches' property, hardly presents clear, cogent, and convincing evidence manifesting either party's recognition of the claimed property line.



CP 148, App. B.

**3. The claimed mutual recognition did not persist for more than ten years.**

The Riches again point to the stairs as evidence the claimed mutual recognition “persisted for more than ten years.” App. Br. 22. Yes, the stairs existed for more than ten years before the commencement of this action, but ten years of stairs that do not parallel the claimed property line and do not even cross the actual surveyed property line are not evidence of

mutual recognition. Once again, the Riches' reliance on these stairs only emphasizes the dearth of factual support for their position that the Rasmussens recognized the claimed property line for more than ten years.

The Riches also rely on Mr. Rich's commencement of construction on the terraces beginning in 2007 as evidence of a longstanding agreement. App. Br. 23. Mr. Rich testified that, "2007 would be that first time – time that I built a terrace near the property line." CP 107:16-19. Mr. Rich's beginning of construction at the bottom of the terraces near the property line in 2007 establishes the beginning of any potential claim for mutual recognition and acquiescence short of the requisite ten-year period. CP 107:16-19. He then stopped work in 2008 and 2009 and only recommenced in 2010, and did not reach the top of the bank until 2013, shortly before the Rasmussens obtained their survey. CP 118:8-20; 183:23-184:22. Thus, the bulk of the work occurred within five years of commencement of this action (including nearly two years during which the parties, individually and through their counsel, sought to resolve their dispute) and was not completed until less than two years before this action was commenced. CP 430:25-431:10.

The Riches do not, and cannot, explain how construction that largely occurred between 2010 and 2013 reflects a mutual recognition of a property line for more than ten years.

**C. The Court should reject the Riches' defense of laches.**

The Riches argue that this Court should allow them to pursue the defense of laches because the Rasmussens "slept on their rights" and their

“current objections come too late.” App. Br. 24-25. The Riches’ arguments are contrary to law and are unsupported by the facts.

The Rasmussens responsibly and promptly obtained a survey in 2013 when Mr. Rich’s construction of the upper-most terrace became prominent and alarming in scale and potential ramifications. What appeared initially to be Mr. Rich seeking to stabilize the hill evolved, and in 2013 the work became alarmingly vertical and caused many concerns. CP 309:5-7; 90:18-25; 233:9-16; 309:15-23; 302:15-303:2. The Rasmussens acted immediately in obtaining a survey in August 2013. CP 152. The survey revealed for the first time that Mr. Rich’s work extended as much as 12.7 feet onto the Rasmussens’ property. They then immediately sought to resolve the issues without success over the ensuing two years before commencing this action. CP 430:26-431:17. Nothing in the facts suggests the Rasmussens slept on their rights.

The Riches’ argument also would completely rewrite the elements of a claim for mutual recognition and acquiescence because, while that claim matures after an agreement has existed for ten years, any litigant claiming an equitable interest in a neighbor’s property could invoke laches to shorten the ten-year period for a claim to mature. The Riches cite no authority for the proposition that they can circumvent the requirements of a claim for mutual recognition and acquiescence in this fashion and we are aware of none.

The defense of laches is not generally available to shorten a statute of limitations. As the court explained in *Brost v. L.A.N.D., Inc.*, 37 Wn. App. 372, 375, 680 P.2d 453 (1984),

under ordinary circumstances the doctrine of laches should not be employed to bar an action short of the applicable statute of limitations. A court is generally precluded, absent highly unusual circumstances, from imposing a shorter period under the doctrine of laches than that of the relevant statute of limitations.

While the ten-year requirement for claims of mutual recognition and acquiescence is not a statute of limitations, the logic and effect are similar and the court's reasoning in *Brost* should apply here. The Riches' position would fundamentally change the elements of a claim of mutual recognition and acquiescence by effectively shortening to an indefinite period the time when such a claim ripens. Under the Riches' reasoning, they can accelerate the time by which a claim of mutual recognition and acquiescence ripens by claiming the burdened property owners did not take prompt affirmative steps to prevent the maturation of the claim. This removes the requirement imposed on the party claiming an equitable interest in a neighbor's property to show that the property line had been recognized and respected for ten years and replaces it with a new, vague requirement that the burdened property owner must seek to prevent the encroachment in an unspecified period of time long before the ten years elapse. This analysis would fundamentally alter longstanding property rights.

The Riches' complaints of delays by the Rasmussens turn the equities on their head. The Riches argue that the Rasmussens "had an opportunity to obtain a survey from 1993 to 2013,..." App. Br. 30. Mr. Rich stabilized the hill in 2007 and then did nothing more until 2010, and his construction did not alarm the Rasmussens until 2013, when they promptly obtained their survey. The Riches, not the Rasmussens, pursued major construction activities knowing Dr. Rasmussen was uncertain of the property line, and without pursuing a survey. CP 195:5-22. Yet, they seek to avoid the consequences of their recklessness by arguing that the Rasmussens delayed in obtaining a survey until the structure became so large as to alarm the Rasmussens. Nothing in the record suggests that the Rasmussens failed to act after they became aware of the encroachment.

The court in *Brost v. L.A.N.D., Inc.*, explained when it is appropriate to apply laches:

It is only appropriate to apply laches when a party, knowing his rights, takes no steps to enforce them and the condition of the other party has in good faith become so changed that he cannot be restored to his former state.

*Id.*, 37 Wn. App. at 375 (citation omitted). Here, the Rasmussens took steps to enforce their rights once the Riches' construction became an issue in 2013 by promptly obtaining a survey, and then pursuing this action after failing to resolve the dispute amicably. And the Riches can be restored to their former state by simply moving the encroaching, unpermitted structure that Mr. Rich constructed onto his own property. We are not dealing with a permanent, permitted structure such as a house.

**D. The Court should reject the Riches' defense of equitable estoppel.**

The Riches' claim of equitable estoppel similarly cannot be reconciled with the doctrine of mutual recognition and acquiescence. As detailed at length above, Mr. Rich never physically demarcated the property line he now claims. While the Riches now argue they relied on Dr. Rasmussen's "agreeing to the boundary line without a survey and in assisting and observing the work without objection," they ignore that Mr. Rich never told the Rasmussens of any of the claimed physical markers on the ground. For example, Mr. Rich does not believe he told the Rasmussens of the string he claims to have installed along the property line. CP 213:6-13. Given the native vegetation in the ravine down to the beach, that the Rasmussens did not object to Mr. Rich's work stabilizing the bank beginning in 2007 hardly excuses the Riches from proceeding at their peril in embarking on construction without a permit and without a survey, and does not excuse the Riches from satisfying the elements of a claim for mutual recognition.

None of the authorities upon which the Riches rely apply equitable estoppel as a basis for excusing compliance with the elements of a claim for mutual recognition. To do so would, as with the Riches' laches argument, destroy the concept of a mutual recognition claim.

Finally, even if application of equitable estoppel were available as an end-run around the elements of a claim for mutual recognition, the facts

do not support a defense of equitable estoppel. As the court held in *Thomas v. Harlan*, 27 Wn.2d. 512, 178 P.2d 965 (1947), “[t]itle to real property is a most valuable right which will not be disturbed by estoppel unless the evidence is clear and convincing.” *Id.*, 27 Wn.2d. at 518. Given that Mr. Rich never physically walked and demarcated the property line on the ground and established it with Dr. Rasmussen, there is no basis for claiming reliance on inaction by the Rasmussens.

**E. The Rasmussens Should Be Awarded Their Reasonable Attorneys’ Fees And Costs.**

The Riches pursued their counterclaim under RCW Chapter 7.28. CP 20, Counterclaim ¶ 3.1. Accordingly, the Superior Court erred in ruling, on reconsideration, after initially awarding the Rasmussens their reasonable attorney fees and costs, that RCW 7.28.083(3) does not permit an award. Under that statute,

(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.

The Riches claimed that their improvements existed for more than ten years prior to commencement of this action, and claimed that those improvements thereby entitled them to title to the disputed property under “RCW 7.28”, the chapter governing adverse possession claims, pursuant to a broadly titled Counterclaim styled “Declaratory Judgment as to Common Boundary Line And/Or Decree of Quiet Title.” CP 20:13; 24:8; 24:14. They specifically claimed a “right of possession as defined by

RCW 7.28.010.” CP 24:25-26 (underlining added). That is the statute governing adverse possession claims: “To establish adverse possession, the claimant must show use that was open, notorious, continuous, uninterrupted, and adverse to the property owner for the prescriptive period of 10 years. RCW 7.28.010.” *Cole v. Laverty*, 112 Wn. App. 180, 184, 49 P.3d 924 (2002).

When the Rasmussens moved for summary judgment, they sought an award of attorneys’ fees and costs pursuant to RCW 7.28.083(3) because “[t]he Riches pursued their counterclaim under RCW Chapter 7.28. See Counterclaim ¶ 3.1.” CP 64:19-26. The Riches did not dispute the argument in their 20-page response to the motion. CP 162-181.

The Superior Court found that, “an award of legal fees and costs to the Rasmussens as the prevailing parties would be just and equitable” and awarded fees and costs pursuant to RCW 7.28.083(3). CP 456:10-12.

Under RCW 7.28.083(3),

(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.

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. While the Riches later cast their claim solely as a claim for mutual recognition, their Counterclaims were also styled claims for adverse possession.

The legislature directed, in RCW 7.28.100, “[t]hat the provisions of RCW 7.28.050 through 7.28.100 shall be liberally construed for the purposes set forth in those sections.” Thus, RCW 7.28.083(3) shall be liberally construed. Consistent with that directive, the recent decision in *Erbeck v. Springer*, 191 Wn. App. 1049 (2015), an unpublished opinion of Division 1 of this Court (copy appended hereto as App. A), supports an award of fees here, regardless of whether the Court concludes that the Riches asserted a counterclaim for adverse possession. In that case, the Erbecks were awarded fees under RCW 7.28.083(3), the same statute as the Rasmussens have relied upon, even though the claim on which they prevailed was for a prescriptive easement, not adverse possession. The court reasoned,

RCW 7.28.083(3) uses the term “adverse possession.” The present case involves prescriptive easements. But these doctrines “are often treated as equivalent[s],” and the elements required to establish adverse possession and prescriptive easements are the same. Thus, we conclude that this statute applies in this case and exercise our discretion to award the Erbecks reasonable attorney fees.

*Id.*, at 9.

The Riches argued to the Superior Court that, “[a]dverse possession and the doctrine of mutual recognition and acquiescence are two separate theories that involve different elements.” CP 556:18-19. But so too are claims for adverse possession and prescriptive easement. The doctrine of mutual recognition and acquiescence requires that adjoining landowners mutually recognize a common property line for ten years.

In order to establish a claim of adverse possession, one must prove exclusive, actual and uninterrupted, open and notorious, and hostile possession of property. *Chaplin v. Sanders*, 100 Wn.2d 853, 857, 676 P.2d 431 (1984). The period throughout which these elements must concurrently exist is ten years. RCW 4.16.020. Hostility “does not import enmity or ill-will, but rather imports that the claimant is in possession as owner, in contradistinction to holding in recognition of or subordination to the true owner.” *Chaplin*, at 857. As with a claim for adverse possession, in a claim for mutual recognition and acquiescence, a property owner must acquiesce in a neighbor’s establishment of the property line, i.e. deferring to the neighbor’s use and possession of the disputed property as though the neighbor is the actual owner, for the same ten-year period. The only difference is that, with adverse possession, there is no mutual agreement on the common property line. The two doctrines address the same issue, whereby a property owner can acquire equitable title to property after treating property as theirs for ten years. Thus, in *Lilly v. Lynch*, this Court held that “the mutual recognition and acquiescence doctrine supplements adverse possession.” *Id.*, 88 Wn. App. at 316.

Accordingly, this Court should find either that the Riches’ pursuit of Counterclaims based on the statute governing adverse possession claims authorized the Superior Court to award fees to the Rasmussens or, in the alternative, should find that, consistent with the statutory mandate in RCW 7.28.100 to liberally construed RCW 7.28.083(3), an award of fees

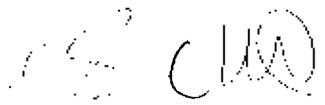
to the Rasmussens is authorized by RCW 7.28.083(3) for their successful defense of the Riches' claim for mutual recognition and acquiescence.

## VI. CONCLUSION

This Court should affirm the Superior Court's order granting the Rasmussens summary judgment dismissing the Riches' claim of mutual recognition and acquiescence and quieting title in favor of the Rasmussens because the Riches failed to show they physically designated the claimed property line for ten years. The Court should also reverse the trial court's ruling that RCW 7.28.083(3) does not authorize an award of attorney fees and costs to the Rasmussens as the prevailing party.

RESPECTFULLY SUBMITTED this 10th day of March, 2017.

KELLER ROHRBACK L.L.P.



By \_\_\_\_\_

Rob J. Crichton, WSBA #20471  
Attorneys for Respondents/Cross-  
Appellants Eric O. Rasmussen and  
Janice M. Rasmussen

**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that I am now, and have at all times material hereto been, a resident of the State of Washington, over the age of 18 years, not a party to, nor interested in, the above-titled action, and am competent to be a witness herein. I further certify that on March 10, 2017, I caused the document to which this certificate is attached to be delivered for filing as follows:

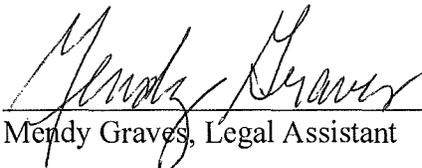
Clerk of the Court  
Court of Appeals, Division II  
950 Broadway, Suite 300, MS TB-06  
Tacoma, WA 98402-4454  
*Via Court's JIS-Link Electronic Filing System*

The original will be maintained in the files of the offices of Keller Rohrback L.L.P.

I further certify that on this date, I caused a copy of the document to which this certificate is attached to be delivered to the following by email:

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# **APPENDIX A**

191 Wash.App. 1049

Only the Westlaw citation is currently available.

NOTE: UNPUBLISHED OPINION, SEE WA R GEN  
GR 14.1

Court of Appeals of Washington,  
Division 1.

David H. ERBECK and E. Adele Erbeck, husband  
and wife, Respondents,

v.

Susan S. SPRINGER and John Doe Springer, wife  
and husband, and all other persons claiming any  
right, title, and interest in and to plaintiffs'  
property, Appellants.

No. 72568-8-I.

Dec. 21, 2015.

Appeal from Snohomish Superior Court; Hon. Thomas J.  
Wynne, J.

#### Attorneys and Law Firms

Matthew Rick Cleverley, Fidelity National Law Group,  
Seattle, WA, for Appellant.

Larry McConnell Trivett, Attorney at Law, Marysville,  
WA, for Respondent.

UNPUBLISHED

COX, J.

\*1 Susan Springer appeals the judgment in this quiet title action. She argues that the court erroneously determined that she did not have an express easement over a roadway owned by her neighbors, David and Adele Erbeck. She also claims the court erroneously determined the scope of her prescriptive easement over the same roadway for one of her two tracts. Finally, she argues that the court erroneously determined that she did not have any prescriptive easement over the roadway for her remaining tract. Substantial evidence supports the trial court's findings of fact. And these findings support the court's conclusions of law. We affirm.

The properties' history is relevant here. In 1972, a developer subdivided a large parcel of unimproved real property into 16 separate tracts. Each tract in the plat map is designated with a letter from "A" through "P." And each of these tracts is further described by a legal description on the plat map.

By statutory warranty deed dated January 17, 1974, the developer conveyed four of the tracts to Fritz W. Kuester and Mathilde Kuester, his wife. The legal descriptions of all four tracts are fully set forth in the deed. None of these legal descriptions includes language showing its letter designation ("A" through "P") in the plat map. Likewise, none of these legal descriptions includes the tract designation ("Tract A" through "Tract P") in the plat map. But it is beyond legitimate dispute that the legal descriptions in this deed correspond with the legal descriptions of Tracts C, D, E, and N, respectively, of the plat map.

This deed also contained language granting an express easement for a roadway over Tract O of the plat. The roadway is 20 feet in width and provides access to 99th Avenue N.E., a public roadway to the east of all tracts in the plat.

The disputes in this case center on who has the right to use this easement and the scope of rights to use the easement.

After they acquired Tract D, the Kuesters constructed a single family residence on the West 132 feet of this tract. They occupied this residence until the Springers purchased this tract in 1988. The Springers continued to use this residence when they purchased the property.

The Kuesters used the East 558 feet of Tract D for "haying, grazing, and raising cattle" during their ownership of this tract. Springer continued this use for similar purposes during her ownership of this tract.

In May 1974, the Erbecks purchased Tract O from the developer by real estate contract. This tract is subject to the roadway easement that we previously described.

By statutory warranty deed dated March 15, 1988, Mathilde Kuester, a single woman as her separate estate, conveyed Tract D to Ross N. Springer and Susan S. Springer, husband and wife.

By statutory warranty deed dated March 17, 1988, Mathilde Kuester, a single woman as her separate estate,

also conveyed Tract C to Ross N. Springer and Susan S. Springer, husband and wife. This deed also purports to convey a 20 foot wide easement with this tract.

\*2 In October 2013, David and Adele Erbeck commenced this quiet title action against Susan Springer. They sought declaratory and injunctive relief with respect to the roadway over their property, Tract O. In her answer, Springer sought a determination that she had express easement rights to use the roadway on Tract O to obtain access to Tracts C and D. Alternatively, she sought a determination that she has prescriptive easement rights to use the roadway to obtain access to these two tracts.

At trial, the parties stipulated to the admission into evidence of 48 exhibits. Moreover, they also stipulated that Springer had a prescriptive easement over the roadway owned by the Erbecks to obtain access to her residence. That residence is located on the West 132 feet of Tract D. The stipulation did not include any agreement as to the East 558 feet of Tract D.

The trial court concluded that Springer had no express easement rights to use the roadway. But the court also determined that she had acquired a limited prescriptive easement right to use the roadway to obtain access to the residence located on the West 132 feet of Tract D. This was based, in part, on the parties' stipulation at trial.

The court also determined that she had a limited easement right to use the roadway to obtain access to the East 558 feet of Tract D for "pasture, grazing and raising cattle." Finally, the trial court concluded that Springer failed to prove a prescriptive easement to use the roadway for the benefit of Tract C.

Springer appeals.

### EXPRESS EASEMENT

Springer argues that the trial court improperly concluded that she had no express easement over the roadway to obtain access to Tracts C and D. We hold that she failed in her burden to prove any express easement rights in the roadway over Tract O, the property owned by the Erbecks.

We construe deeds to give effect to the parties' intentions and pay particular attention to the grantor's intent "when discerning the meaning of the entire document."<sup>1</sup> We use the deed's language as a whole to determine the parties' intent.<sup>2</sup> When construing a deed, we give meaning "to

every word if reasonably possible."<sup>3</sup>

A deed is ambiguous if it is capable of two or more reasonable meanings.<sup>4</sup> We do not consider extrinsic evidence if the deed's plain language is unambiguous.<sup>5</sup> But if the deed is ambiguous, we may consider extrinsic evidence to ascertain the parties' intent.<sup>6</sup> This evidence includes "the circumstances of the transaction" and the parties' subsequent conduct.<sup>7</sup> But extrinsic evidence cannot be used to "vary, contradict or modify the written word."<sup>8</sup> We also construe the deed against the grantor if the parties' intent remains in doubt.<sup>9</sup>

"Interpretation of a deed is a mixed question of fact and law."<sup>10</sup> The parties' intent "is a question of fact, and the legal effect of their intent is a question of law."<sup>11</sup> After a bench trial, our "review is limited to determining whether substantial evidence supports the [trial court's] findings and, if so, whether the findings support the conclusions of law."<sup>12</sup> Substantial evidence exists as "long as a rational trier of fact could find the necessary facts were shown by a preponderance of the evidence."<sup>13</sup>

\*3 "Unchallenged findings of fact are verities on appeal."<sup>14</sup> We review de novo conclusions of law.<sup>15</sup>

We start with examination of the January 17, 1974 statutory warranty deed by which the developer conveyed certain tracts to the Kuesters. That deed contains the following legal descriptions:

The East 690 feet of the South 330 feet of the North 1730 feet of Section 24, Township 30 North, Range 5 East, W.M.;

EXCEPT 99th Avenue N. E.

The East 690 feet of the South 330 feet of the North 1380 feet of Section 24, Township 30 North, Range 5 East, W.M.;

EXCEPT 99th Avenue N. E.

The East 690 feet of the South 330 feet of the North 1050 feet of Section 24, Township 30 North, Range 5 East, W.M.;

EXCEPT 99th Avenue N. E.

The South 330 feet of the North 1380 feet of the West 660 feet of the East 1350 feet of Section 24, Township 30 North, Range 5 East, W.M.;

TOGETHER WITH an easement over the South 20 feet of the North 1400 feet of the East 1350 feet of Section 24, Township 30 North, Range 5 East, W.M.<sup>[16]</sup>

Springer argues that this legal description is unambiguous. She further claims that the express easement described in the last three lines of this legal description applies to Tracts C and D, which are described earlier in this deed. While we agree that the legal description is unambiguous, we disagree with this argument.

As the trial court indicated in its oral decision, there can be no serious dispute that the legal descriptions in the deed describe four tracts of real property, not one. At oral argument of this case on appeal, counsel for Springer properly conceded that this is correct.

Thus, the question is whether the express easement applies only to the last tract of the four tracts described in the deed or to all of these tracts. To the extent it applies to all tracts, then Tracts C and D, now owned by Springer, benefit from that express easement. Otherwise, they do not benefit.

As the trial court correctly decided in construing the deed, the description for each tract is contained in a paragraph ending with a period. Semicolons are used to separate the two-part description within each paragraph.

For example, the first two lines of the legal description of the first tract ends with a semicolon. The last line (“EXCEPT 99th Avenue N.E.”) ends with a period. This pattern is replicated for the next two tracts described in the deed.

The legal description for the fourth tract is different. That description states that it conveys the following property:

The South 330 feet of the North 1380 feet of the West 660 feet of the East 1350 feet of Section 24, Township 30 North, Range 5 East, W.M.;

TOGETHER WITH an easement over the South 20 feet of the North 1400 feet of the East 1350 feet of Section 24, Township 30 North, Range 5 East, W.M.[<sup>17</sup>]

The first three lines of this description address fee title to the property. The “Together With” language that follows addresses the express easement. Notably, a semicolon separates the description of the fee title conveyed from the express easement that goes with it. And the description of the easement is followed by a period.

\*4 Thus, the deed unambiguously shows that the preceding three tracts do not benefit from the easement. This supports the trial court’s conclusion that the easement applies only to the last of the four tracts

described in the deed.

Further, even if the deed were ambiguous, extrinsic evidence supports the court’s conclusion. The trial court used evidence extrinsic to the deed to correlate the four tracts to the original plat map and the descriptions on that plat map. This was proper.

When one compares the tracts on the plat map with those in the deed, it is clear that the developer conveyed Tracts C, D, E, and N, as shown on the plat map. Moreover, it is also clear from this comparison that Tract N contains the “Together With” language pertaining to the easement at issue in the case, and no other tract relevant to this case does. Accordingly, the express easement is for the benefit of Tract N and crosses Tract O, owned by the Erbecks. It is not for the benefit of either Tract C or Tract D, both of which are now owned by Springer.

This interpretation makes sense. When one examines the plat map, it is clear that both Tract C and Tract D abut 99th Avenue N.E. Tract N does not abut this public right of way. Thus, Tract N requires the roadway easement over Tract O to obtain access to the public roadway. In contrast, neither Tract C nor Tract D needs the roadway easement for this purpose—both tracts abut the public roadway.

These observations are consistent with the developer’s testimony that was also the subject of a stipulation at trial.<sup>18</sup> This developer prepared the deed at issue. According to the stipulation, the developer testified that the 1974 sale to the Kuesters “was not intended to include, or grant to [them] any easement rights over and across the Erbecks’ parcel (Parcel O), for the benefit of either of Springer[’s] parcels (Parcels C or D), for the reason that said parcels had direct access to 99th Avenue Northeast.”<sup>19</sup> This testimony demonstrates that the grantor intentionally granted an express easement for Tract N only.

To summarize, the punctuation pattern in the deed, the correlation of the legal descriptions in the deed with those in the plat map, and the testimony of the developer as to his intent show that there is only one reasonable interpretation of the deed. They show the developer’s intent to limit the express easement to benefit Tract N. It was not intended for the benefit of Tracts C or D.

Springer argues that the punctuation in the deed “simply creates a list of items and should be interpreted as such.”<sup>20</sup> She cites authorities to support the proposition that doing so in this case permits the conclusion that the easement in the deed applies to all of the tracts described, not just

Tract N. This argument is wholly unpersuasive.

Here, the grouping together of the legal descriptions of the four tracts conveyed is not a mere list. As explained above, there is no dispute that the legal descriptions in the deed describe four tracts of real property, not one. The punctuation pattern in the deed also demonstrates that the legal descriptions are purposefully grouped together to expressly grant an easement for Tract N only. Additionally, even if the deed were ambiguous, evidence extrinsic to the deed shows that the grouping of the legal descriptions is not a list. We have uncontroverted evidence of the grantor's intent to convey an easement limited to Tract N. We also have uncontroverted evidence from the plat map that is consistent with the grantor's intent. In short, the rule that Springer attempts to apply to this case does not apply at all.

\*5 Springer also argues that the trial court improperly used extrinsic evidence to interpret the deed because it unambiguously conveyed a 20-acre parcel with an easement for the entire parcel.<sup>21</sup> Not so.

Based on the punctuation pattern in the deed, the only reasonable interpretation of the deed is that it conveys four separate parcels and expressly grants an easement only for Tract N. Thus, there is no reasonable argument that the deed unambiguously grants an easement for a 20-acre entire parcel.

Lastly, Springer argues that she has an express easement over the Erbecks' roadway because the Kuesters included an express easement in the deed when they conveyed Tract C to her.<sup>22</sup> This claim is also without support in the record.

The Kuesters included an express easement over the Erbecks' roadway in the March 17, 1988 deed granting Tract C to Springer.<sup>23</sup> But they had no express easement to grant, as discussed earlier, and a "grantor of property can [not] convey ... greater title or interest than the grantor has in the property."<sup>24</sup> Accordingly, Springer may not rely on this deed to establish her rights.

### PRESCRIPTIVE EASEMENTS

Springer argues that the court erroneously determined that she did not have prescriptive easement rights for Tract C, and improperly determined the scope of her prescriptive easement rights for Tract D. We again disagree.

Easements provide the right to use another's real property

without owning it.<sup>25</sup> Easement rights can be obtained by adverse use, also known as prescription.<sup>26</sup> "Prescriptive rights ... are not favored in the law, since they necessarily work corresponding losses or forfeitures of the rights of other persons."<sup>27</sup> A person claiming a prescriptive easement bears the burden of proof and must prove the following elements:

- (1) use adverse to the right of the servient owner, (2) open, notorious, continuous, and uninterrupted use for the entire prescriptive period, and (3) knowledge of such use by the owner at a time when he was able to assert and enforce his rights.<sup>28</sup>

"The period required to establish a prescriptive easement is 10 years."<sup>29</sup> Adverse use means that the claimant used a landowner's land without the landowner's permission.<sup>30</sup>

To satisfy the continuous and uninterrupted use element, the claimant need not "prove constant use" of the property.<sup>31</sup> "[T]he claimant need only demonstrate use of the same character that a true owner might make of the property considering its nature and location."<sup>32</sup> Additionally, "[t]he extent of the rights acquired through prescriptive use is determined by the uses through which the right originated, [and that] [t]he easement acquired extends only to the uses necessary to accomplish the purpose for which the easement was claimed."<sup>33</sup>

Whether the prescriptive easement elements have been established is "a mixed question of law and fact."<sup>34</sup> Factual findings must be supported by substantial evidence.<sup>35</sup> This court reviews de novo the trial court's "conclusion that the facts ... constitute a prescriptive easement."<sup>36</sup>

### Tract C

\*6 Springer argues that the trial court used the incorrect legal standard when it determined that her use was not continuous and not interrupted. Specifically, she argues that the court improperly focused on her use of the roadway to graze cattle, and failed to evaluate her use of the roadway for agricultural purposes. We disagree.

During trial, Springer testified that she and her husband purchased Tracts C and D in 1988, and grazed cattle on both properties beginning in 1990. Thus, 1990 would have been the beginning of any prescriptive period for grazing cattle on Tract C.

She further testified that she had cattle in 1991 and 1993

through 1997. She testified that in 1999, she and her husband had an agreement with a neighbor to share in feeding the Springers' and the neighbor's cattle. After the dissolution of her marriage, Springer sold her cattle and entered into an agreement with the neighbor that allowed him to board his cattle on her property. In exchange, he did yardwork for her. From 2007 to the trial date, only the neighbor's cattle remained on Tract C.

In the trial court's oral decision and the findings of fact that followed, the court decided that Springer's use of the roadway to obtain access to her property for grazing cattle fell short of the 10 year prescriptive period required to establish her claim. We agree. It was her burden to prove all elements of her prescriptive easement claim for the full 10 year period. She did not.

There is no testimony as to Springer's use of the roadway for cattle grazing purposes between 1999 and 2007. Because the prescriptive period on this use began to run in 1990, she was required to show continuous use until 2000. Springer fails to fill the gap in time after 1999. Thus, substantial evidence supports the trial court's finding that Springer did not continuously use the roadway for the required purpose for 10 years. This finding of fact supports the trial court's conclusion that Springer failed to establish prescriptive easement rights over the roadway for the benefit of Tract C.

Moreover, her testimony for the period after 2007 fails to establish her use of the property for cattle grazing purposes from that time to trial. This is consistent with the trial court's oral decision.

Springer also testified that she conducted other activities on this tract. But her testimony concerning clearing of the property was in connection with cattle grazing that began in 1990. She fails to establish that she continued this activity for the prescriptive period of 10 years. The same applies to the planting of trees and the maintenance offences on this tract.

We note that the supreme court recently decided *Gamboa v. Clark*.<sup>37</sup> While we need not rely on that case to decide this one, its teachings are important to note.

There, the original owners split a 42-acre parcel into two parcels.<sup>38</sup> The Gamboas and Clarks owned the two adjoining parcels, separated by a gravel road.<sup>39</sup> Both parties used the roadway for many years and were aware of the other party's use.<sup>40</sup> Neither party objected until the parties disputed ownership of the land on which the roadway was situated.<sup>41</sup> A land survey determined that a small portion of the road was on the Gamboas' property

and that the rest was on the Clarks' property, until the road reached an area where the Gamboas had an express easement over the Clarks' property.<sup>42</sup>

\*7 The trial court determined that the Gamboas' use was adverse to the Clarks' rights.<sup>43</sup> The supreme court determined whether an initial permissive presumption existed in prescriptive easement cases.<sup>44</sup> In doing so, it resolved a conflict between the divisions of the court of appeals.<sup>45</sup>

The supreme court concluded that "an initial presumption of permissive use to enclosed or developed land [exists where] there is a reasonable inference of neighborly sufferance or acquiescence."<sup>46</sup> The court reasoned that applying this presumption "incentivizes landowners to allow neighbors to use their roads for the neighbors' convenience," and that "[n]ot applying a presumption of permissive use in these circumstances punishes a courteous neighbor by taking away his or her property right."<sup>47</sup> But the court determined that "a claimant may defeat the presumption of permissive use when the facts demonstrate (1) 'the user was adverse and hostile to the rights of the owner, or' (2.) 'the owner has indicated by some act his admission that the claimant has a right of easement.'"<sup>48</sup>

After determining that such a presumption existed, the supreme court stated that "[w]hat constitutes a reasonable inference of neighborly sufferance or acquiescence is a fairly low bar" and "cited the following as an example of a neighborly accommodation: 'persons travel[ing] the private road of a neighbor in conjunction with such neighbor and other persons, nothing further appearing.'"<sup>49</sup>

The court then determined that the evidence supported a reasonable inference of neighborly sufferance or acquiescence, finding that the Gamboas and Clarks were "neighbors and ... used the road for their own purposes in conjunction with each other without incident."<sup>50</sup> The court also determined that the Gamboas failed to overcome the permissive use presumption.<sup>51</sup> Specifically, the court stated that:

the Gamboas cannot demonstrate either that they interfered with the Clarks' use of the roadway or that the Clarks indicated that the Gamboas had an easement over the driveway. The Gamboas' occasional blading of the road did not interfere with the Clarks' use of the road in any manner.... Indeed, the trial court found that both parties "used the roadway ... without any disputes until 2008. Each party was aware of the other's use of the roadway, but no one objected to the other's use until a dispute arose in 2008."<sup>52]</sup>

Thus, the court concluded that the Gamboas “failed to establish a prescriptive easement.”<sup>53</sup>

Here, the trial court did not make an express finding that Springer’s use of the roadway to obtain access to Tract C was presumptively permissive. We note that it did so for the Kuesters, the predecessors in interest to Springer, for Tract D in unchallenged factual finding 22.<sup>54</sup> Had the trial court made this express finding for Springer, *Gamboa* might apply.

From our review of the record, it appears arguable that had the court been asked to make a similar finding concerning the presumptively permissive use of the roadway to obtain access to Tract C, it could have done so. But this court does not make factual findings. Only the trial court does so. It is sufficient for our purposes to note that such a finding might have been made if the request had been made. We need not further address the potential application of the principles of *Gamboa* to this case.

#### Tract D

\*8 Springer argues that the trial court essentially subdivided Tract D and limited her use of the parcel. This argument mischaracterizes the trial court’s ruling. The court did not subdivide Tract D. It only limited how she could use the easement to obtain access to each tax parcel of this tract.

Based on the Kuesters’ use of the roadway, the trial court concluded that they had a prescriptive easement for access to the residence in which they lived during their ownership. This use ripened to a prescriptive right prior to the March 1988 conveyance to Springer. This right was limited to the West 132 feet of Tract D.

The parties also stipulated that Springer obtained prescriptive easement rights over the roadway owned by the Erbecks to obtain access to her residence located on the West 132 feet of Tract D. The stipulation did not include any agreement as to the East 558 feet of Tract D. Thus, the trial court concluded that Springer obtained a residential easement to use the roadway to obtain access to the West 132 feet of Tract D, which did not “include commercial or business access.”<sup>55</sup>

Springer’s argument that the court subdivided Tract D is unpersuasive. Due to Springer’s use of the Erbecks’ roadway to graze cattle, maintain the pasture land, and mow and bale hay, the court determined that Springer obtained a prescriptive easement to use the roadway to

obtain access to the East 558 feet of Tract D “for pasture, grazing, and raising of cattle purposes and such other customary types of uses.”<sup>56</sup> Accordingly, the court only limited how she could use the easement.

#### ATTORNEY FEES

The Erbecks request attorney fees on appeal under RCW 7.28.083(3). We conclude they are entitled to such an award, subject to compliance with RAP 18.1.

“The general rule in Washington is that attorney fees will not be awarded for costs of litigation unless authorized by contract, statute, or recognized ground of equity.”<sup>57</sup> RCW 7.28.083(3) provides:

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.

The Erbecks are the prevailing parties with respect to the contest over prescriptive rights to the roadway crossing their property. Springer does not contend otherwise.

RCW 7.28.083(3) uses the term “adverse possession.” The present case involves prescriptive easements. But these doctrines “are often treated as equivalent[s],” and the elements required to establish adverse possession and prescriptive easements are the same.<sup>58</sup> Thus, we conclude that this statute applies in this case and exercise our discretion to award the Erbecks reasonable attorney fees. We award attorney fees only for issues concerning prescriptive easement rights.

\*9 Springer argues that there is no basis to award attorney fees and that the Erbecks failed to claim attorney fees under the above statute at trial. The plain words of the statute make clear that an award of fees on appeal is not contingent on any award below. Accordingly, we reject this argument.

We affirm the judgment. We grant the Erbecks reasonable attorney fees on appeal, subject to compliance with RAP 18.1.

**Erbeck v. Springer, Not Reported in P.3d (2015)**

191 Wash.App. 1049

WE CONCUR, LEACH, J., and BECKER, J.

Not Reported in P.3d, 191 Wash.App. 1049, 2015 WL 9274096

**All Citations**

**Footnotes**

- 1 *Newport Yacht Basin Ass'n of Condo. Owners v. Supreme Nw., Inc.*, 168 Wn.App. 56, 64, 277 P.3d 18 (2012) (quoting *Zunino v. Raiewski*, 140 Wn.App. 215, 222, 165 P.3d 57 (2007)).
- 2 *Id.*
- 3 *Id.*
- 4 *Id.* at 66.
- 5 *Id.* at 64.
- 6 *Id.* at 65.
- 7 *Id.*
- 8 *Miller v. Kenny*, 180 Wn.App. 772, 793, 325 P.3d 278 (2014) (quoting *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695, 974 P.2d 836 (1999)).
- 9 *Newport Yacht Basin Ass'n of Condo. Owners*, 168 Wn.App. at 65.
- 10 *Id.* at 64.
- 11 *Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc.*, 170 Wn.2d 442, 459 n. 7, 243 P.3d 521 (2010).
- 12 *In re Det. of P.K.*, 189 Wn.App. 317, 326, 358 P.3d 411 (2015).
- 13 *In re the Welfare of A.W.*, 182 Wn.2d 689, 711, 344 P.3d 1186 (2015).
- 14 *Id.*
- 15 *State v. Jones*, 186 Wn.App. 786, 789, 347 P.3d 483 (2015).
- 16 Trial Exhibit 5.
- 17 *Id.*
- 18 Trial Exhibit 1.
- 19 *Id.*
- 20 Appellant Susan Springer's Reply Brief at 2.

Erbeck v. Springer, Not Reported in P.3d (2015)

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21 Susan Springer's Opening Brief at 11.

22 *Id.* at 14.

23 Trial Exhibit 6; Trial Exhibit 7.

24 *Firth v. Hefu Lu*, 146 Wn.2d 608, 615, 49 P.3d 117 (2002).

25 *Kiely v. Graves*, 173 Wn.2d 926, 936, 271 P.3d 226 (2012).

26 See 17 William B. Stoebuck & John W. Weaver, *Washington Practice: Real Estate: Property Law* § 2.7, at 99 (2d ed.2015).

27 *Gamboa v. Clark*, 183 Wn.2d 38, 43, 348 P.3d 1214 (2015) (quoting *Nw. Cities Gas Co. v. W. Fuel Co.*, 13 Wn.2d 75, 83, 123 P.2d 771 (1942)).

28 *Dunbar v. Heinrich*, 95 Wn.2d 20, 22, 622 P.2d 812 (1980).

29 *Id.*

30 *Gamboa*, 183 Wn.2d at 44.

31 *Lee v. Lozier*, 88 Wn.App. 176, 185, 945 P.2d 214 (1997).

32 *Id.* (quoting *Double L. Properties., Inc. v. Crandall*, 51 Wn.App. 149, 158, 751 P.2d 1208 (1988)).

33 *Id.* at 187.

34 *Gamboa*, 183 Wn.2d at 44.

35 *Newport Yacht Basin Ass'n of Condo. Owners*, 168 Wn.App. at 63.

36 *Gamboa*, 183 Wn.2d at 44 (quoting *Lee*, 88 Wn.App. at 181).

37 183. Wn.2d 38, 348 P.3d 1214 (2015).

38 *Id.* at 40.

39 *Id.*

40 *Id.*

41 *Id.*

42 *Id.*

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43 *Id.* at 42.

44 *Id.* at 43.

45 *Id.* at 46.

46 *Id.* at 47.

47 *Id.* at 48–49.

48 *Id.* at 51–52 (quoting *Nw. Cities Gas Co.*, 13 Wn.2d at 87).

49 *Id.* at 51 (alteration in original) (internal quotation marks omitted) (quoting *Roediaer v. Cullen*, 26 Wn.2d 690, 711, 175 P.2d 669 (1946)).

50 *Id.* at 51.

51 *Id.* at 52.

52 *Id.*

53 *Id.* at 53.

54 Clerk's Papers at 11.

55 *Id.* at 27, 29.

56 *Id.* at 3.

57 *Durland v. San Juan County*, 182 Wn.2d 55, 76, 340 P.3d 191 (2014).

58 *Kunkel v. Fisher*, 106 Wn.App. 599, 602–03, 23 P.3d 1128 (2001); accord 17 *Stoebeck & Weaver*, *supra*, § 2.7, at 99.