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State of Washington  
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No. 51476-1

IN THE COURT OF APPEALS  
STATE OF WASHINGTON

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PERRY SMITH and ERIN SMITH

Appellants,

v.

PAUL STOUT and TRISHA SMITH

Respondents.

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BRIEF OF RESPONDENT

P PAUL STOUT and TRISHA SMITH

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**TABLE OF CONTENTS**

I. INTRODUCTION ..... 1

II. ISSUES ..... 3

III. STATEMENT OF THE CASE..... 4

IV. ARGUMENT ..... 13

A. The trial court properly dismissed the Smiths claim of adverse possession where the undisputed facts show that the previous owners of the adjoining properties established the property line by parol agreement and the Smiths, as bona fide purchasers for value, took possession with reference to that line. .... 13

1. Standard of Review ..... 13

2. Summary Judgment in Adverse Possession Cases ..... 13

B. The trial court properly considered the existence of a parol boundary line agreement as a defense to the Smiths claim of adverse possession where the agreement was made by their predecessors in interest upon whose actions they exclusively rely to prove adverse possession. .... 15

1. The undisputed facts establish a boundary line by parol agreement..... 15

5. Parol Agreement is not an affirmative defense and, even if it is, the Smiths cannot claim surprise when it was raised in the motion for summary judgment because they had specific and detailed knowledge of it, an opportunity to conduct discovery regarding it and made no motion for a continuance. .... 31

6. The trial court did not abuse its discretion by enlarging the time for filing a motion for attorneys’ fees. .... 35

7. The trial court did not abuse its discretion by awarding the Stouts their costs and reasonable attorneys’ fees under RCW 7.28.083 as the prevailing party because it was just and equitable to do so. ... 42

8. The Court’s award of fees was justified on two alternative grounds..... 43

V. RESPONDANTS ARE ENTITLED TO AN AWARD OF ATTORNEY FEES INCURRED ON APPEAL ..... 48

VI. CONCLUSION..... 48

## TABLE OF AUTHORITIES

### Cases

<i>Alexander v. County of Walla Walla</i> , 84 Wn.App. 687, 692, 929 P.2d 1182 (1997).....	13
<i>Anfinson v. FedEx Grd Package Sys., Inc.</i> , 174 Wn. 2d 851, 860, 281 P.3d 289 (2012).....	35
<i>Bank of Nova Scotia v. Tschabold Equip. Ltd.</i> , 51 Wn. App. 749, 754 P.2d 1290 (1988).....	37
<i>Biggs v. Vail</i> , 124 Wash. 2d 193, 197, 876 P.2d 448, 451 (1994).....	46
<i>Bldg. Indus. Ass'n of Washington v. McCarthy</i> , 152 Wn. App. 720, 745, 218 P.3d 196 (2009). ....	44
<i>Bryant v. Joseph Tree, Inc.</i> , 119 Wash. 2d 210, 219, 829 P.2d 1099, 1104 (1992).....	46, 47
<i>Buchanan v. Cassell</i> , 53 Wn. 2d 611, 614, 335 P.2d 611 (1959) .	28, 29, 30
<i>Business Guides, Inc. v. Chromatic Communications Enters., Inc.</i> , 498 U.S. 533, , 111 S.Ct. 922, 934, 112 L.Ed.2d 1140 (1991).....	46
<i>Chaplin v. Sanders</i> , 100 Wn. 2d 853, 857, 676 P.2d 431 (1984). 14, 27, 28, 29	
<i>Clipse v. Comm. Driver Servs.</i> 189 Wn. App. 776, 358 P.3d 464 (2015). 41	
<i>Corey v. Pierce County</i> , 154 Wn. App. 752,225 P.3d 367 (2010) .....	39, 41
<i>Curhan v. Chelan County</i> , 156 Wash.App. 30, 37, 230 P.3d 1083 (2010); see also <i>Loc Thien Truong v. Allstate Prop. and Cas. Ins. Co.</i> , 151 Wn. App. 195, 207–08, 211 P.3d 430 (2009).....	44
<i>Doe v. Spokane &amp; Inland Empire Blood Bank</i> , 55 Wash. App. 106, 111, 780 P.2d 853, 857 (1989) .....	47
<i>El Cerrito, Inc. v. Ryndak</i> , 60 Wash. 2d 847, 855–56, 376 P.2d 528, 533 (1962).....	14, 36
<i>Eller v. E. Sprague Motors &amp; R.V.'s, Inc.</i> , 159 Wn. App. 180, 192, 244 P.3d 447, 453 (2010) .....	44
<i>Fowler v. Johnson</i> , 167 Wash. App. 596, 604, 273 P.3d 1042, 1047 (2012).....	36
<i>Goldmark v. McKenna</i> , 172 Wn.2d 568, 582, 259 P.3d 1095 (2011).....	44
<i>Griggs v. Averbek Realty, Inc.</i> , 92 Wn. 2d 576, 584, 599 P.2d 1289, 1293 (1979).....	41
<i>Hash v. Children's Orth Hosp. &amp; Med. Ctr.</i> , 110 Wn. 2d 912, 916, 757 P.2d 507 (1988). ....	14

<i>ITT Rayonier, Inc. v. Bell</i> , 112 Wn. 2d 754, 757, 774 P.2d 6 (1989). .....	14
<i>Jankelson v. Cisel</i> , 3 Wash. App. 139, 142, 473 P.2d 202, 205 (1970). ...	35
<i>Jensen v. Kohler</i> , 93 Wash. 8, 159 P. 978 (1916).....	35
<i>Johnston v. Monahan</i> , 2 Wn. App. 452, 455, 469 P.2d 930 (1970) ...	16, 18, 23
<i>Kahn v. Salerno</i> , 90 Wn.App. 110, 117, 951 P.2d 321 (1998).....	13
<i>Kave v. McIntosh Ridge P. Rd. Ass'n</i> , 198 Wn. App. 812, 819, 394 P.3d 446 (2017).....	35
<i>Lamm v. McTighe</i> , 72 Wn. 2d 587, 592, 434 P.2d 565 (1967) .....	15
<i>Landberg v. Carlson</i> , 108 Wn. App. 749, 758, 33 P.3d 406 (2001). .....	48
<i>Lilly v. Lynch</i> , 88 Wn. App. 306, 312–13, 945 P.2d 727, 731 (1997).....	27
<i>Miller v. Anderson</i> , 91 Wn. App. 822, 828, 964 P.2d 365, 369 (1998).....	14
<i>O'Neill v. City of Shoreline</i> 183 Wn. App. 15, 332 P.3d 1099, 1104 (2014) .....	passim
<i>Piotrowski v. Parks</i> , 39 Wn. App. 37, 40, 691 P.2d 591, 593 (1984) 16, 18, 23, 24	
<i>Redding v. Virginia Mason Med. Ctr.</i> , 75 Wn.App. 424, 426, 878 P.2d 483 (1994).....	13
<i>Thompson v. Lennox</i> , 151 Wash. App. 479, 491, 212 P.3d 597, 603 (2009). .....	48
<i>VanderStoep v. Guthrie</i> , 200 Wn. App. 507, 526, 402 P.3d 883, 893 (2017).....	41
<i>Wilson v. Horsley</i> , 137 Wash. 2d 500, 507, 974 P.2d 316, 320 (1999) ....	34

**Statutes**

RCW 4.84.185 .....	43
RCW 4.16.020. ....	14
RCW 4.84.185 .....	44, 48, 49
RCW 7.28.083 .....	42, 48, 49

**Rules**

3A L. Orland, Wash.Prac., Rules Practice § 5141 (3d ed. Supp.1991).....	46
50(b),.....	38
52(b).....	38
59(b).....	38
CR 6(b).....	38, 39
CR 11 .....	46, 47, 49
CR 54(b).....	38
CR 54(d).....	3, 38, 39, 40
CR 56(f) .....	34
CR 6(d).....	38, 40

CR 60(b).....	38
RAP 18.1.....	48, 49

## I. INTRODUCTION

The Smiths appeal from a summary judgment dismissing their claim of adverse possession made against their new neighbors, the Stouts, after they owned their property for less than one year. In order to prove adverse possession for the required 10-year period, they would have to “tack” onto the ownership of their predecessors in interest, Doug Rossi and Kim Horvath, who had owned the property for over 30 years.

Rossi and Horvath listed their property for sale in April of 2016. Thereafter, in order to determine the exact location of the boundary line between the two properties, the Stouts had it surveyed. It was marked on the ground with stakes with pink flags. Rossi and Stout agreed to the line, as marked, and further agreed that it would resolve any uncertainty of its location, not only for them, but for any prospective buyer as well.

Prior to purchasing the property from Rossi and Horvath, the Smiths saw the flagged stakes and inspected them and the property on two separate occasions, specifically to ask questions about the property line. They noticed, in particular, that the stakes “cut through a portion of the planting area, parking area and lawn that had been maintained by their sellers”. They had the opportunity to

walk away from the purchase if they did not accept the property line as staked and represented to them. They confirmed that they were comfortable with the boundary line and they closed the transaction.

In less than one year after they purchased their property, without even contracting Rossi or Horvath regarding their prior use of the property or any agreements that might have been made between them and the Stouts, the Smiths sued the Stouts for adverse possession. They claimed ownership of the exact same areas of the Stout property (planting, parking and lawn areas) that were clearly disclosed and identified as not being part of the property that was being sold to them based upon the surveyed and staked property line.

The undisputed facts showed that Stout and Rossi had made an oral boundary line agreement and that the Smiths purchased the property with actual notice of it. Having done so, the Smiths could not establish adverse possession as a matter of law because they could not establish 10 years of adverse use. Any actions or use of Rossi and Horvath that might have amounted to adverse possession was extinguished when they agreed to the boundary line as designated with stakes and flags and sold their property with respect to it. Reasonable minds could not differ in finding that the Smiths could not prove adverse possession as a matter of law.

## II. ISSUES

### Issues Related to Assignment of Error No. 1.

1. Whether the trial court properly dismissed the Smiths' claim of adverse possession where the undisputed facts showed that the previous owners of the adjoining properties established the property line by parol agreement and the Smiths, as bona fide purchasers for value, took possession with reference to that line?
2. Whether the trial court properly considered the existence of a parol boundary line agreement as a defense to the Smiths' claim of adverse possession where the agreement was made by their predecessors in interest upon whose actions they exclusively relied to prove adverse possession?
  - a. Whether the element of hostility fails as a matter of law where there is clear evidence of an intent not to convey the disputed property to a successor in interest?
  - b. Whether the claim of adverse possession fails as a matter of law where, because of the parol agreement by the predecessors in interest to set the boundary line, the claimants have no adverse occupation to which they can "tack" to meet the 10 years requirement for adverse possession.
3. Whether, if the existence of a parol agreement is an affirmative defense, the court did not err in considering it where the Stouts were not prejudiced because they had actual notice of parol agreement as a defense and had a full opportunity to inquire about any oral agreements during depositions and the answer could have been timely amended to include it without prejudice?

### Issues Related to Assignment of Error No. 2.

1. Whether the trial court properly exercised its discretion to enlarge the time for filing a motion for attorneys' fees under CR 54(d) in accordance with *O'Neil v. Sullivan*?
2. Did the trial court properly exercise/abuse its discretion when it awarded the Stouts their attorneys' fees pursuant to RCW 7.28.083

where they successfully defended against the Plaintiff's claim of adverse possession?

3. Whether trial court's oral decision can be the subject an assignment of error?

### **III. STATEMENT OF THE CASE**

The Smiths purchased their property from Doug Rossi and Kim Horvath in May 2016.<sup>1</sup> In March 2017 they sued their next-door neighbors, the Stouts, for adverse possession of areas of landscaping and parking, claiming to own a strip 10 feet north of the deeded line.<sup>2</sup> At the time of filing, they had owned their property less than a year.<sup>3</sup> Prior to commencing the suit, they failed to even contact the individuals from whom they purchased the property and upon whose actions they would depend to establish adverse use.<sup>4</sup>

#### Ownership of the Properties

The Smiths' predecessors in interest were Douglas Rossi and his wife, Kim Horvath. They purchased the property now owned by the Smiths in 1994.<sup>5</sup> Rossi and Horvath were the first to build on the four lot subdivision.<sup>6</sup> In 1995 Mr. and Mrs. Daily purchased the property now

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<sup>1</sup> CP 19-21

<sup>2</sup> CP 1-3

<sup>3</sup> CP 1-3 and 19-21

<sup>4</sup> CP 66, 69

<sup>5</sup> 22-23

<sup>6</sup> CP 33

owned by the Stouts.<sup>7</sup> In 1997 the Dailys built a home on the property.<sup>8</sup> Mr. and Mrs. Daily divorced in 2010<sup>9</sup> and Mrs. Daily was the sole owner of the Stouts' property until she sold it to Paul Stout and Trisha Smith<sup>10</sup> in 2013.<sup>11</sup> Thus, neither the Smiths nor the Stouts have owned their respective properties for ten years.

When the Dailys began to construct their home on the neighboring lot (now owned by the Stouts), the property line was marked and revealed that most of the driveway then used by Rossi and Horvath was located on the lot purchased by the Dailys.<sup>12</sup> Upon realizing the encroachment, Rossi and Horvath relocated their driveway so that it was entirely on their side of the property line and built a rock retaining wall along the edge of the driveway.<sup>13</sup>

After constructing the driveway and wall, they planted roses, blueberries and evergreens on top of the wall to reestablish the buffer area<sup>14</sup>.<sup>15</sup> The relocated driveway was graveled.<sup>16</sup> At the bottom of the

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<sup>7</sup> CP 24-25

<sup>8</sup> CP 43

<sup>9</sup> CP 43-49

<sup>10</sup> Because the Plaintiffs' last name is Smith, for purposes of clarity, Trisha Smith, who is married to Paul Stout, will be referred to as Trisha Stout or Mrs. Stout.

<sup>11</sup> CP 26-28

<sup>12</sup> CP 33-34

<sup>13</sup> CP 63-64

<sup>14</sup> CP 89. (The short plat, within which the parties' lots are located, establishes a 30-foot wide buffer area to the north of the property line, entirely on the Defendants' property.)

<sup>15</sup> CP 65

<sup>16</sup> CP 35

driveway near the end of the rock wall, Rossi stored a wagon in an area that he knew was on property owned by the Dailys/Stouts.<sup>17</sup> He did so, however, with the permission of Mr. Daily and of Mr. Stout.<sup>18</sup> He also installed some raised garden beds in his back yard.<sup>19</sup>

At the far west end of the property, the Daily lot became overgrown with blackberries.<sup>20</sup> When the blackberries became overgrown and began invading the Rossi/Horvath lot, the Dailys gave permission for Rossi/Horvath to cut back them back.<sup>21</sup> They did clear the blackberries and, having done so, maintained an adjacent area by mowing an area of grass between the properties that extended over the boundary line up to the blackberry bushes.<sup>22</sup>

#### Neighborhood Relationships

Rossi and Horvath enjoyed a neighborhood relationship with the Dailys and the Stouts.<sup>23</sup> Rossi borrowed the Stouts' trailer.<sup>24</sup> The Stouts had a key to the Rossi home and mailbox to keep an eye on things and care for their pets if they were gone.<sup>25</sup>

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<sup>17</sup> CP 64, 68

<sup>18</sup> CP 38-39 and 58

<sup>19</sup> CP 35

<sup>20</sup> CP 34

<sup>21</sup> CP 34, 53 and 64

<sup>22</sup> CP 41, 52-53

<sup>23</sup> CP 56, 64 and 67

<sup>24</sup> CP 40, 58

<sup>25</sup> CP 40, 58

When the Stouts purchased their home in 2013, Mr. Rossi showed Paul Stout his estimate of where he thought the property line between the two lots ran on the ground.<sup>26</sup> He did not mark the line with anything, but rather just sort of described its approximate location and the direction it ran.<sup>27</sup>

#### The Property Line is Surveyed, Marked and Agreed Upon

In April 2016 Rossi and Horvath listed their property for sale.<sup>28</sup> At about that same time Stout was contemplating building a garage.<sup>29</sup> In order to make sure that he did not build in the 30-foot buffer area, he had the property line formally surveyed.<sup>30</sup> The surveyed line was marked with three foot tall stakes that had pink flags.<sup>31</sup> Based upon the survey, the property line was a little bit closer to Rossi's raised garden beds than Stout remembered it to have been pointed out by Rossi.<sup>32</sup> The staked line also revealed that at the west end of the property, an area that Rossi mowed, between his orchard and the blackberry area of the Daily property, extended over the staked line.<sup>33</sup> The stakes also showed that the graveled parking area where Rossi stored his wagon with permission was on the

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<sup>26</sup> CP 58, 64-65

<sup>27</sup> CP 58,65

<sup>28</sup> CP 65, 68

<sup>29</sup> CP 58

<sup>30</sup> CP 58 and 333

<sup>31</sup> CP 61

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

Stout side of the staked line<sup>34</sup> and that a peach tree planted by Rossi was also located on the other side of the stakes.<sup>35</sup>

After the stakes were in the ground, Paul Stout and his wife, Trisha, talked to Rossi about the survey.<sup>36</sup> They were outdoors and they checked out the staked line.<sup>37</sup> When they got to the rear of the property, Rossi acknowledged that the tree he planted was on the Stout property and gave it to them.<sup>38</sup> Not long after the conversation with Rossi, they dug up the tree and replanted it to an area of their property where they could water and care for it.<sup>39</sup> Both property owners agreed that staked line was their boundary line.<sup>40</sup> In fact, Rossi commented that it was probably a good thing that the survey had been done because there would be no confusion for a new buyer.<sup>41</sup> By that time, the Smiths had made an offer on the Rossi/Horvath home.<sup>42</sup>

#### Smiths Buy with Actual Notice of the Boundary Line

After Rossi and Stout agreed that their boundary line was where the stakes from the survey were placed in the ground, and that the stakes

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<sup>34</sup> CP 59

<sup>35</sup> CP 35, 59, 62

<sup>36</sup> CP 59 and 61-62

<sup>37</sup> *Id.*

<sup>38</sup> CP 59, 62

<sup>39</sup> *Id.*

<sup>40</sup> CP 59, 65

<sup>41</sup> *Id.*

<sup>42</sup> CP 65

would serve to eliminate any confusion about it, the Smiths visited the property for the express purpose of investigating the survey stakes that had been installed *before* they would close on the purchase.<sup>43</sup> Perry Smith met at the property with his realtor, Rossi, Horvath and their realtor and observed that there were wood stakes with pink tape that cut through a portion of the planting area, parking area and lawn that was mowed by Rossi.<sup>44</sup> Mr. Smith admits that after seeing these stakes the realtors scheduled a *second* walk through the next day for the specific purpose of investigating and walking the property line as identified by the flagged survey stakes.<sup>45</sup> Perry Smith and Rossi walked along the line and Mr. Rossi answered questions that Mr. Smith had about the staked line.<sup>46</sup> The Smiths had the opportunity to walk away from the purchase if they were not comfortable with the marked boundary line.<sup>47</sup> Perry Smith stated that he was comfortable with surveyed line.<sup>48</sup> The Smiths closed the transaction and purchased the Rossi/Horvath home in May of 2016.<sup>49</sup> Rossi and Horvath had multiple back up offers.<sup>50</sup>

#### The Smiths File Unfounded Complaints unrelated to Adverse Possession

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<sup>43</sup> CP 65, 69

<sup>44</sup> CP 71

<sup>45</sup> *Id.*

<sup>46</sup> CP 32

<sup>47</sup> CP 41

<sup>48</sup> *Id.*

<sup>49</sup> CP 66

<sup>50</sup> CP 163

After they purchased and attempted to use areas of property that were clearly beyond the surveyed line, the Stouts notified them of and objected to the use of their property and demanded that they cease.<sup>51</sup> Within a month of moving into their home, the Smiths began filing complaints with Pierce County about the Stouts' activities on their own property.<sup>52</sup> They filed repeated complaints about clearing, grading, building an ATV track and wetlands violations in the buffer area.<sup>53</sup> The fill and grade violation was determined to be "unfounded," the complaint about an ATV track was determined to be "unfounded," and the wetland violation allegation was found to be "no problem."<sup>54</sup> After dealing with the unfounded complaints, Stout began construction of a fence on the staked line.<sup>55</sup> When the complaints to the county failed, the Smiths filed this lawsuit for adverse possession.<sup>56</sup>

The Smiths Claim Adverse Possession of Areas Excluded by the Stakes

Without contacting Rossi or Horvath, the Smiths filed suit for adverse possession of a "ten-foot strip of property that lies north of the property line" based upon the maintenance of "trees, shrubs, flowers and

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<sup>51</sup> CP 72

<sup>52</sup> CP 325-331

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> CP 72

<sup>56</sup> CP 1-3

other landscaping” and a “parking strip” by their predecessors in interest, Rossi and Horvath.<sup>57</sup> There is no evidence in the record of any survey other than the Aspen Survey for the Stouts.<sup>58</sup> Although Perry Smith claims to have also obtained a survey of the property line, there is no evidence in the record of such. The “boundary drawing” (not a recorded survey) to which the Appellants refer throughout their brief was not a part of the trial court record based upon an objection by the Stouts as to its admissibility<sup>59</sup> and the Appellants voluntary withdrawal of the documents from the record.<sup>60</sup> The Order Granting Summary Judgment specifically excluded these proffered exhibits<sup>61</sup>. In addition, appellants have improperly referred to “Exhibit 14” of Rossi’s deposition in their argument<sup>62</sup> but that exhibit is also not part of the trial court record. On an appeal from a summary judgment, evidence that is absent from the materials considered by the trial judge cannot be considered on appeal.<sup>63</sup>

#### Summary Judgment is Granted

Because it was undisputed that the two co-terminus property owners, Rossi and Stout, had agreed upon and designated their boundary

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<sup>57</sup> CP 1-3; 66 and 69.

<sup>58</sup> CP 333

<sup>59</sup> CP 139

<sup>60</sup> VRP 1-19-18 at pgs 9, 20 and 24.

<sup>61</sup> CP 164-65 (Exhibit A to Plaintiffs’ Response and Exhibit C to Perry Smith’s declaration excluded)

<sup>62</sup> Appellants Brief pages 11-13 and footnote 50.

<sup>63</sup> *Gain v. Carroll Mill Co.*, 114 Wash. 2d 254, 261, 787 P.2d 553, 557 (1990)

line on the ground and because the Smiths clearly purchased their property with actual notice of it, the court dismissed the Smiths adverse possession claim as a matter of law.

#### The Court Enlarged the Time for hearing the Request for Fees

Once Summary Judgment was granted, the Stouts moved for an award of fees under RCW 7.28.083, having successfully defended the claim of adverse possession.<sup>64</sup> The motion was filed three days late because counsel for the Stouts had a sudden and unexpected request from a colleague, diagnosed with a serious health problem, to assist with a matter needing immediate attention.<sup>65</sup> After the Smiths objected, claiming the motion was untimely, the Stouts moved to enlarge the time for filing under CR 6(b). The motion was made in the reply to dismiss Smith's claim that the fee request was untimely.<sup>66</sup> Such a motion can be made in writing or orally at a hearing.<sup>67</sup> The trial court exercised its discretion, enlarged the time for filing the fee request<sup>68</sup> and awarded the Stouts their fees under RCW 7.28.083.<sup>69</sup>

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<sup>64</sup> CP 166-172

<sup>65</sup> CP 238-252

<sup>66</sup> CP 232-36

<sup>67</sup> CR 7 (b)(1) in addition, the Smiths had notice of Stouts intent to request enlargement of the time under *O'Neill* several days before the Reply was filed see CP 219-220

<sup>68</sup> CP 314-15

<sup>69</sup> CP 318-320

## IV. ARGUMENT

**A. The trial court properly dismissed the Smiths claim of adverse possession where the undisputed facts show that the previous owners of the adjoining properties established the property line by parol agreement and the Smiths, as bona fide purchasers for value, took possession with reference to that line.**

### 1. Standard of Review

When reviewing an order granting summary judgment, this court engages in the same inquiry as the trial court, considering all facts and reasonable inferences in the light most favorable to the nonmoving party.<sup>70</sup> This court may affirm on any basis supported in the record and the moving party bears the burden of showing the absence of a material issue of fact.<sup>71</sup> (1994). Once the moving party has established that there is no dispute as to any issue of material fact, the burden shifts to the nonmoving party to establish the existence of an element material to its case.<sup>72</sup> Questions of fact may be determined on summary judgment as a matter of law where reasonable minds could reach but one conclusion.<sup>73</sup>

### 2. Summary Judgment in Adverse Possession Cases

Whether certain facts constitute adverse possession is an issue of law

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<sup>70</sup> *Kahn v. Salerno*, 90 Wn.App. 110, 117, 951 P.2d 321 (1998).

<sup>71</sup> *Redding v. Virginia Mason Med. Ctr.*, 75 Wn.App. 424, 426, 878 P.2d 483

<sup>72</sup> *Kahn*, *supra* at 117.

<sup>73</sup> *Alexander v. County of Walla Walla*, 84 Wn.App. 687, 692, 929 P.2d 1182 (1997).

for the court to decide.<sup>74</sup> To establish a claim of adverse possession, a party's possession of property must be: (1) exclusive, (2) actual and uninterrupted, (3) open and notorious, and (4) hostile and under a claim of right.<sup>75</sup> All of these elements must exist concurrently for at least 10 years.<sup>76</sup> Because courts presume that the holder of legal title is in possession, “the party claiming to have adversely possessed the property has the burden of establishing the existence of each element.”<sup>77</sup>

A defendant can move for summary judgment in one of two ways. First, the defendant can set out its version of the facts and allege that there is no genuine issue as to the facts as set out.<sup>78</sup> Alternatively, a party moving for summary judgment can meet its burden by pointing out to the trial court that the nonmoving party lacks sufficient evidence to support its case.<sup>79</sup> One who does not himself acquire title by adverse possession must show his privity to the one who did so acquire title if he is basing his claim upon his predecessor's title<sup>80</sup>

In this case, the undisputed facts show that the Smiths cannot prevail as a matter of law because they bought the property with actual

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<sup>74</sup> *Miller v. Anderson*, 91 Wn. App. 822, 828, 964 P.2d 365, 369 (1998).

<sup>75</sup> *Chaplin v. Sanders*, 100 Wn. 2d 853, 857, 676 P.2d 431 (1984).

<sup>76</sup> RCW 4.16.020.

<sup>77</sup> *ITT Rayonier, Inc. v. Bell*, 112 Wn. 2d 754, 757, 774 P.2d 6 (1989).

<sup>78</sup> *Hash v. Children's Orth Hosp. & Med. Ctr.*, 110 Wn. 2d 912, 916, 757 P.2d 507 (1988).

<sup>79</sup> *Young v. Key Pharma. Inc.*, 112 Wn. 2d 216, 225 n.1, 770 P.2d 182 (1989) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)).

<sup>80</sup> *El Cerrito, Inc. v. Ryndak*, 60 Wash. 2d 847, 855–56, 376 P.2d 528, 533 (1962)

notice of the staked property line based upon a parol agreement made by their predecessors in interest and the respondents. Consequently, regardless of what actions Rossi and Horvath may have taken with respect to “maintaining trees, shrubs, flowers or other landscaping” or parking a wagon that might have constituted some evidence of adverse possession, the agreement to recognize the boundary as surveyed on the ground, renders any such actions irrelevant as a matter of law.

**B. The trial court properly considered the existence of a parol boundary line agreement as a defense to the Smiths claim of adverse possession where the agreement was made by their predecessors in interest upon whose actions they exclusively rely to prove adverse possession.**

1. The undisputed facts establish a boundary line by parol agreement.

In addition to the doctrine of adverse possession, Washington recognizes four practical location doctrines that can change or establish property boundaries.<sup>81</sup> They are: parol agreement, estoppel in pais, location by a common grantor and mutual recognition and acquiescence.<sup>82</sup> In this case, regardless of the actions taken by Mr. Rossi and Ms. Horvath (the Smiths’ predecessors in interest) prior to the sale of their property, the boundary line was agreed upon and set prior to the time they sold to the

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<sup>81</sup> *Lamm v. McTighe*, 72 Wn. 2d 587, 592, 434 P.2d 565 (1967).

<sup>82</sup> *Id.*

Smiths. Because the Smiths took possession and purchased the property with respect to the property line to which their Sellers had agreed, their claim of adverse possession (based entirely upon the alleged actions of their predecessors in interest) fails.

The elements of the practical location doctrine known as boundary by parol agreement are as follows:

- (1) There must be either
  - (a) a bona fide dispute between two coterminous property owners as to where their common boundary lies upon the ground **OR**
  - (b) both parties must be uncertain as to the true location of such boundary;
- (2) the owners must arrive at an express meeting of the minds to permanently resolve the dispute or uncertainty by recognizing a definite and specific line as the true and unconditional location of the boundary;
- (3) they must in some fashion physically designate that permanent boundary determination on the ground; **AND**
- (4) they must take possession of their property by such occupancy or improvements as would reasonably give constructive notice of the location of such boundary to their successors in interest; **OR** (as an alternative to (4)...), (4a) bona fide purchasers for value must take with reference to such boundary.<sup>83</sup>

Uncertainty. The adjoining parties need not be engaged in “an open dispute” in order to fix their boundary by parol agreement; it is sufficient that there be such uncertainty as to warrant the calling of a

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<sup>83</sup> *Piotrowski v. Parks*, 39 Wn. App. 37, 40, 691 P.2d 591, 593 (1984) quoting *Johnston v. Monahan*, 2 Wn. App. 452, 455, 469 P.2d 930 (1970)

surveyor.<sup>84</sup> There was sufficient uncertainty regarding the line for the Stouts to have called a surveyor to mark it. Mr. Stout was uncertain about where the line was located and needed its location to locate the 30-foot buffer zone.<sup>85</sup> The reason for his need to resolve his uncertainty is irrelevant. The testimony upon which the Smiths rely to suggest otherwise is inadmissible hearsay.<sup>86</sup> There was sufficient uncertainty on the part of Mr. Rossi because he admits that he was not sure of the exact location of the line<sup>87</sup> and at one point testified that “by line of sight” he thought the rock wall was the property line.<sup>88</sup> He admitted that he was uncertain about its exact location when he attempted to point it out to Mr. Stout because it had been over 15 years since the property had been surveyed.<sup>89</sup> Ms. Horvath testified that she and her husband had not drawn lines on the ground and did not know exactly where the property line was.<sup>90</sup> The testimony upon which the Appellants rely to suggest there was no uncertainty on Rossi’s part<sup>91</sup> actually reveals he was inconsistent and unclear about where the line was. He testified that when he planted the

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<sup>84</sup> *Id.* at 42

<sup>85</sup> CP 58

<sup>86</sup> Appellants Brief, pg 31, footnote 129

<sup>87</sup> CP 65

<sup>88</sup> CP 34

<sup>89</sup> CP 65

<sup>90</sup> CP 52-53

<sup>91</sup> Appellants Brief, pages 29-30 confirms the inconsistencies and uncertainty about the exact location of the boundary line.

most recent peach tree, he believed that it was on his property.<sup>92</sup> The Stout survey, however, revealed it was not.<sup>93</sup> The law does not require that there be a dispute, simply that there be uncertainty sufficient to warrant the calling of a surveyor. Here the undisputed facts show there was uncertainty by both property owners about the location of the property line and, with one of the properties listed for sale, it was prudent to resolve any uncertainty by having a formal survey of the line done.

The Line was Physically Designated on the Ground. It is undisputed that the property line was marked on the ground by survey stakes with pink flags.<sup>94</sup> The law requires only that the neighbors must “physically **designate**” their agreed line on the ground<sup>95</sup>. It is certainly satisfied if they or one of them installs some improvement like a fence or wall that clearly marks the line. Note that the courts in *Piotrowski* and *Johnston* did not say “install” or “build”; they said “designate.” Does that mean the neighbors may “mark” their agreed line by adopting some existing physical object(s) already on the ground, such as a man-made fence, wall, hedge, road, driveway or a natural feature, such as two trees at either end of a lot or the line of a steep bluff? It seems clear that they

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<sup>92</sup> CP 36

<sup>93</sup> CP 59, 62

<sup>94</sup> CP 59, 65, 68

<sup>95</sup> *Johnston v. Monahan*, 2 Wn. App. 452, 469 P.2d 930 (1970)

might adopt such a “designation” without installing or building anything. Why should they have to tear down an old fence or destroy a concrete wall or driveway and replace it with a new one if the old one is on the line they want? Assuming the successors are notified of the fence line, an old fence is as good notice of the line to their successors in title as a new one would be. In this case the Appellants were told about the staked property line, inspected it on two separate occasions, were given the opportunity to walk away from the purchase if they did not like it and chose to close anyway.

It is undisputed that the flagged stakes were in the ground and visible before the Smiths purchased and that they were upset by them.<sup>96</sup> They walked the line twice. They said they were comfortable with the line. The fact that the stakes may have been removed by the time of oral argument on a motion for SJ one and a half years later, does not mean that the Smiths did not have actual notice of the line marked on the ground by stakes and flags.<sup>97</sup> If that were true, a person opposing a parcel boundary line agreement could defeat it simply by removing the demarcation on the ground, whether it be a fence, row of trees or survey stakes before the date for hearing or trial. In cases where a neighbor has improperly removed a fence based upon a new survey, forcing his neighbor to sue to restore the

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<sup>96</sup> CP 51

<sup>97</sup> Although appellants suggest that the stakes were somehow “haphazard” there is no evidence in the record of that. Footnote 130 does not cite to any such evidence.

property line based on an old fence, the absence of the fence at the time of oral argument or trial does not mean that it was not sufficient to establish a boundary line based upon its existence at the time in question. The undisputed facts reveal the coterminous property owners had “designated” the line on the ground to which they had agreed: the flagged survey stakes.

Uncertainty. The Parties Expressly Agreed to recognize the surveyed line as their property line to resolve any uncertainty about its location. Rossi and Stout have both testified that they agreed that the stakes marked the property line between their parcels.<sup>98</sup> They both agreed that it resolved any uncertainty about where the line was located.<sup>99</sup> In fact, they specifically agreed that it would resolve any uncertainty for the any new buyer of Rossi’s home.<sup>100</sup> In reliance on the agreement, the Stouts transplanted one of the peach trees that Rossi planted on the Stout side of the staked line<sup>101</sup>, commenced construction of a fence on that line and placed logs to prevent parking across the line.<sup>102</sup> The testimony regarding the agreement between Rossi and Stout is unrefuted and they are the only two parties that matter: the two coterminous property owners.

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<sup>98</sup> CP 59,65

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> CP 59, 62

<sup>102</sup> CP 72

Actual Notice. Lastly, it is undisputed that the Smiths, as bona fide purchasers for value, took with reference to the staked property line. The three foot tall stakes were visible on the ground<sup>103</sup>, the Smiths inspected the property after the stakes were installed along the property line, they confirmed that that were “comfortable with the surveyed line,” and, although they had the opportunity to walk away from the sale, they chose to purchase knowing exactly where the property line between the two properties was located on the ground.<sup>104</sup> Perry Smith admitted that before they purchased the property, he had his wife saw “wood survey stakes with pink tape that cut through a portion of the planting area, parking area and lawn that had been maintained by the sellers”.<sup>105</sup> These are the exact areas to which the Smiths claimed ownership in their lawsuit for adverse possession.<sup>106</sup> Mr. Smith has also admitted that after seeing the stakes, the realtors scheduled a **second** walk through the next day for the specific purpose of investigating and walking the property line as identified by the flagged survey stakes.<sup>107</sup> Mr. Rossi testified that “the whole reason that we met out there was their concern about the property

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<sup>103</sup> CP 61

<sup>104</sup> CP 32, 56, 66, 69

<sup>105</sup> CP 71

<sup>106</sup> CP 2

<sup>107</sup> CP 71

stakes”.<sup>108</sup> The law does not require that the Smiths have knowledge of the parol agreement itself, only that they have knowledge of the line, whether constructive or by actual notice.<sup>109</sup> In this case, the Smiths have admitted that they saw the flagged and staked line and investigated it.<sup>110</sup>

The Appellants contend that Rossi made representations to them about their ability to use property that was, according to the stakes, owned by the Stouts.<sup>111</sup> Such representations, even if made, have no bearing on the claim of adverse possession against the Stouts<sup>112</sup>. They further misrepresent the facts arguing that Rossi and Horvath did not disclose the existence of a boundary agreement when asked such a question on the Form 17 Seller Disclosure Statement<sup>113</sup> when in fact they simply forgot to answer the question at all.<sup>114</sup> Notably absent from record is any request by the Smiths or their realtors to have the question answered, even after they became concerned with the stakes on the ground.

2. There is no legal requirement that elements occur sequentially.

There is no legal requirement that the elements of parol agreement

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<sup>108</sup> CP 41

<sup>109</sup> *Piotrowski v. Parks*, 39 Wn. App. 37, 40, 691 P.2d 591, 593 (1984)

<sup>110</sup> CP 71

<sup>111</sup> Appellants Brief pg 32.

<sup>112</sup> Rossi/Horvath are not parties to this suit and the Appellants have not made any claims against them which, most likely, were precluded by the terms of their Real Estate Purchase and Sale Agreement, the doctrine of merger and estoppel.

<sup>113</sup> Appellants Brief, pg 32

<sup>114</sup> CP 121

occur in separate steps or sequences but even if such was required the undisputed facts in this case proved a parol agreement. There are admittedly very few cases involving boundary line by parol agreement. While the facts of some cases may have developed in a particular way, there is nothing that requires a special sequence or lapse of time between the required elements. There is nothing that precludes the marking of the line and the agreement upon it from occurring contemporaneously. In the most recent case of *Piotrowski v. Parks*,<sup>115</sup> the court's holding made no mention that there was a required sequence of events:

We hold, therefore, that an oral agreement between owners of adjoining tracts of land (1) permanently fixing a common boundary that (2) had been uncertain, becomes binding and enforceable upon the parties and their successors in interest after (3) they have in some fashion designated that boundary on the ground by erection of a structure capable of evoking inquiry as to its significance, and after (4) they have taken possession of their property by such occupancy or improvements as would reasonably give constructive notice of the location of such boundary to their successors in interest.

Although the *Piotrowski* holding was based upon constructive notice (because there was no evidence of actual notice) the court acknowledged clearly that the fourth element can be established in the alternative: either constructively or based upon actual notice.<sup>116</sup> *Piotrowski* and *Johnston*

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<sup>115</sup> 39 Wn. App. 37, 46, 691P.2d 591,596 (1984), **rev. den.**, 103 Wn2d. 1031 (1985)

<sup>116</sup> *Id.* at 40.

were both cases that involved constructive notice and whether there was something on the ground sufficient to evoke notice on the part of the successor. However, where there is **actual** notice to a successor in interest, as there was in this case, the alternative test of constructive notice does not apply. Smiths' reliance on the constructive notice element of the doctrine (4 instead of 4(a)) and their argument that the flagged stakes did not constitute a structure sufficient to provoke inquiry notice<sup>117</sup>, is, therefore, clearly misplaced. Imprimatur

The law requires only that the coterminous owners "**in some fashion** designate the boundary on the ground".<sup>118</sup> In light of the Supreme Court's denial of review in the Piotrowski case, the identification of the elements of this practical location doctrine as set forth therein bear the imprimatur of its approval. There is no legal authority that requires that the owners work together to build something on the line or to install the mark together. All that is required is that they both agree on the boundary line and "designate" it as such in some fashion on the ground. Regardless of who called the surveyor to mark the line, the two owners could certainly "designate" those stakes as "the boundary on the ground" and the basis for their agreement. Parties can certainly use monuments already on

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<sup>117</sup> Appellants Brief, 35

<sup>118</sup> *Id.*

the ground such as an old oak tree, a rock wall, a fence post or any number of markers that might already be on the ground and “designate” that they mark the agreed upon boundary line. Survey stakes can be designated as the agreed upon line and when the buyer is shown that line, it is conclusive and binding.

Smiths’ entire case is premised on a claim that the boundary line between the two properties is ten feet north of the line called out in the deeds, based upon adverse possession of areas beyond that line. This is the very nature of adverse possession: relocating boundaries after continuous, exclusive, non-permissive use for 10 years. Under Smiths’ theory to quiet title, by the time Mr. Stout had the property line surveyed in 2016, the boundary line had already been relocated based upon alleged acts of adverse possession by Rossi and Horvath. If adverse possession by Rossi/Horvath (whether by maintenance of flowers, trees, shrubs and other landscaping or by parking a wagon over the property line) had changed the location of the property line (as Smiths contend), they also had the power and the authority to enter into a parol agreement to recognize and agree to the line marked by the pink flagged stakes placed on the ground by the surveyor.

The undisputed facts show that regardless of what actions had been taken over the past 10 or 20 years, none of them were relevant once Rossi

resolved any uncertainty about the property line's location by agreeing with Stout that the staked line was their boundary line and then selling his property to the Smiths with specific reference to that line on the ground. In reliance on the Smiths' confirmation that they were satisfied with the boundary as marked, Rossi/Horvath sold the property to them. Because the boundary line was established by two coterminous property owners **before** Smiths purchased and because they purchased with reference to the newly established boundary line, their claim of adverse possession fails as a matter of law.

3. The Smiths complaints about the buffer area are red herrings.

The issue before the Court also has nothing to do with alleged violations of the short plat restrictions created in the 30-foot buffer area on the Stouts' property. Repeated complaints by the Smiths to the County enforcement division have all been determined to be unfounded.<sup>119</sup> Because the Smiths have no private right of action to sue the Stouts about the buffer area and because the county found their complaints to be unfounded, they resorted to suing them for adverse possession of areas in the buffer zone that they knew were not included in their purchase. The myriad of allegations by Perry Smith relating to the use of the buffer area

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<sup>119</sup> CP 325-331

have no relevance whatsoever and are set forth only to disparage the Stouts in some way and to divert the Court's attention from the only issue at hand: was the property boundary established by parol agreement such that any claim of adverse possession is precluded as a matter of law?

4. The Smiths cannot “tack” to prove adverse uninterrupted use for 10 years.

Because the Smiths have not owned their property for 10 years, they must establish privity with a prior occupant who has held continuously and adversely to the true title holder in order to “tack” onto their use to compute the required 10-year period of adverse holding.<sup>120</sup> The possession must be uninterrupted.<sup>121</sup> The Supreme Court has described the concept of tacking as used to establish adverse possession as follows:

...it is apparent that appellant and his predecessors were claiming more land than their deeds described. *It is sufficient to state that the description in the deeds will be held to include the land in dispute in this case*, since, where there is privity between successive occupants holding adversely to the holder of the true title continuously, the successive periods of occupation may be united or tacked to each other to make up the time of adverse holding. Naher v. Farmer, 60 Wash. 600, 111 P. 768, and cases cited.’ (Italics ours.)

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<sup>120</sup> *Lilly v. Lynch*, 88 Wn. App. 306, 312–13, 945 P.2d 727, 731 (1997)

<sup>121</sup> *Chaplin v. Sanders*, 100 Wn. 2d 853, 857, 676 P.2d 431, 434 (1984)

It is not disputed that the use of the property by the Woodrings was such as to establish a prima facie case of meeting all the qualifications of adverse possession **in the absence of any circumstances showing a contrary intention**. We stated in Nixon v. Merchant, 1943, 19 Wash.2d 97, 141 P.2d 411, 412, quoting from City of Rock Springs v. Sturm, 39 Wyo. 494, 273 P. 908, 97 A.L.R. 1, as follows:

“\* \* \* the actual occupation, use, and improvement of the premises of the claimant as if he were in fact the owner thereof will, **in the absence of explanatory circumstances showing the contrary**, be sufficient to raise a presumption of his entry and holding as absolute owner, and, unless rebutted, will establish the fact of a claim of right.” (Italics ours.)<sup>122</sup>

The *Buchanan* decision is a Supreme Court case that explains why a new owner can “tack” onto a prior owner’s adverse occupation. The decision explains the rationale underlying “tacking”. The Supreme Court reasons that even though the occupation, use and improvement of the premises in the manner of a true owner can result in a prima facie case of adverse possession, that prima facie evidence can be overcome by circumstances showing that there was a contrary intent sufficient to rebut that presumption.<sup>123</sup> Although the *Buchanan* decision predates *Chaplin v. Sanders*<sup>124</sup>, it was not overruled by that case. In *Chaplin*, the court focused on the element of “hostility” holding as follows:

The “hostility/claim of right” element of adverse possession requires only that the claimant treat the land as \*861 his own as against the world throughout the statutory period. The nature of his possession

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<sup>122</sup> *Buchanan v. Cassell*, 53 Wn. 2d 611, 614, 335 P.2d 611 (1959)

<sup>123</sup> *Id.*

<sup>124</sup> *Chaplin v. Sanders* 100 Wn. 2d 853, 676 P.2d 431, 436 (1984)

will be determined solely on the basis of the manner in which he treats the property. His subjective belief regarding his true interest in the land and his intent to dispossess or not dispossess another is irrelevant to this determination.<sup>125</sup>

*Chaplin* was focused on the adverse possessor's subjective intent to disposes the title holder of the land prior to transfer. The intent of a claimant regarding the transfer of the land adversely possessed to a new owner, however, should be relevant to rebutt the prima facie case where the property line is surveyed, agreed upon and the property is sold with respect to that line. The Supreme Court's reasoning in *Buchanan* is consistent with *Chaplin* in that it recognized that the test of adverse possession is the actual occupation, use, and improvement of the premises by the claimant "as if he were in fact the owner thereof".<sup>126</sup> However, In *Buchanan*, the Supreme Court also held that the prima facie case created by such use was rebuttable and could be overcome with evidence of explanatory circumstances to the contrary. In this case, there is clear evidence of such explanatory circumstances. When Rossi and Stout made the parol agreement, any adverse use by Rossi and Horvath, was "interrupted" and could not be the subject of tacking by the Smiths.

Rossi and Horvath made it clear that they were not selling property beyond the staked boundary line. It is not a situation where they had

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<sup>125</sup> Id. at 860–61

<sup>126</sup> *Buchanan*, *supra* at 614.

adversely possessed land and had not mentioned that land in the deed of transfer. The absence of a legal description in the deed that includes the property claimed to have been adversely possessed is insufficient to rebut evidence of adverse use.<sup>127</sup> However, in this case, it is undisputed that the sellers put the Smiths on actual notice that they were not conveying anything more than the property up to the deeded line that had been surveyed and staked. There is no evidence of Smith contradicting Rossi's testimony regarding notice of the line and the opportunity for the appellants to walk away from the purchase.

Even if one assumes that the use and occupation of the disputed area by Rossi and Horvath constituted adverse use, the undisputed facts regarding the parol agreement and the Smiths' actual notice of the staked property line, constitute "explanatory circumstances showing the contrary" under *Buchanan* that preclude taking to prove the element of ten years of uninterrupted use. Once Rossi and Horvath made it clear that they were conveying only the property up to the marked line, the element of uninterrupted use was rebutted. While the actions of Rossi and Horvath may have met the requirements to establish a *prima facie* case for adverse possession, their parol agreement rebutted the presumption that arises

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<sup>127</sup> *Id.* at 615

when a predecessor in interest uses and occupies the property as a true owner would, interrupting the adverse use and preventing the “tacking” that is necessary for the Smiths to prove their claim.

If the Smiths must stand in the shoes of Rossi and Horvath to meet the 10-year requirement of adverse occupation, they must also stand in their shoes for purposes of their binding parol agreement. Once the parol agreement was made, Rossi and Horvath relinquished any claim that their actions had established adverse possession. Consequently, the Smiths have no adverse use to which they can “tack” their claim. Because of the parol agreement, the Smiths would have to establish 10 years of their own adverse use, which they cannot do.

**5. Parol Agreement is not an affirmative defense and, even if it is, the Smiths cannot claim surprise when it was raised in the motion for summary judgment because they had specific and detailed knowledge of it, an opportunity to conduct discovery regarding it and made no motion for a continuance.**

Smiths claim that parol agreement is an affirmative defense that the Stouts’ waived by not setting it forth in their Answer. The existence of a parol agreement to recognize the staked surveyed line as the boundary by the same people that the Smiths claim adversely possessed the Stouts’ property is simply a defense to that claim as set forth in the preceding sections. The Stouts denied the allegations of adverse use set forth in the

Complaint. Their position is that the boundary line is the line as set forth in the deeds and that it has not been altered in any way by the acts alleged to have amounted to adverse possession.

However, even if the boundary line relocation doctrine of parol agreement could be considered an affirmative defense, there was no prejudice from Stouts' first lawyer's failure to plead it as an affirmative defense<sup>128</sup> because the Smiths were fully aware of this specific defense. When the Stout's new lawyer entered the case, she sent a letter to their attorney refuting the claim of adverse possession and also setting forth specifically each and every defense that might be raised, including parol agreement.<sup>129</sup> Counsel was notified not only with the legal defenses but also was provided with sworn statements from her client's predecessors in interest who had owned and used the property for over 20 years.<sup>130</sup> Smiths were thus fully informed of the theories for the defense, the relevant witnesses and could have asked any and all questions during depositions that related to discussions and/or agreements between the neighbors regarding their property line.

The Smiths allege "unfair surprise" that precluded their attorney from

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<sup>128</sup> The Answer does, however, "reserve the right to name additional affirmative defenses at the completion of discovery."

<sup>129</sup> CP 148-49

<sup>130</sup> *Id.*

being able to question the witnesses properly regarding parcel agreement and an inability to “refute the facts”.<sup>131</sup> After receiving the declarations, depositions were scheduled and, despite hearing testimony about conversations relating to the staked line, Smiths’ counsel simply failed to ask relevant follow up questions. Ms. Horvath testified as follows:

10 Q Did they ever talk to you about property lines?  
11 A Yes.  
12 Q What did they say?  
13 A I was not usually present for those conversations.  
14 It was usually a conversation between Paul and Doug.  
15 Again, my recollection is, Paul came over to say  
16 that they were going to have the property line  
17 surveyed; and then after it was, he and Doug went out  
18 to sort of walk it. And as I recall, my conversation  
19 with my husband, Doug, was that it was where the  
20 Dailys' line had been too; that it all seemed to be  
21 accurate.<sup>132</sup>

Although Mr. Rossi’s deposition was taken **after** Ms. Horvath’s, counsel for the Smiths did not ask about any conversations he had with Paul Stout about the property line to which his wife had referred. Smiths’ attorney was aware of all the legal theories for the Stouts’ defense and had information that should have allowed for any necessary and relevant questioning of the witnesses. The fact that defense counsel later followed up on the conversation to which Ms. Horvath referred, outside of the deposition, does not mean that the Smiths could not have asked the same

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<sup>131</sup> Appellants Brief at 27

<sup>132</sup> CP 55

questions during it.

The testimony of Mr. Stout and Mr. Rossi were both submitted in support of the Stouts Motion for Summary Judgment on December 15, 2017 at the time it was filed.<sup>133</sup> The Smiths' allegation that evidence of the parol agreement was only submitted with the Reply Brief<sup>134</sup> is false. The Smiths responded to the argument regarding parol agreement and, although they did claim in a footnote that it was barred because it was not plead as an affirmative defense<sup>135</sup>, at no point did they request a continuance under CR 56(f) to further explore the issue or address the claimed prejudice. The discovery cutoff had not run so a continuance, to the extent they could have met the requirements of CR 56(f), could have been granted. In addition, the Answer did reserve the right to add additional affirmative defenses<sup>136</sup> and the summary judgment hearing was very early in the case. The Answer was effectively amended, and properly so, as trial was months away. Unfair surprise is a factor which may be considered in determining whether permitting amendment would cause prejudice.<sup>137</sup> There was no unfair surprise as the Smiths' attorney was on notice of the potential existence of a parol agreement and was aware of all

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<sup>133</sup> CP 57-59; 63-66

<sup>134</sup> Appellants Brief, pgs 26-27

<sup>135</sup> CP 134

<sup>136</sup> CP 4-6

<sup>137</sup> *Wilson v. Horsley*, 137 Wash. 2d 500, 507, 974 P.2d 316, 320 (1999)

witnesses who would have had to be a party thereto. Even at trial, the court may allow the amendment of an Answer to add an affirmative defense. It is an abuse of discretion to refuse leave to amend the answer at trial to set up an affirmative defense (setoff), where the plaintiff knew from beginning that the defendant claimed such defense.<sup>138</sup>

**6. The trial court did not abuse its discretion by enlarging the time for filing a motion for attorneys' fees.**

1. Standard of Review

The general standard of review for a trial court's exercise of equitable authority is abuse of discretion.<sup>139</sup> A trial court abuses its discretion when its decision or order is manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons.”<sup>140</sup> Discretion is abused only where no reasonable man would take the view adopted by the trial court.<sup>141</sup> If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.<sup>142</sup> A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are

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<sup>138</sup> *Jensen v. Kohler*, 93 Wash. 8, 159 P. 978 (1916)

<sup>139</sup> *Kave v. McIntosh Ridge P. Rd. Ass'n*, 198 Wn. App. 812, 819, 394 P.3d 446 (2017)

<sup>140</sup> *Anfinson v. FedEx Grd Package Sys., Inc.*, 174 Wn. 2d 851, 860, 281 P.3d 289 (2012)

<sup>141</sup> *Jankelson v. Cisel*, 3 Wash. App. 139, 142, 473 P.2d 202, 205 (1970)

<sup>142</sup> *Id.*

unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.<sup>143</sup>

2. Only the written Order Enlarging Time for Filing Motion for Fees is properly challenged as error.

The only ruling that can be the subject of an assignment of error is the order itself, not prior oral rulings.<sup>144</sup> Parts of the oral decision of the trial court cannot be assigned as error because the court's final determination is expressed in its findings, conclusion and judgment.<sup>145</sup> Here the Court's order dated 2-23-18, two weeks after the oral argument, is the Order to which the Smiths can assign error. It simply states that "the Stouts motion to enlarge the time for filing the Stouts' Motion for Attorneys' Fees is GRANTED..."<sup>146</sup> There are no findings of fact in the Order. Two weeks after the motion was argued and the Judge made an oral ruling, the court entered the written order in the record, rejecting the Smiths proposed order that contained a proposed finding on excusable neglect.<sup>147</sup> It is, therefore, improper to rely upon or challenge the Court's oral statements not

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<sup>143</sup> *Fowler v. Johnson*, 167 Wash. App. 596, 604, 273 P.3d 1042, 1047 (2012).

<sup>144</sup> *El Cerrito, Inc. v. Ryndak*, 60 Wash. 2d 847, 857, 376 P.2d 528, 533-34 (1962)

<sup>145</sup> *Id.*

<sup>146</sup> RP 314-15

<sup>147</sup> VRP 374

contained within the written order. Additionally, on appeal, the court can affirm the trial court's order on any grounds.<sup>148</sup>

3. No abuse of Discretion.

The Court has discretion to enlarge the time within which a motion for fees can be made even after the time for filing has run where there is no prejudice in responding to the motion. In *O'Neill v. City of Shoreline*<sup>149</sup>, the court held that failure to file a motion to enlarge time within ten days after entry of judgment did not result in a waiver of the right to recover attorney fees and costs. The court also found that the 10-day limit in CR 54(d)(2) was not jurisdictional, allowing the trial court to enlarge the time for filing a motion for attorneys' fees where there is no prejudice.<sup>150</sup> The Court held that a party establishes prejudice by showing "a lack of actual notice, a lack of time to prepare for the motion, and no opportunity to provide countervailing oral argument and submit case authority".<sup>151</sup>

Based upon the court's definition of prejudice, there is none in this case. Although the motion was filed three days late, had it been filed on Monday January 29 (which would have been timely) the motion would still have been heard on February 9 because Pierce County motions are

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<sup>148</sup> *Bank of Nova Scotia v. Tschabold Equip. Ltd.*, 51 Wn. App. 749, 754 P.2d 1290 (1988)

<sup>149</sup> *O'Neill v. City of Shoreline*, 183 Wn. App. 15, 332 P.3d 1099, 1104 (2014)

<sup>150</sup> *Id.* at 22.

<sup>151</sup> *Id.*

heard only on Fridays<sup>152</sup>. The response would still have been due on Wednesday February 7 at noon<sup>153</sup>. The Smiths had notice of the legal basis for the claim for fees (not only with the motion but also in the Answer, the letter to counsel, and the Motion for Summary Judgment), had adequate time to prepare a response and to submit case authority.

The *O'Neill* case is directly on point. The analysis by the Court reveals that the only consideration for enlargement of the time limits under CR 54(b) is prejudice to the party in being notified and able to oppose the fee award. The Court explained its reasoning as follows:

The City contends that the trial court erred by considering the O'Neills' motion for determination of the amount of fees and costs because they filed it more than 10 days after the court entered a stipulated judgment for damages in their favor. **The City asserts that the trial court must, but did not, make a finding of excusable neglect before it could consider the O'Neills' untimely motion. We disagree.**

CR 54(d)(2) requires a party seeking attorney fees and expenses to file a claim by motion "no later than 10 days after entry of judgment." CR 6(b) provides procedures for enlarging the time specified in this rule. CR 6(b) specifically prohibits extending the time for taking action under rules 50(b), 52(b), 59(b), 59(d), and 60(b). **The O'Neills never filed a motion to enlarge time. The City claims that this omission resulted in the O'Neills' waiver of any right to recover fees and costs...**In *Goucher*, the defendant filed a motion in limine the first day of trial, in violation of the time requirements of CR 6(d). Our Supreme Court rejected the plaintiff's contention that the trial court erred in considering the motion, stating, " 'CR 6(d) is not jurisdictional, and that reversal for failure to comply requires a

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<sup>152</sup> PCLR 7(a)(1)

<sup>153</sup> PCLR 7(a)(5)

showing of prejudice.' " A party establishes prejudice by showing "a lack of actual notice, a lack of time to prepare for the motion, and no opportunity to provide countervailing oral argument and submit case authority."

The City has offered no meaningful distinction between the time requirements of CR 6(d) and CR 54(d)(2), and we see none. The identification in CR 6(b) of specific time requirements in rules that cannot be enlarged strongly supports the conclusion that Goucher applies to the other time requirements of the civil rules. Here, the City conceded at oral argument that it demonstrated no prejudice to the trial court. Therefore, **even if the O'Neills failed to comply with the 10-day time limit, they did not waive their right to recover fees.**<sup>154</sup>

Stouts raise identical arguments here that were rejected by the Court in *O'Neill*. They also rely upon *Corey v. Pierce County*<sup>155</sup> to argue that excusable neglect must be shown. The *O'Neill* decision specifically rejected reliance on *Corey* stating that "Corey merely affirmed a trial court's exercise of discretion to enforce the time requirements of CR 54(d)(2) and did not address whether a court **must** enforce them".<sup>156</sup> The Court can exercise its discretion to enlarge the period where no prejudice with respect to the motion for fees is shown.<sup>157</sup>

The court did not abuse its discretion in enter the Order enlarging time to hear the motion for fees. The Court relied upon *O'Neill*, a case that was nearly identical factually with respect to the missed deadline

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<sup>154</sup> *Id.* at 21-23 (footnotes omitted).

<sup>155</sup> *Corey v. Pierce County*, 154 Wn. App. 752,225 P.3d 367 (2010)

<sup>156</sup> *Id.* (emphasis added)

<sup>157</sup> *O'Neill*, *supra* at 22.

under CR 54(d)(2) and the request to enlarge time under CR 6(d). The *O'Neill* court enlarged the time for filing where no prejudice was shown. Similarly, the 3-day delay resulted in no prejudice here, especially where the hearing on the motion (pursuant to Pierce County local rules) and the time for responding to it were same days they would have been had the motion been timely filed. The Stouts were able to brief and respond to all issues.

It cannot be said that the trial court's decision in this case was "manifestly unreasonable" because the court did not take a view that no reasonable person would take. The Court of Appeals in *O'Neill* made the same ruling. At a minimum, reasonable persons could differ as to the propriety of the action taken by the trial court. The court's decision was not outside the range of acceptable choices, given the facts and the applicable legal standard. Nor was the decision based upon untenable reasons, because the facts in this case met the legal standard set forth in *O'Neill*.

In the event, however, that this court finds that excusable neglect must be shown, this court can find that the evidence in the record meets this standard. The unforeseen request of a colleague for immediate help in an urgent situation should be considered sufficient. Unlike *Clipse v. Comm.*

*Driver Servs.*<sup>158</sup> and *Corey v. Pierce County*,<sup>159</sup> where no explanation whatsoever was offered for the late filing and the courts determined that there was no abuse of discretion in **denying** the motion to enlarge time for filing the fee request, the record does contain an explanation. Counsel here has set forth a justification for the missed deadline based on an unexpected overwhelming new case, taken on at the request of a seriously ill colleague, that distracted her on the day of and days preceding the deadline for filing. Concern for the welfare of a friend and colleague who is facing a serious illness coupled with an unexpected new workload with imminent deadlines should constitute excusable neglect.

Excusable neglect is determined based on the particular facts of each case.<sup>160</sup> The trial court has broad discretion over the issue of excusable neglect.<sup>161</sup> The Court abuses that discretion only when no reasonable person would take the position adopted by the trial court.<sup>162</sup> Given that *O'Neill* has not been overruled and was cited by *Corey, Division II*, without criticism, a reasonable person could rely upon it in exercising discretion to enlarge the time for hearing the motion for attorneys' fees.

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<sup>158</sup>*Clipse v. Comm. Driver Servs.* 189 Wn. App. 776, 358 P.3d 464 (2015),

<sup>159</sup> *Corey, supra* at 379

<sup>160</sup> *VanderStoep v. Guthrie*, 200 Wn. App. 507, 526, 402 P.3d 883, 893 (2017).

<sup>161</sup> *Id.*

<sup>162</sup> *Griggs v. Averbek Realty, Inc.*, 92 Wn. 2d 576, 584, 599 P.2d 1289, 1293 (1979).

**7. The trial court did not abuse its discretion by awarding the Stouts their costs and reasonable attorneys' fees under RCW 7.28.083 as the prevailing party because it was just and equitable to do so.**

RCW 7.28.083 provides in pertinent part:

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.

In this case, the Smiths and their attorney commenced this lawsuit for adverse possession without actually speaking to the prior owners of the property to determine the nature and scope of their use of their property, the relationship that they had with their neighbors, whether they had been given permission to use, clear or maintain any of the areas of the property or any other relevant facts related to the case before filing suit. They also did not speak to the Stouts about their claims before filing suit.

Most striking, however, was the fact that the Smiths were fully aware, both from the declarations and letter provided to them in August 2017, and from their own observations on two walkthroughs, that a survey had been commissioned by the Stouts, that the line was staked with flags on the ground, and that they could have walked away if they were not comfortable with or had objections to the line that was staked on the ground. Instead of walking away from the sale, they chose to close with

the property line as it was represented to them and then, less than a year after purchase, they file suit for quiet title and ejectment based solely upon alleged adverse possession of “an approximately five to ten foot strip of Stouts’ property that lies north of the property line.”<sup>163</sup> In addition, because the lawsuit was filed in conjunction with repeated complaints<sup>164</sup> to the county regarding the Stouts’ use of their own property, which were all determined to be “unfounded”<sup>165</sup>, the lawsuit, although completely unrelated to those complaints, seems retaliatory and/or a method of harassment.

**8. The Court’s award of fees was justified on two alternative grounds.**

1. The Stouts are entitled to an award of reasonable expenses, including attorneys’ fees for defending against a frivolous claim.

On appeal, relief can be award on any grounds supported by the evidence. RCW 4.84.185 provides in pertinent part:

In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party

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<sup>163</sup> CP 1-3, ¶4.1.

<sup>164</sup> Complaints for grading and filling violations and for the construction of motorcycle tracks were made in June 2016 within one month of purchase and thereafter complaints of wetlands violations were made. *Dec. of Sharon Predoehl Certifying records filed 1-16-18.*

<sup>165</sup> *Id.*

claim, or defense. This determination shall be made upon motion by the prevailing party after a voluntary or involuntary order of dismissal, order on summary judgment, final judgment after trial, or other final order terminating the action as to the prevailing party. The judge shall consider all evidence presented at the time of the motion to determine whether the position of the nonprevailing party was frivolous and advanced without reasonable cause. In no event may such motion be filed more than thirty days after entry of the order. (*emphasis added*)

RCW 4.84.185 authorizes the trial court to award the prevailing party reasonable expenses, including attorney fees, incurred in opposing a frivolous action.<sup>166</sup> Such an award is available only when the action as a whole, can be deemed frivolous.<sup>167</sup> A lawsuit is frivolous if, when considering the action in its entirety, it cannot be supported by any rational argument based in fact or law.<sup>168</sup> It is noteworthy that the bar association's statement, which is part of the legislative history of this statute, endorsed an award of fees as particularly appropriate where spite lawsuits such as are brought simply to harass and harangue the other party are deemed frivolous.<sup>169</sup>

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<sup>166</sup> *Bldg. Indus. Ass'n of Washington v. McCarthy*, 152 Wn. App. 720, 745, 218 P.3d 196 (2009).

<sup>167</sup> *McCarthy*, 152 Wn. App. at 746, 218 P.3d 196.

<sup>168</sup> *Curhan v. Chelan County*, 156 Wash.App. 30, 37, 230 P.3d 1083 (2010); *see also Loc Thien Truong v. Allstate Prop. and Cas. Ins. Co.*, 151 Wn. App. 195, 207–08, 211 P.3d 430 (2009) (award of fees under RCW 4.84.185 may be made against a party when the action, viewed in its entirety, cannot be supported by any rational argument on the law or facts); *Goldmark v. McKenna*, 172 Wn.2d 568, 582, 259 P.3d 1095 (2011).

<sup>169</sup> *Eller v. E. Sprague Motors & R.V.'s, Inc.*, 159 Wn. App. 180, 192, 244 P.3d 447, 453 (2010) citing Statement of Washington State Bar Association on S.B. 3130, 48th Leg., Reg. Sess. (Wash. 1983) (on file with Wash. State Archives)).

In the case at bar, the Smiths sued after only owning the property for one year and without talking to the prior owners. In addition, the suit appears to have been coordinated with repeated unfounded complaints to Pierce County. The suit appears to have been intended to harass and harangue the Stouts. The suit to adjust the property line by up to ten feet was brought even after the Smiths were shown the survey stakes on the ground and purchased the property with respect to that line, having been allowed the opportunity to walk away from the transaction if the line was not acceptable to them. Even if there was evidence of adverse possession, a reasonable investigation revealed that the co-terminus property owners had agreed on the property line and had specifically notified the Smiths of its location. Filing a lawsuit to adjust that line within less than a year of their purchase and pursuing it after being notified of the potential oral agreement was frivolous.

RCW 4.84.185 allows for an award of “reasonable expenses” including attorneys’ fees. Thus, the reasonable expenses are in addition to or outside of the attorneys’ fees. Consequently, if the suit is found to be frivolous, the Stouts should be entitled to all of the costs associated with their defense: the depositions, certified copies of evidence submitted to the Court, bridge tolls for travel to Gig Harbor to the site, computer searches to locate witnesses, postage and working copy charges that were all

reasonable expenses incurred to defend the lawsuit plus the attorneys' fees as set forth in the declarations of counsel.

2. The Stouts are also entitled to an award of fees under CR 11.

CR 11 is not meant to act as a fee shifting mechanism, but rather as a deterrent to frivolous pleadings.<sup>170</sup> The purpose behind CR 11 is to deter baseless filings and to curb abuses of the judicial system.<sup>171</sup> Both the federal rule and CR 11 were designed to reduce “delaying tactics, procedural harassment, and mounting legal costs.”<sup>172</sup> CR 11 requires attorneys to “stop, think and investigate more carefully before serving and filing papers.”<sup>173</sup> “[R]ule 11 has raised the consciousness of lawyers to the need for a careful pre-filing investigation of the facts and inquiry into the law.”<sup>174</sup> Courts should employ an objective standard in evaluating an attorney's conduct, and the appropriate level of pre-filing investigation is to be tested by “inquiring what was reasonable to believe at the time the pleading, motion or legal memorandum was submitted”.<sup>175</sup> If a complaint lacks a factual or legal basis, the court can only impose CR 11 sanctions if it also finds that the attorney who signed and filed the complaint failed to

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<sup>170</sup> *Biggs v. Vail*, 124 Wn. 2d 193, 197, 876 P.2d 448, 451 (1994).

<sup>171</sup> See *Business Guides, Inc. v. Chromatic Communications Enters., Inc.*, 498 U.S. 533, —, 111 S.Ct. 922, 934, 112 L.Ed.2d 1140 (1991).

<sup>172</sup> 3A L. Orland, *Wash.Prac., Rules Practice* § 5141 (3d ed. Supp.1991).

<sup>173</sup> See Fed.R.Civ.P. 11 advisory committee note, 97 F.R.D. 165, 192 (1983).

<sup>174</sup> *Bryant v. Joseph Tree, Inc.*, 119 Wn. 2d 210, 219, 829 P.2d 1099, 1104 (1992).

<sup>175</sup> *Biggs, supra at 197.*

conduct a reasonable inquiry into the factual and legal basis of the claim.<sup>176</sup> The court should inquire whether a reasonable attorney in like circumstances could believe his or her actions to be factually and legally justified.<sup>177</sup> In making this determination, the court may consider such factors as:

the time that was available to the signer, the extent of the attorney's reliance upon the client for factual support, whether a signing attorney accepted a case from another member of the bar or forwarding attorney, the complexity of the factual and legal issues, and the need for discovery to develop factual circumstances underlying a claim.<sup>178</sup>

In the case at bar, the Smiths owned their real property less than a year and their entire claim was dependent upon the actions, conduct and agreements of their predecessors in interest, yet neither they nor their attorney contacted Rossi and Horvath about the claim. NO reasonable inquiry into the factual and legal basis of the claim took place.

A party seeking CR 11 sanctions should give advance notice to the offending party of their intention to seek sanctions under CR 11.<sup>179</sup> The Smiths and their attorney were placed on specific notice that the Stouts would seek CR 11 sanctions if they pursued the case in a letter dated

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<sup>176</sup> *Bryant v. Joseph Tree, Inc.*, 119 Wn. 2d 210, 220, 829 P.2d 1099, 1105 (1992).

<sup>177</sup> *Doe v. Spokane & Inland Empire Blood Bank*, 55 Wash. App. 106, 111, 780 P.2d 853, 857 (1989) (quoting *Cabell v. Petty*, 810 F.2d 463, 466 (4th Cir.1987)).

<sup>178</sup> *Bryant v. Joseph Tree, Inc.*, supra at 220–21

<sup>179</sup> *Bryant v. Joseph Tree, Inc.*, 119 Wash. 2d 210, 224, 829 P.2d 1099, 1107 (1992).

August 11, 2017.<sup>180</sup> CR 11 sanctions for attorneys' fees, at least for those incurred subsequent to the notice provided in August, are appropriate.

#### **V. RESPONDANTS ARE ENTITLED TO AN AWARD OF ATTORNEY FEES INCURRED ON APPEAL**

Pursuant to RAP 18.1, the Stouts requests an award of attorney fees and costs incurred in this appeal. Grounds for obtaining attorney fees at trial will support an award on appeal.<sup>181</sup> Fees may be awarded as part of the cost of litigation when there is a contract, statute, or recognized ground in equity for awarding such fees.<sup>182</sup> The Stouts are entitled to attorneys' fees under statute, RCW 7.28.083 as the prevailing party, having successfully defended a claim of adverse possession and a frivolous case under RCW 4.84.185. Additionally, just as the filing of the claim without investigation justified an award of terms under CR 11, the filing of this appeal was frivolous and should entitle the Stouts to an award of attorneys' fees.

#### **VI. CONCLUSION**

Based upon the above argument, this Court should affirm (1) the trial court's order granting summary judgment dismissing the plaintiff's claim

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<sup>180</sup> See Supplemental Dec. of Pierce filed 1-16-18.

<sup>181</sup> Landberg v. Carlson, 108 Wn. App. 749, 758, 33 P.3d 406 (2001).

<sup>182</sup> Thompson v. Lennox, 151 Wash. App. 479, 491, 212 P.3d 597, 603 (2009).

of adverse possession because the undisputed facts reveal that the Smith's predecessor in interest made a parol agreement establishing the boundary line and the Smiths purchased with actual knowledge of that line; (2) the trial court's order enlarging the time for filing a motion for attorney's fees because (a) there was no abuse of discretion in granting enlargement where there was no showing of prejudice as a result of the late filing and (b) if a showing of excusable neglect was necessary, there was evidence of such sufficient to justify upholding the trial court's exercise of discretion in granting the motion to enlarge; and (3) the trial court's order granting the defendants their attorneys' fees and costs as the prevailing party under RCW 7.28.083 and/or alternatively under CR 11 and as the prevailing party defending a frivolous suit. In addition, if the trial court's rulings are affirmed, the Respondents should be awarded their attorneys' fees and costs on appeal in accordance with RAP 18.1 and pursuant to RCW 7.28.083, RCW 4.84.185 and CR 11.

DATED this 26<sup>th</sup> day of September, 2018.

Respectfully submitted,  
MORTON McGOLDRICK, P.S.  
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By Kathleen E. Pierce  
Attorneys for Respondent

**CERTIFICATE OF SERVICE**

I declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

I am employed by the law firm of Morton McGoldrick, P.S.

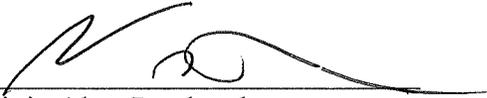
At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the state of Washington, over the age of eighteen (18) years, not a party to the above entitled action, and competent to be a witness herein.

On, I served in the manner noted the document(s) entitled: on the following person(s):

Dianne K. Conway	<input type="checkbox"/>	U.S. Mail
Gordon Thomas Honeywell LLP	<input type="checkbox"/>	Facsimile
1201 Pacific Ave., Ste. 2100	<input type="checkbox"/>	Messenger
Tacoma, WA 98402	<input checked="" type="checkbox"/>	E-Mail

DATED this 26 day of September at Tacoma, Washington.

MORTON McGOLDRICK, P.S.

  
\_\_\_\_\_  
Virginia Ales, Patalegal

# MORTON MCGOLDRICK

September 26, 2018 - 4:27 PM

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**Appellate Court Case Title:** Perry and Erin Smith, Appellants v. Paul Stout and Trish Smith, Respondents  
**Superior Court Case Number:** 17-2-06036-0

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