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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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PHYLLIS Y. RAINWATER,

APPELLANT

v.

RAINSHADOW STORAGE, LLC, a Washington Limited Liability  
Company; JOHN R. DICKINSON and LORI R. DICKINSON, dba, WE DIG  
IT,

RESPONDENTS

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APPELLANT'S OPENING BRIEF

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W. Jeff Davis, WSBA No. 12246  
BELL & DAVIS PLLC  
433 North Fifth Avenue, Suite A  
Sequim, Washington 98382  
(360) 683-1129  
Attorneys for Appellant Phyllis Y. Rainwater

Brandon S. Gribben, WSBA No. 47638  
HELSELL FETTERMAN LLP  
1001 Fourth Avenue, Suite 4200  
Seattle, Washington 98154  
(206) 292-1144  
Of Attorneys for Appellant Phyllis Y.  
Rainwater

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## I. INTRODUCTION

This lawsuit concerns a dispute over title to residential property located in Sequim, Washington. Appellant Phyllis Rainwater<sup>1</sup> is a retired school teacher who purchased a single-family home located at 124 Strawberry Lane with her now deceased husband, Gene Rainwater, back in 2003. Phyllis still owns and lives at the home today. Phyllis and Gene purchased their home from the Clark family, who had lived at the home since 1992. Clerk's Papers ("CP") at 021 (lines 7-8); CP at 385 (lines 17-21).

There was a well-defined tree line that marked the eastern boundary of Phyllis's property. CP at 385 (lines 21-26); CP at 386 (lines 1-9). The neighboring property to the east of Phyllis's property, known as 100 Taylor Cutoff Road, was owned by Dale and Troye Jarmuth from 1993 until 2017. The Jarmuths legally described western boundary extended approximately 6 feet to the west of the boundary trees along the entire length of Phyllis's property. CP at 280 (lines 5-11); CP at 424 (lines 6-8). This area is referred to the "disputed area" that is the subject of this quiet title action.

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<sup>1</sup> To avoid confusion between the similar names of Rainwater and Rainshadow, Phyllis is used in place of Ms. Rainwater. No disrespect is intended.

Aerial photographs demonstrate that the boundary trees had been in existence since at least 1990, and likely even earlier. CP at 295; CP at 021 (lines 19-25). The aerial photographs also show that to the east of the boundary trees was an overgrown area approximately 8 to 15 feet wide running the full length of the neighboring property. CP at 281 (lines 4-14); CP at 297.

In 2016, the Jarmuths subdivided their property into two lots and sold the eastern lot to Respondent Rainshadow Storage LLC (“Rainshadow Storage”). CP at 475 (lines 21-26). The Jarmuths admit that during the entire time that they owned their property they did not go near the boundary trees. In fact, the Jarmuths both acknowledged that they believed the tree line was the common boundary line. Their use of their property conformed to this belief. CP at 249 (lines 14-19); CP at 253 (lines 12-21).

Soon after Rainshadow Storage purchased the Jarmuths’ eastern lot, it clear cut the boundary trees without making any attempts to contact Phyllis. CP at 271 (lines 8-25); CP at 272 (lines 1-14), CP at 477 (lines 18-24). Rainshadow Storage also removed the majority of a 6-foot high wooden fence that was on Phyllis’s property and had her address affixed to it. CP at 271 (lines 11-12); CP at 264 (lines 23-26), CP at 365 (lines 1-3), CP at 382. Respondents John R. Dickinson and Lori R. Dickinson d/b/a We Dig It (“We Dig It”) assisted Rainshadow Storage in removing

the trees and clearing the disputed area. CP at 272 (lines 15-24), CP at 577 (lines 21-25).

The evidence overwhelmingly demonstrated that Phyllis and her predecessors satisfied each element of adverse possession and obtained title to the disputed area, which includes the boundary trees. In addition, Phyllis and the Jarmuths both testified that they thought the boundary trees were the common boundary line. CP at 046 (lines 19-24); CP at 049 (lines 15-21); CP at 248 (lines 14-25); CP at 249 (lines 14-21), CP at 253 (lines 15-21); CP at 386 (lines 10-18); CP at 388 (lines 1-21); CP at 462 (lines 16-28); CP at 463 (lines 1-6). Thus, Phyllis obtained title to the disputed area under the doctrine of mutual recognition and acquiescence.

The Trial Court erred when it granted Rainshadow Storage's motion for summary judgment and denied Phyllis's cross-motion. When viewing the evidence in a light most favorable to Rainshadow Storage, the Trial Court should have awarded Phyllis summary judgment on her claims for adverse possession and mutual recognition and acquiescence. At a bare minimum, there are material issues of fact that preclude an award of summary judgment to Rainshadow Storage. Phyllis now appeals and requests that the Court of Appeals reverse the Trial Court's order and award her summary judgment.

## **II. ASSIGNMENT OF ERROR**

1. The Trial Court erred in granting Rainshadow Storage's Motion for Summary Judgment where it found that there were no issues of material fact and that Rainshadow Storage was entitled to summary judgment as a matter of law.

2. The Trial Court erred in denying Phyllis's Motion for Summary Judgment where it found that there were no issues of fact and that Phyllis had failed to establish that she acquired the disputed area by adverse possession.

3. The Trial Court erred in denying Phyllis's Motion for Summary Judgment where it found that there were no issues of fact and that Phyllis had failed to prove her claim for mutual recognition and acquiescence by clear, cogent and convincing evidence.

4. The Trial Court erred in awarding Rainshadow Storage its reasonable attorney's fees and costs.

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

1. Whether the Trial Court erred, when viewing the evidence in the light most favorable to Phyllis, in finding "insufficient evidence to establish 'maintenance' of the area within approximately 5-6 feet of the former tree line over a 10-year period. (Assignment of Error No. 1)

2. Whether the Trial Court erred, when viewing the evidence in the light most favorable to Rainshadow Storage, in finding that Phyllis

failed to establish that she adversely possessed the disputed area?

(Assignment of Error No. 2)

3. Whether the Trial Court erred, when viewing the evidence in the light most favorable to Rainshadow Storage, in finding that Phyllis failed to establish that she obtained title to the disputed area under the doctrine of mutual recognition and acquiescence? (Assignment of Error No. 3).

4. Whether the Trial Court erred in awarding Rainshadow Storage its reasonable attorney's fees and costs? (Assignment of Error No. 4).

#### **IV. STATEMENT OF THE CASE**

##### **A. Overview of Phyllis's and Her Predecessors' Ownership and Use of Property.**

Roger and Helen Clark purchased 124 Strawberry Lane on April 15, 1988. CP at 211. The boundary trees that lined the eastern border of their property were already planted when the Clarks purchased the property. CP at 21 (lines 4-8); CP at 22 (lines 16-18). The boundary trees were comprised of 16 to 17 trees. They were planted close together in a straight line. CP at 279 (lines 16-18). Donna Gast, who lived next door to the Clark family for over a decade at the property directly to the south confirmed that Mr. Clark did all the landscaping on his property and always maintained his property up to the boundary trees. CP at 23 (lines 5-7, 18-20). Mr. Clark installed a sprinkler system, with 8 to 10 sprinkler

heads, in the yard, which included the disputed area. The sprinklers ensured that the trees were adequately watered. CP at 386 (lines 19-24).

Here is an aerial photograph taken on July 21, 2003, around the time that Phyllis purchased her property that depicts: Phyllis's property, the boundary trees, the Jarmuths' property, the drainage ditch on the Jarmuths' property, and the Gasts' property. CP at 285.



On June 3, 2003, Phyllis, and her now deceased husband, Gene, purchased their property from the Estate of Roger Floyd Clark. CP at 23 (lines 24-25); CP at 24 (line 1). When Phyllis purchased her property it was completely fenced in by the boundary trees and other fences. CP at 385 (lines 21-25). The boundary trees had matured during the past 15 years since the Clark family owned the property. CP at 397; CP at 399; CP

at 403; CP at 405. The boundary trees clearly defined the eastern border of Phyllis's property. The trees also served as an important view and noise buffer. CP at 385 (lines 24-25).

Phyllis's property has a large yard with a pasture area that was clearly enclosed by the boundary trees to the east and boundary trees along with a fence to the north. CP at 285. Gene and Phyllis enjoyed viewing their yard from a gazebo. The yard was well maintained up to and including the boundary trees, which are in the background of this photograph. CP at 397.



Between 2003 and 2013, Phyllis and Gene would move a bench into the pasture area within a few feet of the boundary trees. They enjoyed sitting in that area and taking in the surrounding beauty. CP at 386 (lines 25-26); CP at 387 (lines 1-3). During this period the bottom limbs of the boundary trees were trimmed and the pasture area was mowed up to the trees. CP at 399; CP at 401; CP at 405; CP at 407. In fact, the pasture and boundary trees were in the same condition year after year. CP at 285; CP at 307; CP at 309; CP at 311; CP at 315; CP at 321; CP at 323.

Phyllis and Gene continuously maintained the pasture area up to and including the boundary trees. CP at 386 (lines 13-18). When they were away, they would have others, including the Gasts, maintain the yard. CP at 237 (lines 12-20); CP at 386 (lines 12-19). However, it was not always necessary to mow under the trees as the branches themselves prevented the grass from growing. CP at 237 (lines 17-20).

In 2003, Mr. Gast asked Gene if the Gasts could graze their miniature ponies in the pasture area that is enclosed by the boundary trees. CP at 25. Phyllis and Gene were neighborly so they agreed. Gene and Mr. Gast installed a wire mesh fence attached to the tree trunks along the northern and eastern boundary trees. CP at 25 (lines 11-12). The purpose of the fence was to keep the Gasts' miniature horses from wandering beyond the boundary trees. CP at 25 (lines 15-18). Phyllis and Gene did

not ask the Jarmuths for permission to install the fence and the Jarmuths did not object to them installing the fence. CP at 050 (lines 3-16).

In addition to the wire mesh fence installed by Mr. Gast and Gene on the west side of the boundary trees, there was a second, slightly different, wire mesh fence on the east side of the boundary trees. CP at 365 (lines 9-18). While it is not specifically known when this second wire mesh fence was installed, Phyllis testified that it was there when Gene and (Mr. Gast installed the other wire mesh fence. CP at 555 (lines 18-25); CP at 556 (lines 2-5). There were remains of this second wire mesh fence in the rubble after Rainshadow Storage bulldozed the trees. CP at 365 (lines 15-18).

Around 2005, the Gasts stopped grazing their horses. The wire mesh fencing, however, remained attached to the boundary trees up until February 2017 when Rainshadow Storage cut down the boundary trees, rolled up the wire mesh fencing, and dumped it on Phyllis's property. CP at 27 (lines 13-16).

When Phyllis purchased her property in 2003 there was a drainage ditch running through her property in a north-south direction. CP at 285; CP at 299; CP at 449 (lines 27-28). There was a wooden bridge that provided pedestrian and vehicular access over that ditch. CP at 449 (lines 27-28); CP at 450 (lines 1-2). In 2007, the drainage ditch was buried. CP

at 280 (lines 25-26); CP at 281 (lines 1-5); CP at 462 (lines 23-28). Gene and Phyllis used the wood from the bridge to build a 20 foot wide fence that was approximately 6 feet tall. The large wooden fence was installed at the driveway entrance to Phyllis's property on the east side of the road. CP at 450 (lines 27-28); CP at 451 (lines 1-8). A locking metal gate was attached to the fence. CP at 364 (lines 21-25). A sign with Phyllis's address (124 Strawberry Lane) was posted to the wooden fence.

The wooden fence was installed perpendicular to the boundary trees so that it also extended approximately 6 feet into the western portion of the Jarmuths' legally described property. CP at 451 (lines 1-8). Phyllis and Gene then installed additional metal fencing that ran from the southernmost boundary tree to the eastern portion of the wooden fence. Phyllis and Gene did not ask the Jarmuths for permission before installing the wooden and metal fencing and the Jarmuths did not protest the location of the fencing, even though it encroached approximately six feet into their property. CP at 050 (lines 3-16).

**B. Overview of the Jarmuths' Ownership and Use of Property.**

Dale and Troye Jarmuth purchased their property on July 22, 1993. CP at 034 (lines 3-5); CP at 213; CP at 618 (lines 8-16). When they purchased their property, the Clark family still owned the property to the west. CP at 034 (lines 13-16).

The Jarmuths lived next door to Phyllis's property for almost 25 years. The western area of the Jarmuth property initially contained a large drainage ditch that ran north-south. CP at 280 (lines 25-26); CP at 281 (lines 1-5). Between the drainage ditch and Phyllis's boundary trees were dense bushes and bramble. CP at 042 (lines 16-21); CP at 048 (lines 10-25); CP at 049 (lines 1-2). The area between the drainage ditch and the boundary trees was approximately 8 to 15 feet. CP at 281 (lines 4-14); CP at 297.

During the entire 25-year period, the Jarmuths did not set foot anywhere near the boundary trees. CP at 249 (lines 14-19), CP at 253 (lines 24-25). This is because they both believed that their legally defined property was the natural area between the boundary trees and the drainage ditch. CP at 042 (lines 16-28); CP at 043 (lines 1-6), CP at 044; CP at 049 (lines 15-21). When asked: "Did anyone else ever go in that strip between the irrigation ditch and the trees [from 1993 until the property was sold to Rainshadow Storage]? Mrs. Jarmuth testified: No. You couldn't get through it." CP at 246 (lines 20-25); CP at 247 (line 1).

In January, 2007, the Jarmuths hired Bruch & Bruch to remove the dense brush and bramble so that the drainage ditch could be filled in. CP at 042 (lines 23-24). After the drainage ditch was filled in the area between the boundary trees and the prior location of the drainage ditch

was allowed to become overgrown with dense brush and bramble. CP at 043 (lines 1-4); CP at 044; CP at 319; CP at 321; CP at 323.

Mrs. Jarmuth testified that: “Upon completion of the project, we let our western boundary line return to its natural state again with no obstacle, obstruction fence, or barrier in sight.” CP at 043 (lines 2-4). Mrs. Jarmuth admits, unequivocally, that she believed that her “western boundary line” was the natural area east of the boundary trees.

Dale Jarmuth also admits that he never set foot on Phyllis’s property during the Clark family’s and Phyllis’s ownership. CP at 049 (lines 24-25). Mr. Jarmuth testified that he was aware that Phyllis and Gene built the wooden fence and connected it with a second fence to the boundary trees in 2007. Mr. Jarmuth admitted that he thought the boundary trees, the wooden fence and the second fence that connected the two was the common boundary line. CP at 253. When asked whether he “thought the [boundary] trees essentially straddled the property line,” Mr. Gast responded: “Correct.” CP at 049 (lines 19-21). During the entire time period that the Jarmuths owned the property next to Phyllis, from 1993 to 2017, they never once occupied or claimed ownership of the disputed area, including the boundary trees. CP at 388 (lines 1-10).

Except for the brief period when the drainage ditch was filled in, from at least 1988 until the Jarmuths sold the western lot to Rainshadow

Storage in 2017, neither the Jarmuths, nor anyone else for that matter, entered the area west of the drainage ditch. CP at 042 (lines 16-28); CP at 043 (lines 1-6); CP at 048 (lines 20-25), CP at 049 (lines 1-2). The Jarmuths never entered this area between the drainage ditch and the boundary trees because they considered this area their western boundary line.

In 2016, the Jarmuths decided to subdivide their property into two lots with the intent of selling the eastern lot that bordered Phyllis's property. CP at 475 (lines 21-26). The Jarmuths obtained a survey as part of the short subdivision process. CP at 484. Before Rainshadow Storage clear cut the boundary trees, its workers had to clear away the brush and bramble to the east. CP at 489-491. Meanwhile, the area underneath the boundary trees' branches was neatly trimmed and maintained.

Rainshadow purchased their property from the Jarmuths on February 17, 2017 for the purpose of building and operating storage units. CP at 475 (lines 22-24). Initially, Ryan Schaafsma, Rainshadow Storage's principal, saw the boundary trees and thought it was the boundary between the two properties. CP at 367 (lines 13-14). Mr. Schaafsma, however, later learned that he needed to relocate the buried irrigation ditch to build more storage units. After learning that the

irrigation ditch would limit the development potential, Mr. Schaafsma decided to rely solely on the 2016 survey and survey markers. He justified Rainshadow Storage's unilateral removal of the boundary trees and large wooden fence on the survey. CP at 367 (lines 14-16).

During his deposition he claimed: "My understanding is that legally surveys establish a boundary line, yes." CP at 264 (lines 7-8).

Immediately after purchasing the property, and without making any attempts to contact Phyllis, Rainshadow Storage removed the boundary trees and the majority of the large wooden fence. CP at 265; CP at 477 (lines 18-21).

**C. Procedural History.**

After Rainshadow Storage single handedly tore down Phyllis's boundary trees and fence line, without consulting or notifying her, Phyllis commenced this lawsuit against Rainshadow Storage. Phyllis sought to quiet title in the disputed area based upon adverse possession and mutual recognition and acquiescence. She is also seeking damages under RCW 4.24.630 because Rainshadow Storage caused waste to her property by removing the boundary trees and other improvements.

Phyllis also asserted claims against We Dig It for assisting Rainshadow Storage with removing the boundary trees, fences and other improvements. Rainshadow Storage answered the lawsuit and claimed that

boundary trees and other improvements were on its legally described property and that Phyllis did not previously acquire title to the disputed area.

Rainshadow Storage and Phyllis filed Motions for Summary Judgment. The Trial Court ruled that when viewing the evidence and making reasonable inference in favor of Phyllis that she failed to prove she had acquired the area up to the boundary trees through adverse possession. The Trial Court also ruled that there was a lack of evidence that Phyllis (or her predecessors) and Rainshadow Storage (or its predecessors) had mutually recognized or acquiesced that the boundary trees were the common property line. CP at 011-012.

On October 1, 2018, the Trial Court filed its Memorandum Opinion and Order Granting Rainshadow Storage's Motion for Summary Judgment and dismissing Phyllis's claims. On October 19, 2018, Phyllis filed her Notice of Appeal from the Trial Court's ruling. CP at 7-8. Rainshadow Storage waited until October 25, 2018 to file its Motion for Attorney's Fees, along with its proposed Findings of Fact and Conclusions of Law for Order Granting Attorney's Fees and Awarding Costs, and Judgment on Attorney's Fees, Quieting Title and Order of Dismissal. CP at 707. On November 27, 2018, Phyllis filed her Response to Rainshadow Storage's Motion for Attorney's Fees and Costs, and Objection to

Proposed Findings and Conclusions and Order. CP at 673-674. After the motion was fully briefed, the Trial Court filed its Memorandum Opinion re Attorney Fees on December 4, 2018. CP at 654-656. Phyllis timely appealed that order. CP at 632-646.

## V. ARGUMENT

### A. Standard of Review.

Appellate courts review summary judgment de novo, engaging in the same inquiry as the Trial Court. *Highline Sch. Dist. No. 401 v. Port of Seattle*, 87 Wn.2d 6, 15, 548 P.2d 1085 (1976). Summary judgment is proper if the records on file with the Trial Court show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). All facts and reasonable inferences therefrom are construed in the light most favorable to the nonmoving party. *Keck v. Collins*, 131 Wn. App. 67, 325 P.3d 306, 312 (2014); *Campbell v. Reed*, 134 Wn. App. 349, 139 P.3d 419 (2006).

Generally, a Trial Court does not enter Findings of Fact in summary judgment orders and any such findings are superfluous and are not considered on appeal. *Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 795, 64 P.3d 22 (2003); *Fabre v. Town of Ruston*, 180 Wn. App. 150, 321 P.3d 1208 (2014).

In analyzing and applying the evidence, it must be kept in mind that adverse possession and mutual recognition and acquiescence are alternate, separate and independent theories. *Green v. Hooper*, 149 Wn. App. 627, 205 P.3d 134, 141 (2009) (citing *Lilly v. Lynch*, 88 Wn. App. 306, 316, 945 P.2d 727 (1997)). Mutual recognition and acquiescence is based upon implied or express boundary agreements while adverse possession requires the possessor to appropriate another's property. *Rasmussen v. Rich*, No. 49433-7-II (Div. II, December 5, 2017).<sup>2</sup> If one fails, the other may prevail.

**B. The Trial Court erred in granting Rainshadow Storage summary judgment on Phyllis's claim for adverse possession. While the Trial Court should have awarded Phyllis summary judgment on this claim, there are, at a minimum, issues of material fact that preclude an award in favor of Rainshadow Storage.**

The undisputed evidence demonstrates that Phyllis obtained title to the disputed area by adverse possession. At a minimum, however, when viewing the evidence in favor of Phyllis, there is woefully insufficient evidence to award judgment in favor of Rainshadow Storage.

The main purpose of the adverse possession doctrine is to assure maximum utilization of the land, encourage the rejection of stale claims

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<sup>2</sup> This citation is to an unpublished decision and “the decision has no precedential value, is not binding on any court, and is cited only for such persuasive value as the court deems appropriate.” *Crosswhite v. Wash. State Dep't of Soc. & Health Servs.*, 197 Wn. App. 539, 544, 389 P.3d 731 (2017); *see* GR 14.1.

and quiet titles. *Chaplin v. Sanders*, 100 Wn.2d 853, 860, 676 P.2d 431 (1984). To prove adverse possession, Phyllis must demonstrate that she, and the Clark family before her, possessed the disputed area in a manner that was (1) exclusive, (2) open and notorious, (3) hostile, and (4) actual and uninterrupted for a 10 year period. *Teel v. Stading*, 228 P.3d 1293, 1295 (2010) (citing *Chaplin v. Sanders*, 100 Wn.2d 853, 857-62, 676 P.2d 431 (1984)). “Possession” is established if it is of such a character as a true owner would exhibit considering the nature and location of the land in question. *Shelton v. Strickland*, 106 Wn. App. 45, 21 P.3d 1179, 1182 (2001). There is no requirement that Phyllis maintain every square inch of the disputed area; only that she treat it as a true owner would.

Each element need only be proven by a preponderance of the evidence. *Varrelman v. Blount*, 56 Wn.2d 211, 211-12, 351 P.2d 1039 (1960). Preponderance of the evidence means that, after considering all of the evidence, the proposition on which a party has the burden of proof is more probably true than not true.” See *Hudson v. United Parcel Serv. Inc.*, 163 Wn. App. 254, 258 P.3d 87, 91 (2011).

Title vests automatically in the adverse possessor if all the elements are fulfilled throughout the statutory period. *El Cerrito, Inc. v. Ryndak*, 60 Wn.2d 847, 855, 376 P.2d 528 (1962) (“...such possession ripens into an original title”). A predecessor’s adverse use may be tacked

on to the claimant's use, if privity exists between them, and if together they have held the land continuously and adversely to the title holder for the requisite ten year period. *Miller v. Anderson*, 91 Wn. App. 822, 827, 964 P.2d 365 (1998); *Roy v. Cunningham*, 46 Wn. App. 409, 731 P.2d 526 (1983).

Also, an adverse possessor need not enclose the claimed area. It is well established that boundaries may be defined by the use of the property. *Bryant v. Palmer Coking Coal Co.*, 86 Wn. App. 204, 212 936 P.2d 1163 (1997). Possession may extend beyond areas actually possessed if the claimant meets the elements for penumbral possession. This is possession that shows an area is reasonably needed to carry out the property owner's objective. *State v. Stockdale*, 34 Wn.2d 857, 863, 210 P.2d 686 (1949), overruled on other grounds, *Chaplin v. Sanders*, 100 Wn.2d 853, 857-62, 676 P.2d 431 (1984).

1. The Clark family and Phyllis's use of the disputed area was "open and notorious."

The "open and notorious" element requires proof that (1) the true owner had actual notice of the adverse use throughout the statutory period, or (2) the claimant used the land in a way that would lead a reasonable person to assume the claimant was the owner. *Shelton v. Strickland*, 106 Wn. App. 45, 51 – 52, 21 P.3d 1179 (2001). In other words, the claimant

must show that the true owner knew, or should have known, that the occupancy constituted an ownership claim. *Anderson v. Hudak*, 80 Wn. App. 298, 405, 907 P.2d 305 (1995). As with all of the elements, in determining whether this requirement is met, a Court must consider the claimant's conduct in light of the character of the property at issue. The necessary occupancy and use need be of the character that a true owner would assert in view of the property's nature and location. *Krona v. Brett*, 72 Wn.2d 535, 539, 433 P.2d 858 (1967); *Anderson v. Hudak*, 80 Wn. App. 398, 403, 907 p.2d 305 (1995).

The Clark family and Phyllis's use of their property, including the disputed area, was open and notorious. Phyllis and Gene mowed their pasture up to the boundary trees; they pruned the boundary trees, they installed a wire mesh fence onto the boundary trees; they installed a large wood fence in the disputed area; they installed another fence that connected the boundary trees to the large wooden fence. None of this is in dispute. Thus, this element of adverse possession has been met.

2. The Clark family and Phyllis's use of the disputed area was "actual and interrupted."

The "actual and uninterrupted" element does not require claimants to show that they used the property constantly, but only use of the same character that a true owner might make of the property considering its

nature and location.” *Lee v. Lozier*, 88 Wn. App. 176, 185, 945 P.2d 214 (1997) (citing *Double L. Props., Inc., v. Crandall*, 51 Wn. App. 149, 158, 751 P.2d 1208 (1988)). Neither actual occupation, cultivation, nor residence is necessary to constitute actual possession. *Campbell v. Reed*, 134 Wn. App. 349, 362, 139 P.3d 419 (2006).

The Clark family had actual and uninterrupted use of the disputed area since they purchased their property in 1988 until it was sold to Phyllis and Gene in 2003. Use of the disputed area was continued by Phyllis and Gene until at least 2013, and then by Phyllis until 2017. Their use vastly exceeds the 10 years necessary to satisfy this element of adverse possession.

3. The Clark family and Phyllis’s use of the disputed area was “exclusive.”

The “exclusive” element requires proof that the claimant’s dominion over the land was as exclusive as the community would expect of an ordinary title owner in light of the land’s nature and location. *Crites v. Koch*, 49 Wn. App. 171, 174, 741 P.2d 1005 (1987). Even if the claimant allows the title owner an occasional transitory use as the community would expect an average owner to allow a neighbor, possession is likely exclusive. *Lilly v. Lynch*, 88 Wn. App. 306, 313, 945 P.2d 727 (1997). The critical requirement of exclusivity is that the

claimant not share possession with the owner. Nor may the claimant share possession too much with third persons who are there without the claimant's consent. 17 Stoebuck, Wash. Pract.: Real Estate: Property Law § 8.19, at 541 (2d ed. 2004).

There is no evidence that anyone other than the Clark family, and then Phyllis and Gene, occupied the disputed area and claimed the boundary trees as their own. Phyllis and Gene took care of them as the true owners would. Rainshadow Storage will likely argue that because Phyllis and Gene were friends with the Gasts, and let them graze their miniature horses in their pasture, that this broke the "exclusive" use of their property. This is a red herring. The Gasts' use of this area was permissive and did not break Phyllis and Gene's exclusive use of their property.

The Gasts acknowledge that Gene gave them permission to use this area for the miniature horses. This request for permission demonstrates that the Gasts acknowledged Gene and Phyllis's exclusive ownership of the disputed area up to and including the boundary trees. The fact that permission was expressly given demonstrates Gene and Phyllis's dominion over their property and the disputed area. Just as renting to tenants does not interrupt adverse possession, neither does the voluntary offer to allow one's neighbor to use your land as it denotes neighborliness

and friendship. *O'Brien v. Schultz*, 45 Wn.2d 769, 278 P.2d 322 (1954); *Foote v. Kearney*, 157 Wn. 681, 2990 P. 226 (1930). Thus, Phyllis has satisfied the “exclusive” element of adverse possession.

4. The Clark family and Phyllis’s use of the disputed area was “hostile” to the Jarmuths.

The hostility claim of right element requires only that the claimant treat the land as her own as against the world throughout the statutory period. The “hostile” does not require animosity, but only “that the claimant possesses property in a manner not subordinate to the title of the true owner.” *Teel v. Stading*, 155 Wn. App. 390, 395, 228 P.3d 1293 (2010). Further, “where a fence purports to be a line fence, rather than a random one, and when it is effective in excluding an abutting owner from the unused part of a tract...it constitutes prima facie evidence of hostile possession up to the fence.” *Wood v. Nelson*, 57 Wn.2d 539, 541, 358 P.2d 312 (1961). The boundary trees, which were planted close together and in a straight line, are considered a line fence. *See Town of Clyde Hill v. Roisen*, 111 Wn.2d 912, 767 P.2d 1375 (1989); *Lakes at Mercer Island Homeowners Ass’n v. Witrak*, 61 Wn. App. 177, 810 P.2d 27 (1991).

Hostility means the claimant is in possession as owner, rather than holding in recognition of, or subordination to, the true owner. *Chaplin v. Sanders*, 100 Wn.2d 853, 857 – 858, 676 P.2d 431 (1984) (citing *King v.*

*Bassindale*, 127 Wn. 189, 192, 220 P. 777 (1923)). This element requires only that the claimant treat the land as his own as against the world throughout the statutory period. The nature of her possession will be determined solely on the basis of the manner in which she treats the property.” *Chaplin v. Sanders*, 100 Wn.2d at 860-861.

Phyllis and Gene, and the Clark family before them, asserted their ownership of the disputed area by (a) exclusively occupying and maintaining it, (b) installing a wire mesh fence on the boundary trees, and (c) building a larger wooden fence at the southeast corner of their property that extended 10 to 12 feet into the disputed area.

There are three undisputed facts that, when considered together, warrant reversal of the lower court’s decision. They are: (1) the disputed area is located entirely on Phyllis’s side of the boundary trees, (2) between July 22, 1993, when the Jarmuths purchased their property, and February, 2017, when the Jarmuths sold the western portion of their property that bordered Phyllis’s property, the Jarmuths never occupied or asserted ownership of the disputed area because they believed that their western boundary was the “natural” area lying east of Phyllis’s boundary trees, and (3) the Gasts believed the disputed area was owned by the Clarks and then Phyllis. These facts, alone, establish Phyllis’s ownership of and title to the

disputed area by adverse possession and mutual recognition and acquiescence.

At a minimum, the evidence raises sufficient issues of material fact that a reasonable person could find, by a preponderance of the evidence, that Phyllis acquired title to the disputed area by adverse possession. It is undisputed Phyllis, and before her the Clark family, considered the boundary trees to be the eastern boundary. The boundary trees acted as a natural fence. The area to the south of the boundary trees was maintained solely by the Clark family, and then Phyllis and Gene. Phyllis testified that she and her husband Gene maintained the property up to the boundary trees. The pictures confirm this. And the Jarmuths admit that they did not occupy or maintain the boundary trees or any of the area west of the trees.

That is the standard from which Phyllis's maintenance should be judged. Phyllis and Gene, and the Clark family before them, were the only persons who maintained the disputed area. No other person, besides the occasional guest, set foot in the disputed area. Donna Gast clearly remembered Gene maintaining the property up to the boundary trees line.

In addition to the numerous aerial photographs, Rainshadow Storage's took pictures just prior to cutting the boundary trees, which demonstrate that Phyllis's yard was maintained up to and underneath the boundary trees.

Phyllis has proven each element of adverse possession by a preponderance of the evidence. At a minimum, when viewing the evidence in favor of Phyllis, there are issues of material fact that preclude an award of summary judgment in favor Rainshadow Storage.

**C. The Trial Court erred when it ruled that Phyllis failed to acquire title to the disputed area by mutual recognition and acquiescence.**

Property boundaries that differ from survey boundaries may be established through the doctrine of mutual recognition and acquiescence. *Lamm v. McTighe*, 72 Wn.2d 587, 591, 434 P.2d 565 (1967). Under this theory boundaries may be adjusted by neighbors' oral acts or their acts on the ground. *Green v. Hooper*, 149 Wn. App. 627, 639, 205 p.3d 134 (2009). "It is a rule long since established that if adjoining property owners occupy their respective holdings to a certain line for a long period of time, they are precluded from claiming that the line is not the true one, the theory being that the recognition and acquiescence affords a conclusive presumption that the used line is the true boundary." *Lamm v. McTighe*, 72 Wn. 2d 587, 592, 434 P.2d 565, 568 (1967).

To establish acquiescence and mutual recognition a party must prove that:

- (1) 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) 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) mutual recognition of the boundary line continued for [10 years].

*Merriman v. Cokeley*, 168 Wn.2d 627, 630, 230 P.3d 162 (2010).

The elements must be proven by clear, cogent and convincing evidence. To meet this burden of proof, the evidence must show that the ultimate facts are highly probable. 168 Wn.2d at 630-31.

The first element is proven where the line is shown to be certain, well defined, and in some fashion physically designated upon the ground. *Id.* at 630. There is no requirement that the purported boundary line be an uninterrupted tangible object, like a fence. A fence, pathway, or another monument or combination of monuments must clearly divide the two parcels. *Id.* at 631.

In this case, it is undisputed that the boundary trees were “well defined.” There were also two fences located on either side of the boundary tree. A tree fence is a well-defined and physical marker on the land and typically designates where one’s property line ends and where the other begins.

Both Dale and Troye Jarmuth testified they believed their western boundary was either the boundary trees or the “natural” area immediately to the east of the boundary trees. Mr. Jarmuth was aware in 2007 when Gene and Mr. Gast installed a large wooden fence and connected a wire fence running north to the boundary trees on what the Jarmuths and Phyllis believed was the common boundary line. Mr. Jarmuth thought that these improvements were on the boundary line and did not encroach onto his property.

Phyllis’s and the Jarmuths’ mutual recognition and acquiescence that the boundary trees were the eastern boundary of Phyllis’s property is also demonstrated by the photographs attached to the Declaration of Terry Curtis, a qualified expert in the interpretation of aerial photography and the extraction and compilation of photogrammetric data from aerial photographs. The first picture dated 7-15-90 was taken three years before the Jarmuths purchased their property. CP at 295; CP at 297. The Jarmuth property is depicted on the lower middle of CP at 295 and the right-hand portion of CP at 297.

This photograph indicates that the Jarmuths’ predecessor only farmed to the edge of the irrigation ditch, which was located approximately 8-15 feet to the east of the boundary trees. This photograph also indicates that the Clarks maintained their property up to the boundary

trees. The Clark family's maintenance activities is depicted in greater detail in the 7-27-97 picture, which was taken four years after the Jarmuths purchased their property. CP at 299; CP at 301.

The 8-1-00 picture shows the boundary trees with the Jarmuths' natural area with a gap between the two. CP at 302. All of the aerial photographs that were reviewed and interpreted by Mr. Curtis demonstrate Phyllis's maintenance of her property and the boundary trees, with the area to the east of the boundary trees left in a natural state. CP at 307; CP at 309; CP at 311. When making all reasonable inferences in favor of Phyllis, the pictures demonstrate her, and her predecessors', use, occupation and maintenance of the disputed area that includes the boundary trees for a period in excess of 20 years.

The picture taken August 29, 2010, shows for the first time the large wooden fence installed by Gene and Mr. Gast in 2007. CP at 319. The ditch on the Jarmuths' property has been buried and the Jarmuths maintenance of their property stops well short of the boundary trees and fence. CP at 321. Jarmuths' property shows their maintenance down short of their natural area, the natural area and then Phyllis' tree line.

The photographic evidence from 1990 through 2017 depicts the Clark family and Phyllis's maintenance of the property up to and including the boundary trees. That photographic evidence also

demonstrates that the Jarmuths did not maintain their property up to the boundary trees. Phyllis and her predecessor, the Clark family, exclusively occupied and maintained Phyllis's property, including the boundary trees.

Phyllis testified that she believed the boundary trees were her property. Mrs. Jarmuth testified that she believed her property was the natural area abutting the boundary trees. Mr. Jarmuth also testified that he thought the common boundary was in the natural area.

These facts warrant reversal of the Trial Court's order and awarding Phyllis summary judgment on her claims for adverse possession and mutual recognition and acquiescence. But, at a minimum, these facts and reasonable inference made in favor of Phyllis create issues of material fact that must be decided at trial.

**D. The Trial Court erred in entering Findings of Fact and Conclusions of Law in awarding Rainshadow Storage its attorney's fees.**

The Trial Court erred in entering Findings of Fact in awarding attorney's fees that go to the issues on Summary Judgment. As noted above, Findings of Fact are considered superfluous on review of Summary Judgment because the Appellate Court makes a de novo review. As such, there should be no need to address the Findings of Fact. Further, entry of Findings of Fact 1, 2, 3, 4, 6, 7, and 8 were not necessary for awarding fees. However, because the findings were entered and then conclusions,

they are addressed here to preserve the objections to them filed in the Trial Court.

Findings of Fact 1, 2, 3, and 7 are not supported by the evidence. As argued above, Phyllis declaration, together with the declarations of both Gast, Jarmuth, and Terry Curtis, more than established, at least on Summary Judgment, Clark's, then Gene and Phyllis' exclusive occupancy and maintenance of, and ownership claim to, the disputed area for more than 10 years.

Similarly, the Declarations Phyllis, both Jarmuth and Gast, and the Declaration of Terry Curtis unequivocally establish that Jarmuth treated the tree line as the boundary between the two properties and that they never claimed the disputed area.

As those findings were the basis for the attorney fee award, and were not supported by substantial evidence, the findings and the conclusions of law should be rejected and the attorneys' fee award reversed.

**E. The Trial Court erred in awarding reasonable attorney's fees to Rainshadow Storage.**

Washington State follows the American Rule in awarding attorney's fees. A Court may award fees only if authorized by a contract provision, a statute, or a recognized ground in equity. *King Cnty. v. Vinci*

*Constr. Grands Projects/Parsons RCI/Frontier-Kemper*, 188 Wn.2d 618, 398 P.3d 1093, 1097 (2017). Here, no contract provision is involved and no equitable theory alleged entitling Rainshadow Storage to an award of attorneys' fees. Similarly, each of the statutes cited by Rainshadow Storage does not confer this Court with authority to award Rainshadow Storage its attorney's fees.

**F. Rainshadow Storage failed to move for attorneys' fees within the strict 10-day time limit imposed under CR 54(d).**

Rainshadow Storage's request for attorney's fees was untimely and should have been denied. The Trial Court's October 1, 2018 Memorandum Opinion was a final judgment under CR 54 because it determined the rights of the parties and dismissed Phyllis's case on the eve of Trial. This judgment was deemed effective from the time it was filed with the Court Clerk. CR 58(b). CR 54(d)(2) mandated that Rainshadow Storage file its motion for attorneys' fees and costs within 10 days of the Court's opinion. Instead, it inexplicably waited 25 days to bring its motion, and setting the hearing 60 days after the Court's Memorandum Opinion.

CR 54(d)(2) states that:

Costs, Disbursements, Attorney's Fees, and Expenses. (2) Attorney's Fees and Expenses. Claims for attorney's fees and expenses, other than costs and disbursements, shall be made by motion unless the substantive law governing the action provides for the recovery of such fees and expenses as an element of damages to be proved at Trial. Unless otherwise

provided by statute or order of the Court, *the motion must be filed no later than Ten (10) days after entry of judgment.*” (emphasis added).

The 10 day deadline imposed by this statute is mandatory, not permissive.

The WSBA Board of Governors stated purpose for the amendment that added CR 54(d)(2) was that: “The primary purpose of the proposed amendments is to require a prevailing party to move for attorneys’ fees (and any other costs not provided by the statute) within Ten (10) days of the entry of judgment—the same deadline imposed for other post-judgment motions. This is done by adding a new section (d)(2) to CR 54.” The Board of Governors acknowledged that by not having a deadline by which a party must move for attorneys’ fees, it could “create delay at the appellate level when an aggrieved party seeks to obtain appellate review of a subsequently entered attorney fee award.”

Rainshadow Storage’s inexcusable delay in moving for attorneys’ fees prejudiced and harmed Phyllis. Based on how the Trial Court’s decision was framed, Phyllis had 30 days after the Court’s Memorandum Opinion was entered to file a Notice of Appeal. To wait until after Rainshadow Storage’s motion for attorneys’ fees would put Phyllis at risk of Rainshadow Storage arguing she was beyond the 30 day appeal period. Permitting Rainshadow Storage’s tardy motion and late entry of an attorneys’ fee award required a second appeal with additional costs and

delay. This is inequitable, is expressly prohibited by CR 54(d)(2), and should not have been allowed by the Trial Court.

However, even if Rainshadow Storage had timely filed a motion for attorneys' fees, the motion should have been denied on substantive grounds as well for the reasons discussed below.

**G. RCW 4.84.030 strictly limits recoverable attorneys' fees as costs to \$200.00.**

RCW 4.84.030 provides for the recovery of costs and disbursements. RCW 4.84.080 limits attorney's fees recoverable as costs to \$200.00. RCW 4.84.030 – Prevailing party to recover costs – states that:

In any action in the Superior Court of Washington the prevailing party shall be entitled to his or her costs and disbursements; but the Plaintiff shall in no case be entitled to costs taxed as attorneys' fees in actions within the jurisdiction of the District Court when commenced in the Superior Court.

RCW 4.84.080 provides that:

When allowed to either party, costs to be called the attorney fee, shall be as follows: (1) In all actions where judgment is rendered, Two Hundred Dollars and 00/100 (\$200.00). (2) In all actions where judgment is rendered in the Supreme Court or the Court of Appeals, after argument, Two Hundred Dollars and 00/100 (\$200.00).

Here, there is no dispute that Rainshadow Storage is the prevailing party; however, Rainshadow Storage is only entitled to statutory attorneys'

fees. The prevailing party is limited to statutory attorneys' fees when there is no statute providing otherwise. *See Johnston v. Karjala*, 172 Wn. 122, 129, 19 P.2d 948 (1933). The only contract, statute, or recognized ground in equity that provides for attorneys' fees are RCW 4.84.030 and 4.84.080, which provide for statutory attorneys' fees of \$200 to the prevailing party. Therefore, the Court should find that Rainshadow Storage is only entitled to statutory attorneys' fees of \$200.00 under RCW 4.84.030 and 4.84.080.

**H. RCW 4.24.630 does not provide Rainshadow Storage with a reciprocal right to attorneys' fees.**

Rainshadow Storage is not entitled attorney's fees under RCW 4.24.630 because the plain reading of that statute does not provide for such fees. This section states in part:

Damages recoverable under this section include, but are not limited to, damages for the market value of the property removed or injured, and for injury to the land, including the costs of restoration. In addition, the person is liable for reimbursing the injured party for the party's reasonable costs, including but not limited to investigative costs and reasonable attorney's fees and other litigation-related costs.

When interpreting a statute, Courts first look to the statute's plain language. *City of Seattle v. Holifield*, 170 Wn.2d 230, 237, 240 P.3d 1162 (2010). "If the plain language is subject to only one interpretation, our inquiry ends because plain language does not require construction." *Id.*

This section does not allow a party who successfully defends a claim under this provision to recover attorney fees; it is not reciprocal. *Kave v. McIntosh Ridge Primary Road Association*, No. 48779-9-II, Slip. Op. at 23 (Wash. Ct. App. Div. II). Rainshadow Storage is not entitled to its attorneys' fees under the waste statute, RCW 4.24.630, because it does not provide a reciprocal right for attorneys' fees.

**I. The Trial Court should have denied Rainshadow Storage's request for attorneys' fees under RCW 7.28.083 because the equities favor Phyllis and Rainshadow Storage has unclean hands.**

RCW 7.28.083(3) states that:

“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.”

Although RCW 7.28.083 permits a Court to award some or all of the attorneys' fees to a prevailing party in an adverse possession case, it is only after it considers all the facts and determines an award is equitable and just. The equities in this matter favor Phyllis.

The Court's decision was largely based on its finding that it found “insufficient evidence to establish ‘maintenance’ of the area within approximately 5-6 feet of the former tree line over a 10-year period.” While the Court found that Phyllis did not meet her burden of establishing

each element of adverse possession it is undeniable that Rainshadow Storage was reckless when it cut down the trees that bordered Phyllis's property and removed a large section of the wood fence that was partially on her legally described property and partially on Rainshadow Storage's.

Rainshadow Storage admits that it never contacted Phyllis or attempted to determine if she had been responsible for maintaining the trees that formed a boundary line parallel to the legally described property. Ryan Schaafsma, one of Rainshadow Storage's principals, admitted during his deposition that he was only concerned with the legally described boundary lines. This indifference to Phyllis's property rights was even more egregious when Rainshadow Storage removed a significant portion of her large wooden fence.

In 2007, Phyllis and her husband built a large wooden fence that crossed into Rainshadow Storage's legally described property. Phyllis believed that this fence was located entirely on her property and so did the Jarmuths who sold the property to Rainshadow Storage. In February 2017, over 9 ½ years after the fence was built, Rainshadow Storage removed a large portion of the fence that was located on its legally described property. Rainshadow Storage did this without ever discussing the fence with Phyllis or making any attempts to contact her. The fence was clearly serving Phyllis's property because it had her address posted on

the fence. Rainshadow Storage clearly knew this because she stacked the portion of the removed fence on her property.

Phyllis and the Jarmuths always treated the trees and the wooden fence as the boundary line. The only time the legally described property was claimed as the true boundary was when Rainshadow Storage purchased the property from the Jarmuths. Up until that point, Dale and Troye Jarmuth admittedly believed that the tree line was the property line between the two properties. At no time after they purchased the property in 1993, did Jarmuth ever claim or occupy up to the survey line.

RCW 7.28.083 does not mandate an award of attorneys' fees to the prevailing party. In fact, the statute only allows for an award of attorneys' fees if the Court "determines such an award is equitable and just." Under these set of facts, it would not be equitable or just to award attorneys' fees to Rainshadow Storage who performed absolutely no due diligence in determining whether Phyllis had a legal right to the trees or whether the fence has been erected for longer than 10 years.

**J. Rainshadow Storage is not entitled to attorneys' fees based upon its CR 68 offer of judgment because RCW 4.24.630 does not provide a defendant with a reciprocal right to recover attorneys' fees.**

Rainshadow Storage argues that it is entitled to attorneys' fees under CR 68. This Court should find that Rainshadow Storage is not

entitled to attorneys' fees under CR 68 because the underlying statute only provides for attorneys' fees as costs to the injured party – i.e. Phyllis.

CR 68 states in part, that: “If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.” The term “costs” has been interpreted as not including attorney's fees and expert witness fees. *Sims v. Kiro, Inc.*, 20 Wn. App. 229, 238, 580 P.2d 642, 647 (1978); *Fiorito v. Goerig*, 27 Wn.2d 615, 179 P.2d 316 (1947).

Attorneys' fees may or may not be included in the “costs” that can be recovered under CR 68. *Lietz v. Hansen Law Offices, P.S.C.*, 166 Wn. App. 571, 581, 271 P.3d 899 (2012). If the underlying statute defines “costs” to include attorneys' fees, Courts are satisfied that such fees are to be included as costs for purposes of CR 68. *Lietz*, 166 Wn. App. at 582 (citing *Seaborn Pile Driving Company, Inc. v. Gayle Glew, et al.*, 132 Wn. App. 261, 131 P.2d 910 (2006) (citing *Marek v. Chesny*, 473 U.S. 1, 105 S.Ct. 3012, 87 L.Ed.2d 1 (1985)); *Hodge v. Dev. Servs. of Am.*, 65 Wn. App. 576, 579, 828 P.2d 1175 (1992) (quoting *Marek*, 473 U.S. at 9). “[B]y relying on the underlying statute the Court places the ultimate responsibility to make the decision where it should be-on the Legislature.” *Hodge*, 65 Wn. App. at 581.

In *Marek*, the Plaintiff filed a Civil Rights Claim against the Defendants under 42 U.S.C. § 1983. 473 U.S. at 3. The Defendants made an offer of judgment under CR 68 before trial for \$100,000.00. *Id.* at 4. The Plaintiff rejected the offer and was awarded \$60,000.00 after trial. *Id.* The Defendants filed a request for costs including attorneys' fees under CR 68 and argued that such costs included attorneys' fees. *Id.* On appeal, the Court held that the Defendants could recover attorneys' fees as costs under CR 68 because the suit was filed under 42 U.S.C. § 1983, and under "42 U.S.C. § 1988, a prevailing party in a § 1983 action may be awarded attorney's fees 'as part of costs.'" *Id.* at 9. In interpreting CR 68, the Court reasoned that "the most reasonable inference is that the term 'costs' in Rule 68 was intended to refer to all costs properly awardable under the relevant substantive or other authority." *Id.* In summary, the Court stated: "In other words, all costs properly awardable in an action are to be considered within the scope of Rule 68 'costs.' Thus, absent congressional expressions to the contrary, where the underlying statute defines 'costs' to include attorney's fees, we are satisfied such fees are to be included as costs for purposes of Rule 68." *Id.*

Under RCW 4.24.630, an injured party may recover damages for waste. In addition to damages, the injured party may also recover "reasonable costs, including but not limited to investigative costs and

reasonable attorneys' fees and other litigation-related costs." RCW 4.24.630.

Here, Rainshadow Storage is not entitled to attorneys' fees under CR 68 because the underlying statute only allows an injured party to recover attorneys' fees as a part of costs, unlike in *Marek*. In that case, the underlying statute, 42 U.S.C. § 1988, allowed the prevailing party to recover attorneys' fees as a part of costs. *Marek*, 473 U.S. at 9. However, the underlying statute here, RCW 4.24.630, only allows the injured party to recover attorneys' fees as a part of costs. This distinction is central to the determination of whether attorneys' fees are recoverable as costs under CR 68 because the *Marek* decision—which interprets this issue and to which Hodge and all the other cases cited by Defendant originate — reasoned that “the most reasonable inference is that the term ‘costs’ in Rule 68 was intended to refer to all costs properly awardable under the relevant substantive or other authority.” *Marek*, 473 U.S. at 9.

Consistent with this reasoning, although the underlying statute, RCW 4.24.630, defines costs to include attorneys' fees, Rainshadow Storage is not entitled to attorneys' fees as costs under CR 68 because such fees are not properly awardable to a defendant under RCW 4.24.630. This interpretation is also consistent with the reasoning in *Hodge* that “by relying on the underlying statute the Court places the ultimate

responsibility to make the decision where it should be-on the Legislature.” 65 Wn. App. at 581. The Legislature has determined that only the injured party is entitled to attorneys’ fees as costs. Therefore, the Court should find that Defendant is not entitled to recover attorneys’ fees as costs under CR 68.

The other cases cited by Rainshadow Storage in support of its specious position that it should be entitled to its attorneys’ fees under CR 68 are wholly distinguishable. In both *Lietz* and *Hodge*, the Defendants made an offer of judgment that expressly stated it included costs. When deciding whether or not the Plaintiffs in those actions could seek attorneys’ fees after accepting the offer, the Court looked at whether the underlying statute or contract defined attorneys’ fees as costs. The Court’s reasoning was that if the underlying statute or contract defined attorneys’ fees as costs, then they could not seek additional attorneys’ fees after accepting the offer of judgment. But if the underlying statute or contact did not define attorneys’ fees as costs, then the Plaintiff could seek attorneys’ fees even after accepting the offer of judgment.

Rainshadow Storage is making an entirely different claim here. In this case, Rainshadow Storage is claiming that it should be entitled to its attorneys’ fees under CR 68 because RCW 4.24.630 defines attorneys’ fees as costs. As discussed above, RCW 4.24.630 does not provide

Rainshadow Storage with a reciprocal right to attorneys' fees. If Rainshadow Storage is unable to recover attorneys' fees under that statute in the absence of a CR 68 offer of judgment, then it is axiomatic that it is not entitled to attorneys' fees after serving a CR 68 offer of judgment.

**K. Phyllis is entitled to an award of attorneys' fees and costs on appeal.**

Assuming Phyllis prevails on appeal, she should be awarded her attorney's fees on this appeal under RCW 4.24.630, RCW 7.28.083 or in equity based upon Rainshadow Storage's bad faith, willful misconduct or wantonness. *Gunn v. Riely*, No. 48701-2-II (Wash. Ct. App. Div. II 2017).<sup>3</sup> RCW 4.24.630 specifically entitles Phyllis to an award of reasonable attorney's fees because of Rainshadow Storage's wrongful removal of her boundary trees and other damage to her property.

Rainshadow Storage saw the tree line fence and initially thought it was the boundary line. In its greed to capture more land that it was not entitled to, it flagrantly ignored obvious signs that boundary trees were part of Phyllis's property. Rainshadow Storage unreasonably cut down the boundary tree fence. In the course of cutting down the boundary trees, Rainshadow Storage also removed three wire fences: one to east of the

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<sup>3</sup> This citation is to an unpublished decision and "the decision has no precedential value, is not binding on any court, and is cited only for such persuasive value as the court deems appropriate." *Crosswhite v. Wash. State Dep't of Soc. & Health Servs.*, 197 Wn. App. 539, 544, 389 P.3d 731 (2017); *see* GR 14.1.

boundary trees, one attached to the west side of the boundary trees and the third fence attached to the boundary trees and then running south to the 21-foot wooden fence and locked gate. Any normal person would have inquired as to the ownership of the trees and land inside of the marked boundary line.

Similarly, RCW 7.28.083(3) entitles Phyllis to an award of reasonable attorney's fees and costs. Only Phyllis and her predecessors maintained the boundary trees and used and claimed the disputed area as their own. This tree line was the recognized boundary for almost 30 years. For Rainshadow Storage to ignore the clear occupational lines and cavalierly conclude that the survey line was the true boundary was unreasonable, to put it generously. Equity justifies that Phyllis be awarded her reasonable attorneys' fees and costs.

Finally, Rainshadow Storage's conduct was so unreasonable that fees should be awarded in equity. Removing the boundary trees and related fencing which existed for almost 30 years, without even a scintilla of investigation is outrageous. A simple telephone call to Phyllis, the Gasts or the Jarmuths would put anyone on notice that Phyllis claimed the boundary trees and fence, thereby triggering further investigation. Rainshadow Storage's misguided action was in such bad faith that this Court should award Phyllis fees for this appeal in equity. *Rogerson Hiller*

*Corp. v. Port of Port Angeles*, 96 Wn. App. 918, 927, 982 P.2d 131 (1999).

## **VI. CONCLUSION**

For almost 30 years, Phyllis and her predecessor, the Clark family, are the only persons who used, maintained, occupied or asserted control over the disputed area. This use was open and notorious, exclusive, continuous and hostile to the Jarmuths. Even when viewing the evidence in a light most favorable to Rainshadow Storage, Phyllis has demonstrated that she acquired title to the disputed area by adverse possession. Thus, this Court should reverse the lower court, award Phyllis summary judgment on her adverse possession claim, and remand back to the Trial Court for a hearing on Phyllis's claims for damages.

Phyllis, and the Clark family before her, recognized the boundary trees as the common property line with the Jarmuths. The Jarmuths also testified that they believed the boundary trees, or the natural area abutting the boundary trees, was the common boundary. There is no contradictory evidence in the record. Hence, this Court should reverse the lower court, award Phyllis summary judgment on her claim for mutual recognition and acquiescence, and remand back to the Trial Court for a hearing on Phyllis's claims for damages.

At a bare minimum, when viewing the evidence in favor of Phyllis, there are issues of material fact that preclude an award of summary judgment in favor of Rainshadow Storage. Alternatively, this Court should reverse the trial court, vacate the judgment entered in favor of Rainshadow Storage, and remand back to the trial court for a trial on all issues.

Respectfully submitted this 5<sup>th</sup> day of April, 2019.

BELL & DAVIS PLLC

By   
W. Jeff Davis, WSBA No. 12246  
Attorneys for Appellant

HELSELL FETTERMAN LLP

  
By   
Brandon S. Gribben, WSBA No. 47638  
Of Attorneys for Appellant

## **ADDENDUM TO APPELLANT'S OPENING BRIEF**

The Findings of Fact and Conclusions of Law set forth in the Order dated December 4, 2018 Granting Rainshadow Storage Attorney Fees and Awarding Costs are set forth below.

### Findings of Fact

1. Even when considering all evidence and inferences in favor of plaintiff as the nonmoving party, there is insufficient evidence to establish maintenance of the disputed area with an approximate 5 to 6 feet of the former tree line over a 10-year period.

2. There is insufficient evidence that either parties, or their predecessor owners in interest, recognized it and acquiesced to a boundary line other than the legal boundary of the property.

3. Plaintiff Phyllis Y. Rainwater ("Rainwater") has failed to make a prima facie case showing all the concurrent element of adverse possession based on her claims of maintenance and use.

4. Because there is insufficient evidence to show adverse possession by Rainwater, the claim for trespass upon the disputed area is dismissed as legal title remains per the Defendants' the deed.

5. Rainshadow made a CR 68 offer of judgment that was not accepted. Rainwater has failed to obtain a judgment more favorable than the CR 68 offer.

6. Rainwater requested a continuance under CR 55(f), and the continuance was granted over objection of Rainshadow.

7. Despite given more time, Rainwater failed to produce any facts that would show all concurrent elements of adverse possession presumptively present over a period of 10 years.

8. This increased the cost of litigation.

9. The attorney fees requested are reasonable, are in compliance with accepted rates for this type of work within Clallam County, and the work billed is related to and/or intertwined with the defense of adverse possession and trespass as pled by the plaintiff. The Court has considered the lodestar method and finds fees and costs in the amount of \$39,753.18

#### Conclusions of Law

1. As a matter of law there is insufficient evidence to show tacking of predecessor's use of the disputed area.

2. As a matter of law Rainwater has failed to make a prima facie case of adverse possession with all concurrent elements of adverse possession present during the 10-year period.

3. Rainshadow is the prevailing party.

4. Rainshadow is entitled to attorney fees as the prevailing party under RCW 7.28.083.

5. Rainshadow is entitled to attorney fees under CR 68 as a portion of costs.

6. Due to the authority to award attorney fees for the aforementioned cited statutes where one or all of them may apply, and the

fact that the attorney fees incurred are inextricably intertwined in defending the adverse possession and trespass claims, the Court concludes it is appropriate to award attorney fees as a matter of law.

**CERTIFICATE OF SERVICE**

I, Mindy Davis, hereby declare and state as follows:

1. I am over the age of majority, competent to testify and make the following statements based upon my own personal knowledge and belief.

2. I am now and at all times herein mentioned employed by the offices of BELL & DAVIS PLLC.

3. In the appellate matter of Phyllis Y. Rainwater v Rainshadow Storage, et.al. I did on the date listed below, (1) cause to be filed with this Court an Appellant's Opening Brief; and (2) to be delivered via email to: Shane Seaman, [shane@crosssoundlaw.com](mailto:shane@crosssoundlaw.com), who is counsel of record of Rainshadow Storage LLC and to: Claudia Shannon, [claudia.shannon@libertymutual.com](mailto:claudia.shannon@libertymutual.com), who is counsel of record for We Dig It.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

DATED: April 5, 2019

  
MINDY DAVIS

**BELL & DAVIS PLLC**

**April 05, 2019 - 2:40 PM**

**Transmittal Information**

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