

FILED  
Court of Appeals  
Division II  
State of Washington  
5/28/2019 10:05 AM  
No. 52757-0-II

Clallam County Cause No. 17-2-00506-4

IN THE COURT OF APPEALS, DIVISION II

FOR THE STATE OF WASHINGTON

---

PHYLLIS Y. RAINWATER

Appellant/Plaintiff

vs.

RAINSHADOW STORAGE, LLC, a Washington limited company,  
JOHN R. DICKSON and LORI DICKINSON, dba WE DIG IT

---

Respondents/Defendants

Respondent's Brief

---

Shane Seaman  
WSBA #35350

Cross Sound Law Group  
18887 St. Hwy 305 NE, Suite 1000  
Poulsbo, WA 98370  
360-598-2350  
shane@crosssoundlaw.com

## Contents

TABLE OF AUTHORITIES.....	4
A. INTRODUCTION .....	7
B. RESPONSE TO ASSIGNMENT OF ERRORS AND STATEMENT OF ISSUES .....	8
C. STATEMENT OF CASE .....	9
1. The dispute started due when Rainshadow cut trees within an overgrown strip 5-6 feet wide on its western edge without knowing that Phyllis was claiming she owned the property. ....	9
2. Evidence did not show the prior owners, the Clarks, maintained the disputed 5-6 feet under the overhanging limbs. ....	11
3. Livestock fence installed in 2003 and the neighbors, the Gasts, exclusively used until 2005. No person ever saw Phyllis or Gene within the disputed area between 2003-2005. ....	13
4. Phyllis does not show maintenance of the 5-6 feet or the trees by anyone for a continuous 10 year period whether starting in 2003 or 2005 and they left in 2013 for Arizona. ....	14
5. Phyllis doesn't show she physically occupied the disputed 5-6 feet for 10 year block of time. ....	17
6. Phyllis admits the boundary corner was marked but claims a fence existed "around" the trees in 2003. ....	19

7.	Facts show the fence on the western side of trees, Phyllis’s side..	19
8.	Phyllis does not show a fence existed on eastern side of trees for a 10 year period or she maintained it. ....	20
9.	The Gasts’ westerly livestock fence was hidden in overgrown brush, and no evidence Phyllis maintained the fence.....	22
10.	Wooden bridge converted to fence after spring 2007 is the earliest possible time the disputed 5-6 feet was enclosed, but it also wasn’t for 10 years. ....	24
11.	Reviewing the facts carefully and looking past Phyllis’ argument and supposition shows why her claim was dismissed.....	25
D.	ARGUMENT.....	26
12.	Standard of Review. ....	26
13.	Phyllis offers no authority that the adverse possessor claimant only must show some of the elements of adverse possession to survive a summary dismissal. ....	28
14.	Phyllis cannot meet the Adverse Possession Elements during her ownership or the Clarks’ ownership, even when construing the facts in her favor. ....	29
a)	Phyllis lacked admissible facts showing Gene and Phyllis maintained up to the trees for 10 years.....	29

b) Phyllis’ facts about the Clarks’ ownership did not demonstrate each concurrent element of adverse possession. ....	37
15. The fence was not readily visible, the area was overgrown. Only Phyllis recognized the “convenient” livestock fence 5-6 feet away as a boundary line.....	39
16. A trial would not be in the best interest of judicial economy. The parties performed discovery, the basic facts of the case are known and no fact finder could find in Phyllis’ favor when she bears the burden of proof, and her credibility is at issue. ....	43
17. The Trial Court did not err in entering findings of facts and conclusions of law for the judgment awarding attorney fees.....	44
18. Respondents request attorney fees on Appeal, RAP 18.1.....	47
E. CONCLUSION .....	48

## Table of Authorities

### Cases

<u>Anderson v. Hudak</u> , 80 Wn.App. 398, 404-5, 907 P.2d 305 (1995). .....	32
<u>Boeing Co. v. Sierracin Corp.</u> , 108 Wash.2d 38, 65, 738 P.2d 665 (1987).....	45
<u>Chaplin v. Sanders</u> , 100 Wn.2d 853, 857, 676 P.2d 431 (1984).....	31
<u>Chen v. State</u> , 86 Wn. App. 183, 937 P.2d 612 (1997).....	29
<u>Estep v. Hamilton</u> , 148 Wn. App. 246, 259, 201 P.3d 331, 338 (2008)...	47
<u>Grimwood v. Univ. of Puget Sound, Inc.</u> , 110 Wash.2d 355, 359, 753 P.2d 517 (1988).....	28
<u>Handler v. Port of Chehalis</u> , 97 Wn. App. 750, 754, 986 P.2d 836, 839 (1999).....	28
<u>Herron v. Tribune Pub'g Co.</u> , 108 Wash.2d 162, 170, 736 P.2d 249 (1987).....	29
<u>ITT Rayonier, Inc. v. Bell</u> , 112 Wn.2d 754, 757, 774 P.2d 6 (1989) .....	30
<u>Kesinger v. Logan</u> , 51 Wn.App. 914, 921, 756 P.2d 752 (1988), <i>aff'd</i> 113 Wn.2d 320, 779 P.2d 263 (1989).....	32
<u>Krona v. Brett</u> , 72 Wn.2d 535, 433 P.2d 858 (1967).....	31
<u>Lamm v. McTighe</u> , 72 Wn.2d 587, 592, 434 P.2d 565, 568 (1967).....	40
<u>LaMon v. Butler</u> , 112 Wn.2d 193, 197, 770 P.2d 1027, 1029 (1989) .....	29

<u>Lietz v. Hansen Law Offices, P.S.C.</u> , 166 Wn. App. 571, 581, 271 P.3d 899, 905 (2012).....	47
<u>Lilly v. Lynch</u> , 88 Wn.App. 306, 313, 945 P.2d 727 (1997).....	40
<u>Lingvall v. Bartmess</u> , 97 Wn.App. 245, 982 P.2d 690 (1999).....	34
<u>Maier v. Giske</u> , 154 Wn. App. 6, 19, 223 P.3d 1265, 1272 (2010) .....	35
<u>Meshner v. Connolly</u> , 63 Wn.2d 552, 388 P.2d 144 (1964).....	32
<u>O’Neill v. City of Shoreline</u> , 183 Wn. App. 15, 23, 332 P.3d 1099, 1104 (2014).....	46
<u>Seaquist v. Caldier</u> , 438 P.3d 606, 612 (Wash. Ct. App. 2019).....	29
<u>Shelton v. Strickland</u> , 106 Wn. App. 45, 53, 21 P.3d 1179, 1184 (2001) 37	
<u>Standing Rock Homeowners Ass’n v. Misich</u> , 106 Wn. App. 231, 23 P.3d 520 (2001).....	37
<u>State ex rel. Carroll v. Junker</u> , 79 Wash.2d 12, 26, 482 P.2d 775 (1971). 45	
<u>Stringfellow v. Stringfellow</u> , 53 Wn.2d 639, 641, 335 P.2d 825 (1959)..	28
<u>Taylor v. Talmadge</u> , 45 Wn.2d 144, 149, 273 P.2d 506, 509 (1954) .....	43
<u>Thompson v. Schlittenhart</u> , 47 Wn.App. 209, 734 P.2d 48 (1987); .....	33
<u>Vanderhoof v. Mills</u> , 175 Wn. App. 1050 (2013).....	36
<u>Whyte v. Jack</u> , 176 Wn. App. 1015 (2013) .....	36
 Statutes	
RCW 4.24.630 .....	47, 48
RCW 4.84.030 .....	47

RCW 7.28.083 ..... 47, 48

Rules

CR 54(d)(2)..... 45, 46

CR 56 ..... 27, 28

CR 56(f) ..... 46

CR 6(d)..... 46

CR 68 ..... 47

RAP 18.1..... 48

Treatises

§ 8.9. Actual possession—Principles, 17 Wash. Prac., Real Estate § 8.9  
(2d ed.)..... 30

## A. INTRODUCTION

Respondent Rainshadow Storage, LLC (“Respondent” or “Rainshadow”) does not take the position that there was no genuine issue of material fact at the summary judgment. There are numerous disputed facts that if we go to trial will show that Appellant Phyllis Rainwater’s (“Appellant” or “Phyllis”<sup>1</sup>) claims are not supported by the law and she will never meet her burden of proof because we have been through discovery and know what the facts are. However, Rainshadow is assuming the facts presented in discovery by Phyllis are true. Rainshadow asks this Court to analyze those facts closely though, because looking past the vague assertions and argument and actually considering what would go to trial shows Phyllis has no case.

Phyllis’ late husband Gene Paschal (“Gene”) and the neighbor Glen Gast and Donna Gast (collectively, the “Gasts”) installed a livestock fence in 2003 on the western side of the trees but it wasn’t a boundary fence, the Gast exclusively used the area until 2005 and no one saw Phyllis or Gene use the disputed area for a 10 year block. Phyllis’ photogrammetry expert Terry Curtis (“Curtis”) cannot show use of the disputed 5-6 feet for a 10 year block of time when the predecessors Roger Clark and Helen Clark

---

<sup>1</sup> As noted by Appellants, for ease of reference Phyllis Rainwater is referred to herein as “Appellant” or “Phyllis” to avoid confusion with the Respondent Rainshadow. No disrespect is intended by using her first name.

(collectively, the “Clarks”) owned Phyllis’s property. Phyllis moved from the property in 2013 before residing there for 10 years, listed it for sale and the bank started foreclosure proceedings because it appeared abandoned. The Trial Court did not err in dismissing because even when applying the facts in a light most favorable to Phyllis, she cannot show that there is sufficient evidence in this case to make a prima facie case of adverse possession or boundary by mutual recognition and acquiescence to take to a fact finder in trial. Without those theories changing the boundary, Phyllis’ trespass claim regarding the trees is moot.

**B. RESPONSE TO ASSIGNMENT OF ERRORS AND  
STATEMENT OF ISSUES**

1. The Trial Court did not err in granting summary judgment to Rainshadow because Phyllis did not have sufficient evidence to show a prima facie case of adverse possession. Phyllis could not show a 10 year block with adverse possession.
2. The Trial Court did not err in denying Phyllis’ cross-motion for summary judgment. If the facts were construed in a light most favorable to Rainshadow, summary judgment for Phyllis on the adverse possession claim would be inappropriate as a matter of law.
3. If the facts were construed in a light most favorable to Rainshadow, summary judgment for Phyllis on the boundary by mutual

recognition and acquiescence claim would be inappropriate as a matter of law. The standard of proof is clear, cogent and convincing evidence.

4. The Trial Court did not err in awarding attorney fees, as doing so was well within the discretion of the trial court.

### **C. STATEMENT OF CASE**

- 1. The dispute started due when Rainshadow cut trees within an overgrown strip 5-6 feet wide on its western edge without knowing that Phyllis was claiming she owned the property.**

The disputed area in this case is a strip of land approximately 5-6 feet wide on the eastern side of Phyllis' property, where a survey stake that has existed since Phyllis took ownership marked Phyllis' NE corner (and Rainshadow's NW corner) (CP 388, 476, 486-487, 552). Phyllis and her late husband Gene purchased their real property on June 3, 2003. Phyllis initially claimed a fence always existed on the western edge of the property with a gate across her driveway and a wooden gate fence connected at the southwest corner, enclosing her property (CP 257-258, 550). However in the record she also states she/they never built a fence, but later states that Gene and Glen built the fences, and in her *Declaration* in opposition of Rainshadow's CR 56 motion, Phyliss doesn't claim a fence fully enclosed

her property in 2003, only stating the disputed eastern boundary was marked by a tree line (CP 385). Phyllis claimed that she and Gene used the disputed area in a manner that would put the true owner on notice by maintaining “the area next to the east tree line” (CP 386).

On or about February 17-22, 2017, after verifying the located survey corners, Rainshadow, by and through its agents, with assistance of family and friends including charity and church volunteers, cleared out a severally overgrown area, and then cut down a line of trees on its property (CP 265, 454-460 ). Rainshadow had no knowledge fencing on the entire western boundary until Ryan Schaafsma started the work on removing the brush, bramble and trees, or knowledge that Phyllis claimed ownership of the disputed strip (CP 164). A January 2017 survey didn’t show any encroachments or fencing (CP 156, 164). When Rainshadow and its agents did find an old fence stapled to the western side of the trees, there was no evidence Phyllis was using the 5-6 feet between the trees and the legally described boundary that had been clearly marked at the corner (CP 163-164, 265, 431- 432, 443, 451-452, 454-460)<sup>2</sup>. Phyllis was living in Arizona at the time, and there was zero evidence that Phyllis was maintaining the fence. The trees were removed per County requirements for the site plan.

---

<sup>2</sup> The neighbors and realtor confirm they left June 2013 and the area became overgrown. Phyllis and Gene had not been there for 10 years when they left.

**2. Evidence did not show the prior owners, the Clarks, maintained the disputed 5-6 feet under the overhanging limbs.**

The initially evidence in discovery were not supporting the theories of adverse possession, so Phyllis made up a new claim, that the Clarks “used” the disputed area. All Clarks are deceased, Phyllis never met them and Phyllis offered no evidence from the Clark’s directly. It’s undisputed a line of trees was planted within 5-6 feet of the boundary, but the evidence shows the trees were planted prior to the larger parcel being split into Rainshadow’s and Phyllis’ parcels (CP 166) and likely were a windbreak (CP 166-167), thus the claim the trees were intended to mark the boundary is pure conjecture. Phyllis’ eastern parcel was created by the Caughron Short Plat dated December 20, 1986 (CP 533), and purchased by the Clarks on April 15, 1988 (CP 211). Rainshadow assumes for purposes of summary judgment motion that the testimony of Phyllis’ expert Curtis is true concerning what he observed in the way of “maintenance,” but he does not show adverse possession of the 5-6 feet up to the trees. His opinion is the former tree line lies approximately 5 feet to the east of the legally described line (CP 280). Curtis could not see any fences or evidence of use under the trees in the historical aerial photography due to the “overhanging foliage,” he only had Phyllis self-serving claim it existed (CP 279). No gates or fences are seen in the disputed area in Curtis’ photos dated 8/1/2000 (CP

305), 7/21/2003 (CP 309), or 5/26/2005 (CP 311). Curtis testified Phyllis' eastern portion of the property up to the visible tree line appeared to be used for hay and it has been "maintained" because it appeared someone had kept the area in field grass, preventing the ingrowth or encroachment of brush, brambles or woody vegetation (CP 280).

Asking the question—"Maintained exactly to where?"—demonstrates the problem with Phyllis' claim and this obstacle permeates throughout her claims. Phyllis' expert cannot establish a single scintilla of evidence of use by Clarks in the disputed 5-6 feet because of the "overhanging foliage." That is why the Trial Court did not err, there was no actual evidence of maintenance by the Clarks beyond the tree limbs, only Phyllis' speculation.

Rainshadow offered photos Curtis does not discuss, dated July 27, 1981 and June 10, 1985 (CP 168, 175-176). These are admissible because there was sufficient indicia of reliability, the DOR file number was identified by Curtis (CP 287,289) and Ryan Schaafsma, who had experience in analyzing aerial imagery photography (CP 168). The line of trees are in the photo, no less than 7 years prior to the Clarks purchasing the property. The original owners most likely planted the trees and used them as a windscreen for their garden that is evident in the 1981 and 1985 aerial imagery, before Clarks purchased (CP 167-168). Rainshadow's review of the aerial photographs in 1981 and 1985 doesn't create issues of fact because Curtis does not

establish anywhere in his testimony the Clarks treated the trees or disputed strips as an owner would. All we know of the Clarks' use per Curtis' testimony is that someone mowed the field occasionally up to the "overhanging limbs," but no evidence of the 5-6 feet underneath.

**3. Livestock fence installed in 2003 and the neighbors, the Gasts, exclusively used until 2005. No person ever saw Phyllis or Gene within the disputed area between 2003-2005.**

After Phyllis purchased in June 2003, the Gasts installed a livestock fence along the trees because it was more convenient than digging post holes in the hard ground (CP 223, 430, 450-451, 466). It was never intended to be a boundary fence (CP 223). Between 2003 and 2005, the disputed area was used by the Gasts to pasture their miniature horses (CP 430, 450, 467). The undisputed unbiased testimony on this issue is that only the Gasts used the area, not Phyllis or Gene<sup>3</sup> (CP 109-112, 118, 134-135 450, 467).

---

<sup>3</sup> **Donna Gast:** Q. Did they ever go over and mow or garden or do any other activities in that area where your miniature horses were? A. Not while the horses were there, no. (CP 109-110)

**4. Phyllis does not show maintenance of the 5-6 feet or the trees by anyone for a continuous 10 year period whether starting in 2003 or 2005 and they left in 2013 for Arizona.**

The Gasts testified and Phyllis confirmed through her testimony that Gene was not using the disputed area several years prior to them moving to Arizona in 2013. Phyllis' testimony is that Gene only mowed the area in the pasture for 8 years up to the tree line due to his health, June 2003 to June 2011 (CP 570-571, 574-575 ), and that he trimmed the trees 4-5 years. So even though Phyllis creates a disputed fact that Gene started "mowing" in 2003 when the Gasts say they exclusively used the area until 2005, it does not matter, because Phyllis states Gene only mowed for 8 years and trimmed the trees for 4-5 years because he was in hospice care 3½ years before passing on December 23, 2014 (CP 570-571, 574-575). Glen Gast testifies he never saw Phyllis use the disputed area at all (CP 133)<sup>4</sup>. Phyllis also claims to put a garden bench in the area, but never establishes its existence over 10 years (CP 386), and she says Gene was in hospice care 3 ½ years.

Phyllis is trying to claim an error was made because she brought evidence of "maintenance" up to the tree line but once again she doesn't state precisely where. She shows photographs taken from her yard showing

---

<sup>4</sup> **Glen Gast:** Q. How about Phyllis? Did you ever see Phyllis out there in that area?  
A. Never. (CP 133)

the pasture and tree line in the distance (Appellants Brief, page 7), and offers argument that this shows maintenance. Just like the Clarks’ alleged maintenance, asking the question—“Maintained exactly to where?”—shows why the Trial Court was correct. The evidence shows that for the 8 years Gene mowed, it was to the legally described line five or six feet from the trees, and not beyond it. Photographs taken after the brush was cleared in February 2017 were introduced as Exhibit B of the Declaration of Ryan Schaafsma (CP 487-488), and the one showing the chain saw below were shown to the witnesses during depositions as Exhibit 3-B (CP 113-114, 132-133). Phyllis offers no photographs this close of the area during her occupation of the property while it was being “maintained.”



In the photo the survey corner is in the background (arrow) behind and in line with the end of the chainsaw on the ground, which Phyllis' expert stated is about 5 -6 feet from the base of the trees (CP 426). Several limbs hanging out from the furthest tree remains after Rainshadow started clearing the brush (CP 165). Donna Gast testified Gene maintained up to the trees when asked by Phyllis' counsel, but on cross examination, Donna Gast was more specific about what and where Gene "maintained" specifically stating he maintained up to the limbs growing 6-7 feet from the trunks, no closer than a chainsaw sitting 5-6 feet from the trunks in a photo (CP 114-115)<sup>5</sup>. Glen Gast stated Gene would mow no closer than 10 feet from the trees or approximately up to the end of the chainsaw, and Gene's maintenance didn't go past that (CP 124, 133). Gene didn't maintain past the surveyed line, which according to Phyllis only went on for eight years (CP 570-571, 574-575). Phyllis argues that Gene maintained "up to" the trees, but she didn't offer any evidence to show he did so for 10 years and most certainly

---

<sup>5</sup> Donna Gast: Q. So when you say that he maintained up to the limbs mowing, about where do you think he got?

15 A. Well, I don't think he could have gotten any closer than ... so I would say at least the distance out from that chainsaw and probably further to the west before he would actually be able to get up to the trees.

Q. So when you testified earlier when you were asked "Did he maintain up to the line of trees," being more specific, you're saying up to about that --

A. Yeah, as close as he could get to the trees - without -- Q. Because of the limbs? A.

Because of the limbs. Q. And when we use word "maintain," other than

5 mowing, did you ever see him do anything else? A. No (CP 114-115).

didn't show Gene did so in the disputed 5-6 feet other than arguing her photograph showing the line in the distance is evidence of maintenance.

**5. Phyllis doesn't show she physically occupied the disputed 5-6 feet for 10 year block of time.**

Rainshadow contends that Phyllis didn't occupy the disputed 5-6 feet at all, but arguing this creates an issue of fact. So Rainshadow assumes Phyllis is telling the truth despite not one single witness that can back up her claim about maintenance under the "overhanging foliage." Does this raise an issue of fact? No because the undisputed evidence shows that Phyllis and Gene had not resided in the property for 10 years before they made the choice to sell the property, listing it for sale on June 1, 2013 (June 3, 2003 to June 1, 2013) (CP 443-444). Phyllis claims that even though they had moved to Arizona at the time she still intended to live in Washington (CP 387). Phyllis stated to Chuck Murphy ("Murphy") that they were moving to Arizona and the home would be vacant, which it was for the duration the listing (CP 444). According to Kerri Hytinen ("Hytinen"), Phyllis and Gene made arrangements to sell and pack the house and move in May 2013 (CP 446-447) .

Does Phyllis claim she intended to remain in Washington raise an issue of fact when Murphy's and Hytinen's evidence of her admissible statements

under ER 801(d)(2) contradict her testimony? No, because her subjective intent is not relevant, it's the objective evidence of her use that matters. Per the Gasts, Phyllis and Gene decided to move to Arizona permanently due to Gene's health (CP 115, 451, 468), which was before the house was listed in June 2013. Per Donna Gast, Gene in fact stopped mowing the disputed area at least a year before they moved due to his health (CP 115). Phyllis says 8 years mowing, so we assume that is true, if and only if, the Court ignores the fact that only the Gasts used the disputed area for their miniature horses until 2005 (CP 111, 134- 135, 430, 467). Phyllis agrees that they did not mow the area or trim the trees for 10 years because of Gene's illness (CP 570-571, 574-575). Phyllis testified that "After Gene became ill and we traveled to Arizona, the mortgage company thought we abandoned the property and started foreclosure" (CP 389). Phyllis stopped the foreclosure, but what is relevant is the facts show that even though Phyllis subjectively claims an intent to remain at the house after 2013, objectively it appeared she had left for good before they had resided there for 10 years with only 8 years of mowing. If she wasn't at the property for 10 years actually using and maintaining the disputed 5-6 feet, then what other evidence does she have to show use of the disputed area?

**6. Phyllis admits the boundary corner was marked but claims a fence existed “around” the trees in 2003.**

Because Phyllis cannot show physical use, she hopes the Court will find the fencing sufficient to prove her claim. It’s undisputed that the NE corner was marked and existed at the time Phyllis and Gene purchased their property in 2003 (CP 389, 551-552 ). Thus, the corner has always been known if someone looked for it. Phyllis claims a fence existed in 2003 going around the trees (CP 553-554). Asked what side the fencing was on the trees she initially answered it was on the western side, her side of the trees,<sup>6</sup> but the record shows Phyllis was then later non-descriptive, coy in her answer, even saying the fence was there to hold up the trees (CP 553-556). If we assume Phyllis is being truthful, the fencing was not a boundary, its purpose was to “reinforce” the trees (CP 556, line 8).

**7. Facts show the fence on the western side of trees, Phyllis’s side.**

Phyllis was referring in her testimony to a wire livestock fence that was installed by the Gasts and Gene in approximately 2003, after Gene and Phyllis moved in that was never intended to be a boundary fence (CP 223, 430, 450-451, 466). It stapled to the western side of the trees because the

---

<sup>6</sup> **Phyllis:** Q. So listen to my question. When you first got there in 2003, which side of the tree was it on? Was it on your side or was it on the other side? A. On our side.  
Q. So the fence was on your side; is that correct?  
23 A. Uh-huh. (CP 553)

ground was too hard to dig a fence post, and thus put where it was out of “convenience” (CP 164-165, 223, 430, 450-451, 454-459 466).

Not a single witness has come forward and stated a fence “encircled” the property in 2003. The Gasts testified no fence existed on the trees until they installed it and most damning are the aerial photos. No fencing or gate can be seen across Phyllis’ driveway or going out to the westerly tree line in Curtis’ photos dated 8/1/2000 (CP 305), 7/21/2003 (CP 309), or 5/26/2005 (CP 311). Phyllis’ expert contradicted her argument.

**8. Phyllis does not show a fence existed on eastern side of trees for a 10 year period or she maintained it.**

It seems Phyllis is hoping to confuse the Court by claiming a fence existed also on the eastern side of the trees to defeat the dismissal of her trespass to trees claims. Since Curtis cannot see under the trees, we have no way of verifying her argument. Let’s assume her claim is true (it will be greatly contested at trial), but what is she really saying? In Phyllis’ declaration, she never once says a fence existed on the eastern side when she moved in, only mature trees that could be “considered” a fence (CP 385). Phyllis had an opportunity to inquire of the witnesses about the location of the fence either on the east or west side and both the Gasts were consistent that only their livestock fence existed on the western side of the

trees after they installed it in 2003, and no fencing existed along the disputed area prior to 2003 (CP 107,121, 131, 449, 466).

Again, giving Phyllis the benefit of the doubt, her significant other, Robert Lint (“Lint”) testified he saw a fence in 2015 on the outside of the trees, but all he establishes is that in 2015 a fence may have existed on the other side of the trees, 2 years before it was cut down (CP 365). He has no personal knowledge of how it got there, how long it had been there, and again, Phyllis doesn’t state a fence was there in her *Declaration* (CP 385). It should also be noted that Lint supports his claim that a fence existed on the eastern side of the trees by showing a photograph of a single fence post on the north side of the property (CP 366, 374, 376). Rainshadow shows the fence post in the photograph was part of a fence that ran the entire length of the Rainshadow’s northern property line (CP 171-172) came from the north side and that is not rebutted (CP 164-165). Recall that Curtis’ aerial photos show no fencing encircling the property in 2000, 2003 and 2005. Lint’s speculation does not create issues of fact and other than argument, there is no evidence of any fencing on the east side of the trees for 10 years. Further, Lint cannot show the easterly fence was maintained in any fashion.

Without the easterly fence, Phyllis’ claim to the trees cannot be brought in good faith, because the tree bases are on the Jarmuth/Rainshadow property as marked by the historical corner. The only issue is the 5-6 feet

of overgrown grass, brambles and empty dirt, which Rainshadow offered in a CR 68 offer of judgment to compensate Phyllis for. Trial Court did not err dismissing Phyllis' claim to the trees.

**9. The Gasts' westerly livestock fence was hidden in overgrown brush, and no evidence Phyllis maintained the fence.**

Phyllis offered zero evidence that the Jarmuths knew the westerly livestock fence existed. Jarmuths testified they never saw the westerly livestock fence, thus they cannot have mutually recognized it and acquiesced in it being a barrier (CP 140, 143-144, 442, 462) "I can say for certain I never saw a fence" Dale Jarmuth (CP 442). "I never once saw anything along our property line that resembled a fence" Troye Jarmuth (CP 462). The Gasts confirmed the westerly fence was not visible as it blended into the brush and bramble because Phyllis and Gene let the area become overgrown (CP 105-106, 125-126, 137). Phyllis' photographs show/prove how difficult/impossible the fence was to see, even from her side of the trees where it should be clearly visible. After Phyllis and Gene moved to Arizona, the disputed area became overgrown and the property

appeared abandoned (CP 105-107, 116-117<sup>7</sup> 125-126<sup>8</sup>, 129<sup>9</sup>, 136<sup>10</sup>, 137, 467-468). Donna Gast was concerned the un-mowed pasture area next to the line of tree was a fire hazard and wrote Phyllis in Arizona (CP 117). PUD power billing records showed very little power use at the property after June 2013, corroborating the witnesses' testimony that it appeared Phyllis and Gene left permanently (CP 526-528). This does not create a disputed fact, it only demonstrates that Phyllis wasn't physically occupying the property after 2013, even if she argues she intended to maintain her residency in Washington.

However, assuming Phyllis' testimony is true she intended to stay in Washington, the problem is she didn't produce any evidence to dispute the Gasts' testimony the area was severely overgrown after they left. Her vague claim someone "mowed" the pasture, doesn't show that after 2013 anyone used the disputed 5-6 feet so as to put Jarmuths on notice that Phyllis is claiming their land underneath the "overhanging foliage" blocked and buried by brush, berries and bramble. The Trial Court correctly realized the

---

<sup>7</sup> **Donna Gast:** A. Before they moved permanently down there, it did not. Once they left, then, yes, it did become very overgrown (CP 117).

<sup>8</sup> **Glen Gast** (court reporter mistakenly labeled him "Gene"): A: After Gene passed away, I think the bank sent somebody in to cut the field down. Well, to cut the whole property down, because it was severely overgrown (CP 126).

<sup>9</sup> **Glen Gast:** Q. And did you ever see anyone else maintain his [Gene's] property at all? A. No it was pretty bad. Q. After he passed away? A. Yes.

<sup>10</sup> **Glen Gast:** A...for two or three years that I can recall it just became bigger and bigger and more and more overgrown...Q. Did you ever see anybody, after Gene and Phyllis moved to Arizona, maintaining the pasture area along the trees? A. No.

livestock fence was not visible to the Jarmuths (CP 140, 143-144, 442, 462), which was confirmed by the Gasts (CP 105-106, 125-126, 137), Steve Smith (CP 146), the survey crew of Brian Cayes (CP 151-154), Louis Nelson (CP 147-148) and Everett Nichols (CP 149-150) and other disinterested witnesses, Don Meyer (CP 456) and Jack Tatom (CP 454). If the fence is not visible, its not being maintained.

**10. Wooden bridge converted to fence after spring 2007 is the earliest possible time the disputed 5-6 feet was enclosed, but it also wasn't for 10 years.**

The facts concerning the bridge demonstrate that there hasn't been a 10 year period where Phyllis fully enclosed the property. The wooden bridge crossing the drainage ditch was turned into the gate fencing on the driveway after the PUD work spring/summer 2007 (CP 430-431, 462, 467). Phyllis was asked repeatedly about the bridge and if it became a gate/fence (CP 562-564). Phyllis either forgot it existed or didn't want to admit it, even saying she "didn't know" if the bridge shown in a photo of her property, which she provided in discovery, did or did not exist today (CP 558-561).

The Gasts testified there was a bridge and bridge material was used to create the gate fencing in 2007 (CP 430-431, 467). The photograph provided by Phyllis showed a bridge (CP 435). Curtis' aerial photographs

7/21/2003 showed the ditch and a bridge (CP 307-309), and Curtis' 8/29/2010 photos shows the now constructed gate and fencing (CP 319). When Rainshadow cut the portion of the gate fencing that came from the bridge up to the legal boundary (not over onto Phyllis' side as is implied in Phyllis' brief) Rainshadow didn't act wrongfully. Rainshadow only removed the illegal wooden fence gate encroachment that had been there less than 10 years. The actual gate remains untouched.

**11. Reviewing the facts carefully and looking past Phyllis' argument and supposition shows why her claim was dismissed.**

Phyllis tried to cherry pick certain facts to show her "use" and "maintenance," but the Trial Court clearly recognized she hadn't actually shown use or occupancy for 10 years of the disputed 5-6 foot strip or a recognition by anyone of the buried livestock fencing as a boundary for 10 years. She had zero evidence of maintaining the livestock fence. There are disputed facts in this case. However, even construing her facts as true, and looking at the disinterested witnesses' testimony shows that she cannot make a prima facie case for her claim because she does not have all the elements presumptively present for any 10 year block of time. Phyllis has zero evidence anyone recognized the livestock fence as a barrier, and she cannot show the disputed property was enclosed until spring 2007.

## D. ARGUMENT

### 12. Standard of Review.

Summary judgment is appropriate when the pleadings, depositions, and admissions on file, together with the affidavits, show there is no genuine issue about any material fact and assuming facts most favorable to the nonmoving party, establish that the moving party is entitled to judgment as a matter of law. CR 56(c). Riley v. Andres, 107 Wn. App. 391, 395, 27 P.3d 618, 620 (2001)

When material facts are particularly within the knowledge of the moving party, courts have been reluctant to grant summary judgment. Riley, 107 Wn.App at 395. In such cases, “it is advisable that the cause proceed to trial in order that the opponent may be allowed to disprove such facts by cross-examination and by the demeanor of the moving party while testifying. Id. In Riley it was the adverse possessor, the party that bore the burden of proof throughout trial that was granted summary judgment. The summary judgment was reversed because the titled owner showed the adverse possessor Riley may not have actually used the property as Riley claimed. Id. at 398. And since credibility would be an issue at trial, the nonmoving titled owner should have had the opportunity to expose the adverse possessor demeanor at trial before losing their land. Id. This case

is different than Riley, or rather, Riley would apply if Phyllis had prevailed on her cross motion for summary judgment because her credibility was seriously questionable as she could not keep her story straight. Her own expert contradicted her claims. Thus, the Trial Court never could have granted Phyllis summary judgment on either of her theories.

That is not what happened here. Rainshadow assumed her facts were true, at least those facts that made sense, and then asked the Trial Court to look at all the facts and apply them in a light most favorable to Phyllis. Yes, there are lots of disputed facts, but Phyllis lost because our Courts have repeatedly held that unsupported conclusory allegations are not sufficient to defeat summary judgment. Stringfellow v. Stringfellow, 53 Wn.2d 639, 641, 335 P.2d 825 (1959). Where reasonable minds could reach but one conclusion on the facts presented, summary judgment is appropriate. Handler v. Port of Chehalis, 97 Wn. App. 750, 754, 986 P.2d 836, 839 (1999). Phyllis' opinion, argument, occasional photo, or her significant other's claim about an easterly fence did not set forth enough admissible facts evidentiary in nature, i.e., information as to "what took place, an act, an incident, a reality, as distinguished from supposition or opinion." Grimwood v. Univ. of Puget Sound, Inc., 110 Wash.2d 355, 359, 753 P.2d 517 (1988). A summary judgment motion must set forth facts that would be admissible in evidence. CR 56(e). Phyllis didn't come forth with

evidence to show all elements of adverse possession. Rainshadow is not contending she had to prove her case at the CR 56 motion, rather just show the elements of adverse possession present for a 10 year period. No one disputes the line of trees created a natural barrier, but a barrier seen from a distance as over overgrown foliage is different than facts showing Jarmuths lost 5-6 feet of their property and the trees because of clear “use.”

Rainshadow offered to the Trial Court objective, unbiased facts through testimony of other witnesses and their personal observations. In doing so Rainshadow demonstrated to the Trial Court that summary judgment was appropriate even though numerous contested facts existed. The Trial Court correctly reviewed all the facts in a light most favorable to Phyllis and the Trial Court found Phyllis didn’t have a claim to go to trial. Since review is de novo, Rainshadow respectfully requests this Court analyze the case in the same way and uphold the dismissal.

**13. Phyllis offers no authority that the adverse possessor claimant only must show some of the elements of adverse possession to survive a summary dismissal.**

The Courts have been clear a plaintiff has the burden of establishing a prima facie case on all elements of their claim to survive a summary dismissal. LaMon v. Butler, 112 Wn.2d 193, 197, 770 P.2d 1027, 1029

(1989). The prima facie case must consist of specific, material facts, rather than conclusory statements or argument. Id. citing to Herron v. Tribune Pub'g Co., 108 Wash.2d 162, 170, 736 P.2d 249 (1987); See also Chen v. State, 86 Wn. App. 183, 937 P.2d 612 (1997). Summary judgment may serve as an early test of the plaintiff's evidence. Sequist v. Caldier, 438 P.3d 606, 612 (Wash. Ct. App. 2019)

Granted the above are not real property cases, but the rational applies, because that was the result in ITT Rayonier, Inc. v. Bell, 112 Wn.2d 754, 757, 774 P.2d 6 (1989). Phyllis cannot defeat a CR 56 motion by arguing some the elements exists, sporadically throughout a 10 year period. She must show evidence of the concurrent existence.

**14. Phyllis cannot meet the Adverse Possession Elements during her ownership or the Clarks' ownership, even when construing the facts in her favor.**

- a) Phyllis lacked admissible facts showing Gene and Phyllis maintained up to the trees for 10 years.

The Gasts showed Gene did not mow up to the purported livestock fence line, thus he did not “maintain” by physical acts on the ground that would put a person on notice the property was being adversely possessed beyond the legally described line. Unless there is the requisite degree of

physical possession, no amount of verbal claims, no amount of documents, no kind of acts off the ground will put the claimant in adverse possession.... In most cases, the adverse possessor must be in physical possession of every part of the land that he claims. § 8.9. Actual possession—Principles, 17 Wash. Prac., Real Estate § 8.9 (2d ed.).

**Adverse Possession Elements:** To establish adverse possession, the claimant must show possession that is: (1) open and notorious, (2) actual and uninterrupted, (3) exclusive, and (4) hostile for the 10-year statutory period. ITT Rayonier, 112 Wn.2d at 757 (citing Chaplin v. Sanders, 100 Wn.2d 853, 857, 676 P.2d 431 (1984)); RCW 4.16.020. The party claiming adverse possession bears the burden of proving each element. ITT Rayonier at 757. The concepts of “open” and “notorious,” besides largely overlapping each other, also overlap the elements of “actual” and “hostile.” Consequently, the ultimate test for the elements of adverse possession is the exercise of dominion over the land in a manner consistent with actions a true owner would take. See ITT Rayonier at 759. That is to say, one who adversely possesses land occupies the land in such a way that the true owner would or should know of the adverse ownership claim, given the type and location of property involved.

1. Open and Notorious: A claimant must show such affirmative acts of ownership. In determining what acts are sufficiently open and notorious

to manifest to others a claim to land, the character of the land must be considered. Krona v. Brett, 72 Wn.2d 535, 433 P.2d 858 (1967) (overruled on other grounds); Chaplin v. Sanders, 100 Wn.2d 853, 863. “The necessary use and occupancy should be of the character that a true owner would assert in view of its nature and location.” Krona at 539. The open and notorious requirement is met if (1) the true owner has actual notice of the adverse use throughout the statutory period, or (2) the claimant uses the land so that any reasonable person would assume that the claimant is the owner. In other words, the claimant must show that the true owner knew, or should have known, that the occupancy constituted an ownership claim. Kesinger v. Logan, 51 Wn.App. 914, 921, 756 P.2d 752 (1988), *aff’d* 113 Wn.2d 320, 779 P.2d 263 (1989). Anderson v. Hudak, 80 Wn.App. 398, 404-5, 907 P.2d 305 (1995). When applying the test of adverse possession to a residential property, evidence is deemed sufficient only if the adverse possessor takes and maintains possession of the disputed area and exercises open dominion in a manner and conduct of actual owners in general. This requires that she hold, manage, and care for the disputed property in a like nature and condition as her own. Meshner v. Connolly, 63 Wn.2d 552, 388 P.2d 144 (1964). (overruled on other grounds); Chaplin v. Sanders, 100 Wn.2d 853, 863.

Here, Phyllis' evidence of open use established by maintenance of mowing and trimming tree limbs wasn't present for 10 years, at most it was 8 years based upon her testimony. She left in 2013 prior to 10 years, and the property then appeared to be abandoned. No witness has come forward and testified they saw her using the land for 10 years.

2. Actual possession: To make a prima facie case of actual possession of the 5-6 feet Phyllis would need to show her and Gene actually on the property. The Court should consider the character and locality of the property involved and use of the property should be of the character that a true owner would assert in view of its nature and location. Anderson, 80 Wn.App. at 403. Phyllis couldn't show actual possession of the property by her for a block of 10 years because between 2003-2005 the property is used by the Gasts. She claims that they had her permission, but she could not give permission to use the disputed 5-6 feet, it was legally the Jarmuths. It is not until 2007 the property is fully enclosed (less than 10 years), but in 2013 (or earlier) Phyllis has left the property and is not actually using it any longer.

3. Exclusive: If the alleged adverse possessor has shared use of the property in question, the exclusivity element is lacking. See Thompson v. Schlittenhart, 47 Wn.App. 209, 734 P.2d 48 (1987); ITT Rayonier, 112 Wn.2d at 759. It should be kept in mind that the Phyllis must present

evidence that her use is in a manner that would exclude the Jarmuths from also using the same area for its intended purpose. There is no evidence Phyllis excluded anyone for 10 years. In 2003-2005, the Gasts are the only ones using the disputed property, and it is not fully enclosed until 2007 (less than 10 years before the trees were cut). The Jarmuths left the area in its natural state. Phyllis let the area become overgrown after 2013, therefore there is not a block of time for 10 years where Phyllis can say she exclusively used and maintained the 5-6 feet under the “overhanging foliage,” especially when the evidence is only mowing up to the limbs, not beyond them.

4. Hostile: The “hostility/claim of right” element of adverse possession requires Phyllis treat the land as her 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, 100 Wn.2d at 860-62. After Chaplin, the relevant inquiry regarding the existence of the hostility element became solely the *objective* character of the plaintiff’s possession of the real property in question. Chaplin at 862. The claimant in Lingvall v. Bartmess, 97 Wn.App. 245, 982 P.2d 690 (1999), was found to have satisfied the hostility element by planting trees, clearing away brush and wild shrubbery, landscaping, mowing, and maintaining the area continuously for at least eleven years.

Lingvall v. Bartmess, 97 Wn.App. 245, 254-255. In contrast, the claimant in Anderson v. Hudak failed her burden to meet the hostility element when she was unable to produce evidence that she even sporadically maintained and cultivated the trees or the land immediately surrounding the trees throughout the statutory period. Anderson, 80 Wn.App at 404-405. Merely planting trees was not a sufficient act to show the hostility element. In order to show the requisite level of hostility, Anderson would have had to have taken take some steps to care for and maintain trees. Id. Thus, Anderson did not do “everything a person could do” with the line of trees. Id. Consequently, the element of hostility was not met on those facts. Id. In order to maintain trees, a plaintiff must show that she could access the area, and did acts that clearly put the true owner on notice that the trees were being claimed by the adverse possessor. Phyllis’ case is like Anderson, she did not take all acts a person could take showing hostility for any 10 year block of time. Per her testimony, Gene trimmed the limbs 4-5 years, and trimming the neighbors overhanging limbs across the boundary has never been found by a court to be evidence to claim the entire trees. Per her testimony, Gene mowed for 8 years. The Gasts never saw Phyllis go into the disputed 5-6 feet and they only saw Gene mow up to the limbs, no closer than the chainsaw.

In Maier v. Giske, 154 Wn. App. 6, 19, 223 P.3d 1265, 1272 (2010), Division I looked at the holding in Lingvall, finding that the adverse possessor successfully showed evidence in some areas in dispute but not in others. The Maier adverse possessor was successful where the evidence showed she installed planks and built a berm along the fence, planted trees and shrubs between the planks, and generally landscaped and maintained the area as her own. The Maier adverse possessor was not successful where she only offered evidence of planting a mountain ash and some other vegetation; she did not show evidence of maintenance, because the area was left as “wild vegetation.”

Rainshadow requests the court to review and consider the unpublished decision Whyte v. Jack, 176 Wn. App. 1015 (2013) (See GR 14.1<sup>11</sup>) as persuasive authority. The Whyte Court upheld the dismissal of the adverse possessor’s claim to the disputed area and prescriptive easement claim, said dismissal being obtained on summary judgment in favor of the defendant. The Whyte Court found under facts which are similar to this case, the Anderson case was more controlling, distinguishing, Maier and Lingvall. Whyte held that the “intermittent and insubstantial planting over

---

<sup>11</sup> “...unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as non-binding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate”. GR 14.1

the years is insufficient as a matter of law to demonstrate a prima facie case of adverse use.” Whyte, 176 Wn.App. 1015.

In another unpublished decision, Vanderhoof v. Mills, 175 Wn. App. 1050 (2013) offered as persuasive authority (GR 14.1), the Trial Court dismissed the adverse possessor’s claim on a CR 41(b)(3) half time motion. This Court, analyzing the facts in that case and also applying Anderson, upheld the dismissal, and Rainshadow asks for the same here. The facts are similar to our case, there was evidence that the disputed area had been mowed by the adverse possessor, and there were plantings by the adverse possessor in the disputed area. The Vanderhoof Court, citing to Standing Rock Homeowners Ass’n v. Misich, 106 Wn. App. 231, 23 P.3d 520 (2001) noted that where there is vacant, open, unenclosed, and unimproved, use is presumed permissive. There was no evidence that the fence was intended or recognized as a boundary. Most importantly the adverse possessor’s purported use of the disputed area was not readily observable by the neighbors. Id. Phyliss claimed use of the area is presumed permissive and she didn’t show facts of adverse use for any 10 year block.

- b) Phyllis' facts about the Clarks' ownership did not demonstrate each concurrent element of adverse possession.

Phyllis wishes to “tack” onto Clarks’ “maintenance” of the pasture. If possession of the area was open and notorious for over 10 years, and there is sufficient privity of estate a claimant may “tack” unto their predecessor use and thus establish adverse possession as a matter of law. Shelton v. Strickland, 106 Wn. App. 45, 53, 21 P.3d 1179, 1184 (2001).

Phyllis’s conclusory statements that Clarks “used” and “maintained” the property are not facts. For example she claims: “*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.*” [emphasis added] Appellants Brief Page 24. “*It is undisputed Phyllis, and before her the Clark family, considered the boundary trees to be the eastern boundary...Phyllis and Gene, and the Clark family before them, were the only persons who maintained the disputed area....It is undisputed Phyllis, and before her the Clark family, considered the boundary trees to be the eastern boundary.* [emphasis added] Appellants Brief, Page 25.

With such a sweeping assertion concerning the Clarks' actions and intents, one would think Phyllis would back her argument with admissible facts presumptively meeting each element of adverse possession or boundary by mutual recognition and acquiescence. Yet the evidence for Clark's "use" is really only Phyllis actions, not Clark's. Phyllis claims Donna Gast confirmed the Clarks always maintained "his property up to the boundary trees" citing to page 23 of the record. Appellants Brief, page 5 (CP 23). There is not one admissible fact to establish Phyllis' claim on this page in the record. All that exists is Phyllis' counsel asked a leading question with no foundation for it whatsoever about the Clarks "maintaining the pasture" up to the trees, and on page 101 of the record, is Donna Gast page 15 of her deposition with the objection (CP 101). The evidence is not admissible even though it was answered. Further, it fails to state where exactly the "maintenance" occurred and Donna Gast clearly states she never saw the Clarks maintain the trees (CP 23). Phyllis intentionally being vague about where Clark's maintenance occurred is not a basis to overturn the Trial Court. Phyllis' only other claim is that she believes, with no personal knowledge, that the Clarks installed some sprinklers in the area to water and that also put water on the disputed strip (CP 386). There is no authority that overspray onto your neighbor's yard meets the elements of adverse possession and what a dangerous precedent this Court would set if it ruled

in Phyllis' favor. Curtis could not establish the use under the 5-6 feet due to the overhanging limbs. Unlike in Shelton, Phyllis cannot show "use" of the disputed area by the Clarks, because she cannot show the Clarks use of the disputed 5-6 feet was (1) open and notorious, (2) actual and uninterrupted, (3) exclusive, and (4) hostile.

**15. The fence was not readily visible, the area was overgrown.**

**Only Phyllis recognized the "convenient" livestock fence 5-6 feet away as a boundary line.**

In showing why Phyllis still doesn't raise a prima facie case showing a 10-year block, even the claim of boundary line by recognition and acquiescence fails and because it fails, the Court could not have granted summary judgment in Phyllis' favor on this issue. The claiming party bears the burden of showing, by clear, cogent, and convincing evidence, that both parties acquiesced in the line for 10 years. Lilly v. Lynch, 88 Wn.App. 306, 313, 945 P.2d 727 (1997). Mutual recognition requires a heightened burden. This doctrine holds that "in the absence of an agreement to the effect that a fence between the properties shall be taken as a true boundary line, mere acquiescence in its existence is not sufficient to establish a claim of title to a disputed strip of ground." Lamm v. McTighe, 72 Wn.2d 587, 592, 434 P.2d 565, 568 (1967) "In all cases, it is necessary that acquiescence must

consist in recognition of the fence as a **boundary line**, and not mere acquiescence in the existence of a fence as a barrier.” [emphasis added]. Id

The fatal flaw in Phyllis’ argument is her repeated assertion that the Jarmuths letting the area remain wild was an act of acquiescence to recognizing the trunks of the trees where the livestock fence existed as the boundary, rather than the marked corner 5-6 feet west. The problem with Phyllis’ assertion is that there is no evidence in this record that the Jarmuths acquiesced to the existence of the livestock fence because they never actually saw it. The law does not compel the Jarmuths to “maintain” their side up to legal line because they are the titled owners, vested as a matter of law. Phyllis needed to bring a prima facie case showing that (1) the line must be certain, well defined, and in some fashion physically designated upon the ground, e.g., by monuments, roadways, fence lines, etc.; (2) in the absence of an express agreement establishing the designated line as the boundary line, the adjoining landowners, or their predecessors in interest, must have in good faith manifested, by their acts, occupancy, and improvements with respect to their respective properties, a mutual recognition and acceptance of the designated line as the true boundary line; and (3) the requisite mutual recognition and acquiescence in the line must have continued for that period of time required to secure property by adverse possession. Lamm 72 Wn.2d at 593. In Lamm the Court noted that

the McTighes “occupied their property up to the fence line, passively observed their neighbors’ acts of dominion in relation to the now disputed strip and made no overt claim to any property lying westerly of the fence line.” Id. at 594. Key was the evidence of the adjoining neighbor who could see the acts of dominion.

Phyllis relies on the Jarmuths general assertion that they thought the boundary was in the area of the irrigation ditch and trees (CP 46, 49), but this does not meet the second prong of the test in Lamm. The Jarmuths didn’t know exactly where the boundary was (CP 47, 49). Phyllis’ citation to the record makes an assumptions that the Jarmuths recognized the boundary at base of the tree and therefore the fence. Lacking in Troye Jarmuth’s testimony at CP 248, 249, is her affirmatively stating that she recognized a fence on the trees as a boundary. She didn’t see the fence. In fact, Dale Jarmuth positively says he thought the trees were mostly on his property (CP 49, 253)<sup>12</sup>, around or near the line, but never saw a fence. Phyllis’ argument here is not too dissimilar to her claim the Clarks “used” the area. When examining the evidence about disputed 5-6 feet, nothing exists in the record other than Phyllis’ arguments. Actual evidence for

---

<sup>12</sup> Q. Would it [boundary line] be about where the trees were?

A. About where the trees were that were in that area, yes. Somewhere in that line.

Q. Did you have any understanding of who owned the trees or whose property the trees were located on? A. I knew they were on my property and I assumed some were on Rainwaters’ property. (CP 253)

prongs two and three of Phyllis claim for a boundary by recognition and acquiescence don't exist and that is why the Trial Court was correct.

The parties went through discovery, so the Court should ask, what facts does Phyllis have to take to trial, given that the burden under this claim is clear, cogent and convincing evidence. These witnesses confirmed you could not see the fence, Gast (CP 105-106, 125-126, 137), Steve Smith (CP 146), the survey crew of Brian Cayes (CP 151-154), Louis Nelson (CP147-148) and Everett Nichols (CP 149-150) and other disinterested witnesses, Don Meyer (CP 456) and Jack Tatom (CP 454). There is nothing in the record for a fact finder to consider the fence was recognized and acquiesced to as a boundary by the Jarmuths different than the legally described line because not being seen also means zero evidence of Phyllis maintaining the fence. If she was maintaining it, it would be visible. If mere acquiescence in the existence of a visible fence is not sufficient to establish a claim of title to a disputed strip of ground, then how can a buried, not visible fence be acquiescence to if no one discovers it?

The purpose of the fence is also relevant. The Gasts installed the livestock fence on the trees because it was convenient, not as a boundary fence. Fencing by itself is not dispositive, especially when buried in brush. As noted by Taylor v. Talmadge, 45 Wn.2d 144, 149, 273 P.2d 506, 509 (1954), overruled on other ground by Chaplin, 100 Wn.2d 853:

A fence not erected as a boundary fence, but rather as one to control pasturage, would not give rise to possession of such character as would establish an adverse title. However, the mere building of a fence on disputed land for pasturage would not militate against an adverse holding, if the use of such land were an incident under a claim of right. The question in each case is whether a property fence is maintained as a matter of convenience, or under a claim of ownership.

Taylor, 45 Wn.2d at 149.

That is the question. Did Phyllis bring the Court evidence showing she maintained the fence as a property fence, to claim ownership for 10 years? Has Phyllis shown recognition and acquiescence for 10 years by anyone other than her self-serving claim, even considering all facts most favorable to her?

Considering the holdings in the unpublished cases, Whyte, 176 Wn. App. 1015 and Vanderhoof, 175 Wn. App. 1050 the answer is NO, only argument and a vague assertion that Jarmuths recognized the trees as being in and around the boundary area.

**16. A trial would not be in the best interest of judicial economy. The parties performed discovery, the basic facts of the case are known and no fact finder could find in Phyllis' favor when she bears the burden of proof, and her credibility is at issue.**

Credibility is not determined in a CR 56 motion. However, if this Court does remand this case for trial, practically speaking we are simply

wasting Phyllis' and Rainshadow's time, and potentially exposing Phyllis to substantially more attorney fees. If Phyllis does testify, her inconsistencies in her statements about fences and fencing will be attacked. No longer does she have the presumption that her actual articulable facts, such as the bench location near the trees, Gene's maintenance, Lint's observations of a "fence" in 2015, the "existence" of a fence prior to her ownership—that any of these facts are presumed true. Rainshadow is not asking this Court to pre-judge what a fact finder would do with the contested facts, but recognizing that if Phyllis cannot make a prima facie case of each concurrent element as required in ITT Rayonier, then it is not reasonable to say, when she bears the burden of proof on the entire case, that she has any reasonable probable chance of prevailing.

**17. The Trial Court did not err in entering findings of facts and conclusions of law for the judgment awarding attorney fees.**

In order to reverse an attorney fee award, an appellate court must find the trial court manifestly abused its discretion. Boeing Co. v. Sierracin Corp., 108 Wash.2d 38, 65, 738 P.2d 665 (1987). That is, the trial court must have exercised its discretion on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wash.2d 12, 26, 482 P.2d 775 (1971).

The Court was correct, it entered a judgment pursuant to CR 54 after it ruled on the summary judgment. Phyllis' argument on this point is illogical. If the memorandum opinion was a judgment, requiring a motion to be made within 10 days per CR 54(d)(2) for attorney fees, then that memorandum opinion should have had findings and conclusions under CR 52. But the memorandum opinion was only the preliminary ruling allowing the parties to reduce the Court's order to final judgment dismissing the case, quieting title and awarding fees and costs after the motion for attorney fees was made (RP 7). As the Judge correctly noted, a "judgment" and "order" under CR 54(a) are different, and the Court recognized that fact (RP 11-12) (CP 554-555).

Phyllis was premature in filing a notice of an appeal. Even if this Court were to view the memorandum opinion and order of October 1, 2018 as a final order under CR 54 (CP 13), the time period in CR 54(d)(2) is not strictly enforced. The time requirements of CR 6(d) and CR 54(d)(2) are not set in stone and may be enlarged. O'Neill v. City of Shoreline, 183 Wn. App. 15, 23, 332 P.3d 1099, 1104 (2014). In fact, Phyllis has to show prejudice for her argument to even be considered. Id. There was no prejudice other than an additional filing fee (RP 12).

The Trial Court was also correct in awarding fees. The Trial Court made specific findings (CP 640-642), including that Phyllis did not meet

the elements of her claims (Findings 1-4)(CP 641) and because she failed to do so, Rainshadow was the prevailing party (Conclusion 3)(CP 642). The Trial Court determined that Phyllis was granted a CR 56(f) continuance to get more evidence, and that increased the costs of litigation (Findings 6-8), and the amount requested in fees was reasonable, the Court considered the lodestar method, and thus it was appropriate to award fees in the amount of \$39,753.18 (CP 641).

Phyllis must show it was an abuse of discretion for the Trial Court to have awarded the fees. Rainshadow offered three possible theories that allowed a court, in its discretion to award fees. Under the provisions RCW 4.24.630, RCW 4.84.030, RCW 7.28.083 and CR 68, Rainshadow asked for fees and costs. The provisions under RCW 7.28.083 alone is enough to award fees. The various claims are intertwined, and no reasonable segregation of claims can be made because they all relate to the same facts. Rainshadow prevailed on defending the pled trespass claim under RCW 4.24.630. If Phyllis had prevailed on her claim, then the Court could award attorney fees to her. She did not prevail; thus, Rainshadow is entitled to attorney fees under the concept of reciprocal fees to the prevailing party.

The term “costs” in RCW 4.24.630 includes investigative costs and reasonable attorney fees. Rainshadow made a CR 68 settlement offer that Phyllis declined to accept, and now has prevailed on summary judgment.

The rule is that Rainshadow is entitled to costs incurred after making the settlement offer. See Estep v. Hamilton, 148 Wn. App. 246, 259, 201 P.3d 331, 338 (2008). CR 68 sets forth a procedure for defendants to offer to settle cases before trial. The rule aims to encourage parties to reach settlement agreements and to avoid lengthy litigation. The rule achieves this objective by shifting any post-offer of judgment costs of litigation to a plaintiff who rejects a defendant's CR 68 offer and does not achieve a more favorable result. Lietz v. Hansen Law Offices, P.S.C., 166 Wn. App. 571, 581, 271 P.3d 899, 905 (2012).

CR 68's use of the term "costs," accrued before and after the offer of judgment, may or may not include attorney fees depending on the underlying statute. Lietz, 166 Wn. App. at 581. The trespass statute provides that "cost" includes attorney fees. "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 attorneys' fees and other litigation-related costs." RCW 4.24.630.

### **18. Respondents request attorney fees on Appeal, RAP 18.1.**

Pursuant to RAP 18.1 (a) and (b), Rainshadow requests attorney fees and costs on appeal. Because Rainshadow prevailed on defending the adverse possession claim, RCW 7.28.083 permits fees.

## **E. CONCLUSION**

Phyllis presents evidence of 4-5 years of Gene maintaining the trees up to the livestock fencing and evidence of Gene mowing the disputed area, but not during a 10-year period, June 2003 to June 2011. Phyllis presents evidence of fencing the disputed area but the facts show that it did not actually become fenced in until the work filling in the ditch, and removing the bridge in Spring 2007. That does not equal 10 years of exclusive use. There is no evidence a fence existed on the eastern side of the trees for more than 10 years, and Lint at most establishes two years if he is to be believed at all. Phyllis may claim the livestock fencing existed on all sides of the trees, to but there is no evidence the adjacent neighbors recognized the fence as a boundary. The area became seriously overgrown after Phyllis left for Arizona in 2013. Phyllis claims tacking by the Clarks' use, but all we can do is speculate what happened during their ownership, because we cannot see 5-6 feet of disputed area underneath the "overhanging foliage.

The Trial Court did assume all facts in a light most favorable to Phyllis, but came to realize, she could not make a prima facie case, presumptively showing all concurrent elements of adverse possession present for any 10 year block. Phyllis showed some elements during a block of time, and then some other elements during a different block , but never a prima facie case of all the elements together. Rainshawdow would of course

dispute those at trial where Phyliss has the burden of proof, but did not at the summary judgment. Rainshadow respectfully request the Trial Court be upheld, and that an order directing attorney fees be awarded Rainshadow be entered.

Dated this 28 th day of May 2019.

CROSS SOUND LAW GROUP



---

Shane Seaman, WSBA #35350  
18887 St. Hwy 305 NE, Suite 1000  
Poulsbo, WA 98370  
(360)598-2350  
[shane@crosssoundlaw.com](mailto:shane@crosssoundlaw.com)  
Attorney for Appellants

## CERTIFICATE OF SERVICE

I certify that I directed Respondent's Brief to be served by U.S. Mail, postage prepaid, on May 28, 2019, to the following:

*Attorneys for Appellant Phyllis Y. Rainwater*  
William J. Davis  
BELL & DAVIS PLLC  
P.O. Box 510  
Sequim, WA 98382  
[jeff@bellanddavispllc.com](mailto:jeff@bellanddavispllc.com)

Brandon S. Gribben  
Helsell Fetterman LLP  
1001 4<sup>th</sup> Avenue, Suite 4200  
Seattle, WA 98154  
[bgribben@helsell.com](mailto:bgribben@helsell.com)

*Attorney for Respondent John R. Dickson and Lori Dickson dba WE DIG IT*  
Claudia Shannon  
Law Offices of Mark Dietzler  
1001 4<sup>th</sup> Avenue, Suite 4200  
Seattle, WA 98154  
[claudia.shannon@libertymutual.com](mailto:claudia.shannon@libertymutual.com)

Dated this 28<sup>th</sup> day of May, 2019, at Poulsbo, Washington.



---

Melissa S. Colletto  
Legal Assistant

# CROSS SOUND LAW GROUP

May 28, 2019 - 10:05 AM

## Transmittal Information

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 52757-0  
**Appellate Court Case Title:** Phyllis Y. Rainwater, Appellant v. Rainshadow Storage, LLC, et al, Respondents  
**Superior Court Case Number:** 17-2-00506-4

### The following documents have been uploaded:

- 527570\_Briefs\_20190528094516D2404736\_4103.pdf  
This File Contains:  
Briefs - Respondents  
*The Original File Name was Respondents.Brief.Final.pdf*

### A copy of the uploaded files will be sent to:

- bgribben@helsell.com
- claudia.shannon@libertymutual.com
- jeff@bellanddavispllc.com
- mindy@bellanddavispllc.com

### Comments:

---

Sender Name: Shane Seaman - Email: shane@crosssoundlaw.com  
Address:  
18887 STATE HIGHWAY 305 NE STE 1000  
POULSBO, WA, 98370-8065  
Phone: 360-598-2350

**Note: The Filing Id is 20190528094516D2404736**