

**FILED**

No. 33060-5-III

**AUG 17 2013**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

COURT OF APPEALS, DIVISION III

STATE OF WASHINGTON

---

LARRY B. JUDD AND CHERYLL L. JUDD, a marital community, and  
CHRISTOPHER L. JUDD, a married individual,

Appellants,

vs.

RON JOHNS and SUZANNE JOHNS, a marital community; and  
JAY HEALY, a single individual,

Respondents/Cross-Appellants.

---

RESPONDENTS/CROSS-APPELLANTS' OPENING BRIEF

---

RICHARD D. WALL, #16581  
Attorney for Respondents/Cross-Appellant

Richard D. Wall, P.S.  
Attorney at Law  
505 W. Riverside Avenue, Suite 400  
Spokane, WA 99201  
(509) 747-5646

## TABLE OF CONTENTS

Table of Authorities .....	ii
Introduction.....	1
Issues for Review on Cross-Appeal.....	1
1. Did the Trial Court Abuse Its Discretion By Failing to Award Attorney Fees and Costs Pursuant to RCW 4.84.185 When Plaintiffs Presented No Evidence at Trial Regarding Use of the Disputed Area Prior to 1999 and No Evidence or Argument that The Action Was Filed Within the Applicable Statute of Limitations?.....	1
Statement of the Case .....	2
Standard of Review .....	8
Argument.....	9
<u>The Facts Found by the Trial Court are More than Sufficient as a Matter of Law to Support Adverse Possession</u> .....	12
<u>Appellants Do Not Challenge the Sufficiency of the Evidence to Sustain the Trial Court's Findings</u> .....	14
<u>Appellants Misunderstand the Concept of "Tacking"</u> .....	16
<u>Appellants' Remaining Arguments are Similarly Without Merit</u> .....	19
<u>Respondents Should be Awarded their Attorney Fees and Costs for Responding to a Frivolous Appeal</u> .....	20
<u>Plaintiffs' Action Was Frivolous in Its Entirety Because the Facts Essential to the Outcome Were Not Disputed and the Law of Adverse Possession in Washington is Well-Settled</u> .....	20
Conclusion .....	23
Certificate of Service .....	24

TABLE OF AUTHORITIES

**Cases:**

Washington State Supreme Court:

*Biggs v. Vail*, 119 Wn.2d 129, 134-36, 830 P.2d 350 (1992).....21

*Chaplin v. Sanders*, 100 Wn.2d 853, 859-60, 676 P.2d 431 (1984).....9

*Entertainment Industry Coalition v. Tacoma–Pierce Co. Health Dep't*,  
153 Wn..2d 657, 105 P.3d 985 (2005).....8

*Frolund v. Frankland*, 71 Wn.2d 812, 820, 431 P.2d 188 (1967).....11

*Gorman v. City of Woodinville*, 175 Wn.2d 68, 283 P.3d 1082 (2012).....22

*Hovila v. Bartek*, 48 Wn.2d 238, 241-42, 292 P.2d 877 (1956) .....12

*ITT Rayonier, Inc. v. Bell*, 112 Wn.2d 754, 757, 774 P.2d 6 (1989).....10

*Murray v. Bousquet*, 154 Wash. 42, 49 (1929).....16

*Peeples v. Port of Bellingham*, 93 Wn..2d 766, 771, 613 P.2d 1128 (1980).....8

*State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994) .....12

*Wood v. Nelson*, 57 Wn.2d 539, 540-41, 358 P.2d 312 (1961).....10

*Young v. Newbro*, 32 Wn.2d 141, 200 F.2d 975 (1948) .....11

Washington Court of Appeals:

*Ahmad v. Town of Springdale*, 178 Wn. App. 333, 343-44, 314 P.3d 729 (2013).....21

*Campbell v. Reed*, 134 Wn.App. 349, 361, 139 P.3d 419 (2006) .....9

*Lingvall v. Bartmess*, 97 Wn. App. 245, 255, 982 P.2d 431 (1999) .....10

*Roy v. Goerz*, 26 Wn.App. 807, 614 P.2d 1308 (1980) .....11

**Laws and Statutes:**

RCW 4.16.020(1) .....9, 22

RCW 7.28.070 .....11

RCW 7.28.160.....7

RCW 4.84.185.....7, 21

**Court Rules:**

RAP 10.3(g) .....12

RAP 18.14.....20

**Other Authorities:**

WILLIAM B. TOEBUCK & JOHN W. WEAVER, 17 WASHINGTON  
PRACTICE, REAL ESTATE: PROPERTY LAW § 8.1, AT 504 (2004).....9

## I. INTRODUCTION:

This action arises out of dispute over ownership of a 50 foot wide strip of property in west Spokane County. On November 17, 2011, Appellants, Larry and Cheryl Judd, and Christopher Judd ("Judds"), filed their Complaint seeking to quiet title to the disputed strip. CP 1-8. Respondents, Jay Healy ("Healy") and Ron and Suzanne Johns ("Johns"), counterclaimed to quiet title to the same strip of land. CP 9-16. After a 2 1/2 day bench trial, the Honorable Maryann Moreno issued a Memorandum Opinion denying the Judds' claims and quieting title in the disputed strip in Healy and Johns. CP 415-421. Thereafter, the Court entered formal Findings of Fact and Conclusions of Law. CP 745-750.

## II. ISSUES FOR REVIEW ON CROSS-APPEAL

1. Did the Trial Court Abuse Its Discretion By Failing to Award Attorney Fees and Costs Pursuant to RCW 4.84.185 When Plaintiffs Presented No Evidence at Trial Regarding Use of the Disputed Area Prior to 1999 and No Evidence or Argument that the Action Was Filed Within the Applicable Statute of Limitations?

### III. STATEMENT OF THE CASE

September of 1999, the Judds purchased an approximate 40 acre parcel of land that lies adjacent to and west of two 10 acre parcels owned by Healy and Johns. At the time the Judds purchased the property, there was an existing fence that separated the Healy-Johns properties from the Judds property.

After purchasing the property, the Judds had their property surveyed and discovered that the fence was located approximately 50 feet west of the surveyed boundary line. CP 418. Larry Judd contacted Healy and told Healy that the fence encroached upon the Judds' property and that he would be taking the fence down and rebuilding it on the surveyed boundary line. CP 418. According to Larry Judd, Healy did not respond. CP 418.

Nothing further happened between the parties until the summer of 2011 when the Johns removed that portion of the fence bordering their property in anticipation of constructing an improved fence. The Judds then put up a fence on the survey line approximately 50 feet east of the original fence line and claimed ownership of all the land lying west of the newly constructed fence. CP 419. That portion of the original fence between the Judds and Healy properties was left undisturbed.

After the Judds filed the present action, the Johns took down the fence that had been put up by the Judds. The Judds then obtained an injunction prohibiting any further action by either party to construct a fence or other structure on the disputed strip. CP 419.

At trial, Healy testified that at the time he purchased his property in 1971, the fence consisted of field fence, wooden posts, and T-posts and ran from the north boundary of his property to the south boundary of the adjacent parcel to the south, which was at that time owned by the Nendls. CP 415-16. Healy also testified that in 1971 and 1973 he added electricity to the fence to contain his horses. CP 416. He also planted pasture on the eastern portion of his property up to the fence line and utilized the entire eastern end of his property, including the disputed area, for his horses and cattle throughout the 1970's. CP 416. In the late 1970's, he installed hundreds of additional T-posts made of heavy gauge steel. CP 416.

Healy further testified that he later grazed his horses on the Johns property, which was then owned by the Nendls, with the Nendls permission. CP 416. During the late 1980's and early 1990's, Healy also kept a herd of Scottish Highlander Longhorns on the property, which he pastured on the disputed area. The fence existing at that time was sufficient to contain the animals. CP 416.

Edith Nendl testified that her daughter pastured her horse on the property along with Healy horses and that the disputed area east of the fence was used by the Nendls until they sold the property to the Johns in 2006. CP 417. She further testified that when she moved onto the property in 1973, the north-south fence along the east side of the property was already there and that she believed she owned all the land on her side of the fence. CP 417.

Thomas Wiley testified that he was familiar with the property and that he had previously lived on his grandfather's property just south of the Johns property and had worked the land from 1964 to 1968. CP 418. He remembered that there was a fence running north to south along the east side of the Healy/Johns properties that was made of railroad ties. CP 418. Mr. Wiley understood that the fence had been in place as early as the 1920's or 1930's prior to his grandfather's purchase of nearby property. The fence was improved over the years with metal posts being used to replace old wooden posts. CP 418.

Mr. Wiley's son, Matt, also testified that he visited the property when his grandmother lived in the area around 1999. CP 418. He observed use of the Johns and Healy properties, including the disputed area, for pasturing horses and saw horses grazing from time to time up to

the fence line. He remembered the fence consisting of wooden posts and barbed wire. CP 418.

Mr. Healy's son, Eric, testified that he lived at the Healy property with his father from 1971 to 1978. He and his father brought horses from Utah, which they pastured on the east end of the property. The fence was improved with metal T-posts and insulators. The fence was upright and sufficient to contain the horses. CP 419.

Ron Johns testified that, prior to purchasing their property from the Nendls, he walked the property with the owner and a real estate agent and observed the existing fence bordering the south, east, and north sides of the property. CP 416. The fence was made of intact cedar posts. CP 416. He observed Healy's horses grazing on the eastern portion of the Healy property, included the disputed area. Between 2006 and 2008, he pastured a dozen horses in part on the disputed strip. CP 416-17.

Prior to closing the purchase of the property from the Nendls, Mr. Johns learned that the seller's real estate agent had received an anonymous call regarding possible encroachment of the fence on the adjacent property. Johns spoke to Edith Nendl who told him she believed the existing fence was the eastern boundary of the property. CP 417.

Cheryll Judd testified that she saw the existing fence when they purchased their property. CP 417. She described it as wooden, with rotted

cedar posts and rusted field fencing overgrown with weeds. She claimed that she never observed an T-posts and that she never saw the neighbors using the area west of the fence. However, she admitted that she rarely was in that area prior to 2011. CP 417. She also admitted that her husband never seeded or mowed on the disputed area. CP 417-18.

Larry Judd testified that he never seeded, plowed, or harvested hay from the disputed area, however, he claimed to have mowed and sickles on the disputed area between the Judd property and the Johns property. CP 418. Between 1999 and 2011, he observed Mr. Healy's livestock pasturing on the disputed area. None of the horses or other livestock ever ventured onto the Judd property. According to Mr. Judd, the existing fence was suitable to contain horses. CP 418.

The Judds presented no evidence at trial regarding the use of the disputed area or the maintenance of the fence prior to September 1999 when they purchased their property. .

Based on the foregoing testimony, the trial court concluded that both Healy and the Nendls had obtained title to the disputed area by adverse possession prior to the Judds purchase of their property in 1999. CP 748. The court found that the use of the disputed area by the Nendls and Healy was open, notorious, actual and uninterrupted, exclusive, and hostile to the true owners for a period of more than ten years. CP 747.

The court further found that title to the disputed area between the Johns and Judd properties was conveyed to the Johns when they purchased from the Nendls in 2006 and that privity between the Nendls and Johns was not disputed. CP 747-48. The court quieted title to the disputed strip in Healy and the Johns. CP 748-49.

After the trial court issued its Memorandum Opinion, the Judds moved for reconsideration, arguing that the court should have awarded them a pro-rata portion of the taxes they had paid on their property since 1999 pursuant to RCW 7.28.160. CP 722-24. The motion for reconsideration was denied on the grounds that the Judds had failed to specifically plead the applicability of RCW 7.28.160 and had failed to present any evidence at trial as to the amount of taxes or assessments they had paid, or the value of any improvements they had made to the disputed area. CP 729-30.

Following the entry of Judgment, Healy and Johns moved for an award of attorney fees pursuant to RCW 4.84.185 on the grounds that the action by the Judds was frivolous. CP 754-61. That motion was denied. CP 819-21. The Judds appeal from the trial court's order quieting title to the disputed property in Healy and Johns. Healy and Johns cross-appeal from the denial of their motion for attorney fees.

#### IV. STANDARD OF REVIEW

The trial court's findings of fact are reviewed for substantial evidence. Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the finding. *Harris v. Urell*, 133 Wn.App. 130, 137, 135 P.2d 530 (2006). A finding supported by substantial evidence will not be disturbed on appeal. *Peebles v. Port of Bellingham*, 93 Wn..2d 766, 771, 613 P.2d 1128 (1980), *overruled on other grounds in Chaplin v. Sanders*, 100 Wash.2d 853, 676 P.2d 431 (1984). Whether the facts support the trial court's conclusions of law is reviewed de novo. *Id.*

The standard of review for an award or denial of attorney fees and costs pursuant to RCW 4.84.185 is abuse of discretion. The reviewing court examines the trial court's decision whether a case, taken as a whole, is advanced without reasonable cause. *Entertainment Industry Coalition v. Tacoma–Pierce Co. Health Dep't*, 153 Wn.2d 657, 105 P.3d 985 (2005). The trial court's denial of attorney fees and costs will be reversed only when it is untenable or manifestly unreasonable. *Id.*

## V. ARGUMENT

### **The Law of Adverse Possession:**

The doctrine of adverse possession has been part of the law in Washington State since at least the later part of the 19<sup>th</sup> Century. The purpose of the doctrine is to ensure maximum utilization of land, to encourage rejection of stale claims, and to quiet titles. *Chaplin v. Sanders*, 100 Wn.2d 853, 859-60, 676 P.2d 431 (1984). Adverse possession is sometimes called a doctrine of “repose” that is intended to conform titles to appearances and uses “long maintained on the ground.” See, *Campbell v. Reed*, 134 Wn.App. 349, 361, 139 P.3d 419 (2006) citing, WILLIAM B. TOEBUCK & JOHN W. WEAVER, 17 WASHINGTON PRACTICE, REAL ESTATE: PROPERTY LAW § 8.1, AT 504 (2004). The common law doctrine of adverse possession is also codified in RCW 4.16.020(1), which establishes a 10 year limitation period for actions to recover real property.

Legal ownership of property through adverse possession is established by showing possession that is (1) exclusive, (2) actual and uninterrupted, (3) open and notorious, and (4) hostile for a period of at least 10 years, the period of limitation on actions to recover real property. *Chaplin v. Sanders*, 100 Wn.2d at 857.

What constitutes possession of property is determined by the nature, character and locality of the property and the uses to which is ordinarily applied. *Lingvall v. Bartmess*, 97 Wn. App. 245, 255, 982 P.2d 431 (1999), see also, *Danner v. Bartel*, 21 Wn. App. 213, 216, 584 P.2d 463 (1978), overruled on other grounds by *Chaplin v. Sanders*, 100 Wn.2d at 861, n.2. The simple act of cutting of grass can be sufficient to establish possession of unimproved or unfenced land. See, *Wood v. Nelson*, 57 Wn.2d 539, 540-41, 358 P.2d 312 (1961). Any use that is obvious to a prudent observer is all that is required. See, *Campbell v. Reed*, 134 Wn App. at 362-63.

Actual possession is interrupted only when there is cessation of the possession for some period of time. *Lingvall v. Bartmess*, 97 Wn. App. at 256. A mere protest of adverse use will not interrupt possession that is hostile at its inception. *Id.* Likewise, the granting of consent that is not sought by the adverse possessor will not destroy the nature of possession that is initially adverse and hostile to the rights of the true owner. *Id.*

Possession is “hostile” when it is contrary to the rights of the true owner. Hostility, for purposes of adverse possession, does not mean enmity or ill-will toward the true owner, but instead connotes a use of the land as one’s own. *Chaplin v. Sanders*, 100 Wn.2d at 857-58. The

subjective intent or motive of the adverse claimant is irrelevant. *Id.*, at 860-62. In general, the payment of taxes on property is also not relevant to whether the property has been adversely possessed, however, the statutory period of 10 years can be reduced to 7 years under RCW 7.28.070 when the claimant possesses property under "color of title" and has paid taxes on it for at least 7 years. See, *ITT Rayonier, Inc. v. Bell*, 112 Wn.2d 754, 757, 774 P.2d 6 (1989).

It was previously the law in Washington that the erection of a fence for purposes of keeping cattle or the use of land as pasture would not establish a claim of adverse possession. See, e.g., *Roy v. Goerz*, 26 Wn.App. 807, 614 P.2d 1308 (1980), *Young v. Newbro*, 32 Wn.2d 141, 200 F.2d 975 (1948). However, that line of cases was expressly overruled in *Chaplin v. Sanders* and is no longer good law. *Chaplin v. Sanders*, 100 Wn.2d at 861, n.2. Neither actual occupation, cultivation, or residency is necessary to constitute actual possession. *Campbell v. Reed*, 134 Wn.2d at 362-63. If a line of use is "obvious upon the ground" to a prudent observer, adverse possession may exist up to that line and a reasonable projection of the line. *Id.*, citing *Frolund v. Frankland*, 71 Wn.2d 812, 820, 431 P.2d 188 (1967).

When the use of another's land is open, notorious and adverse, the law presumes knowledge of such use by the true owner. *Hovila v. Bartek*, 48 Wn.2d 238, 241-42, 292 P.2d 877 (1956).

**1. The Facts Found by the Trial Court are More than Sufficient as a Matter of Law to Support Adverse Possession.**

Appellants argue that the trial court misapplied the law regarding adverse possession. Appellants do not specifically challenge any of the Findings of Fact contained in the Memorandum Decision or the Order Quieting Title. Ordinarily, findings of fact not specifically referenced in the Assignments of Error section of an opening brief, as required by RAP 10.3(g) will be treated as verities on appeal. *See, State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Thus, the Findings of Fact entered by the trial court here are verities.

The Findings entered by the trial court include the following:

1.4 Healy purchased his property in 1971 and thereafter used the entire parcel up to the existing fence line for various purposes, including pasturing of animals. Healy used the entire parcel up to the fence line.

1.5 Healy's use of the property was open and notorious, actual and uninterrupted, exclusive, and hostile to the true owners. Such use continued for more than ten years.

1.6 Edith Nendl and her husband utilized her entire parcel up to the existing fence line and utilized the land consistent with ownership.

1.7 The Nendls use of the land was open and notorious, actual and uninterrupted, exclusive, and hostile to the true owners. Such use continued for a period of more than ten years.

1.8 It is undisputed that both Healy and the Nendls pastured livestock on their respective properties, maintained the fence, and relied upon the fencing to contain animals.

The foregoing findings of fact are more than sufficient to support the trial court's conclusion that the Nendls and Healy had obtained title to the disputed area by adverse possession prior when the Judds purchased the adjoining parcel in 1999.

For the first time on appeal, Appellants argue that the evidence presented at trial was insufficient to overcome a presumption that the use of the disputed area was permissive. That argument is completely without merit. As noted in the trial court's Memorandum Opinion, both the Edith Nendl and Healy believed the fence line established the eastern boundary of their respective properties and used all of the area west of the fence line as if they were the true owners. They maintained and improved the fence and pastured animals on the disputed area because they believed they owned it and did so for a period of more than ten years. The use of

land based upon a claim of ownership is clearly inconsistent with use by permission. Therefore, the evidence at trial was more than sufficient to overcome any presumption that the use was permissive.

2. Appellants Do Not Challenge the Sufficiency of the Evidence to Sustain the Trial Court's Findings.

The Judds argue that neither the Nendls' nor Healy's use of the disputed strip was sufficiently exclusive, hostile, open or notorious to support adverse possession. However, the Judds do not argue that the evidence, taken as a whole, was insufficient to support the trial court's findings to the contrary. Instead, the Judds simply cite to their own testimony at trial as if that testimony by itself establishes the facts of the case.

For example, the Judds argue that the use of the disputed area by Nendls and Healy was not exclusive because "the Judds announced their ownership and thereafter accessed and freely used their property from 1999 forward." (Appellants' Opening Brief, p. 23) The trial court made no such finding, however, and the Judds did not propose any such finding or object to the trial court's failure to make a finding on that issue.

In any event, since the trial court correctly concluded that the disputed area had been adversely possessed by the Nendls and Healy prior to the Judds' purchase of their property, whether or not the Judds "announced their ownership" or accessed the disputed area after purchasing their property in 1999 is of no consequence to the trial court's decision.

Similarly, the Judds argue that, because neither Healy nor the Johns objected to the Judds claim of ownership in 1999, their use of the property was insufficiently hostile to the Judds. Again, the characterization of Healy and Johns use of the disputed strip after September 1999 is of no consequence to the trial court's decision, because the court found that the disputed area was adversely possessed prior to 1999. The Judds did not argue below that they had re-acquired title to the disputed strip by adverse possession after September 1999 and fail to challenge on appeal the trial court's failure to make such a finding. Thus, the Judds' claim that they "freely accessed" the disputed area after purchasing their property in 1999 is inconsequential to any issue on appeal.

The Judds also argue, for the first time on appeal, that the maintenance of the fence and pasturing of animals on the disputed area by

the Nendls and Healy was insufficiently hostile and notorious because the surrounding land was "wild county." (Appellants' Opening Brief, p. 27-28) The trial court made no finding that the surrounding land was "wild country" and the Judds did not propose any such finding. Furthermore, any such finding would have been clearly contrary to the evidence. Tom Wiley testified that he worked the land just south of the Johns property between 1964 and 1968. Both the Nendls and Healy lived on their properties. No evidence of any kind was presented to suggest that the surrounding area was so "wild, unbroken, mountainous, or sparsely settled" that the adjoining landowner, Williams, would not have been put on notice of the Nendls and Healy use of the disputed for pasturing of animals and maintenance of the fence for that purpose. *See, Murray v. Bousquet*, 154 Wash. 42, 49 (1929).

In sum, the arguments raised by the Judds on appeal regarding the nature and character of the use of the disputed strip prior to 1999 are either raised for the first time on appeal, contrary to the evidence, or both. The arguments lack any merit in law or fact.

3. Appellants Misunderstand the Concept of "Tacking."

The Judds argue that the trial court erred by allowing the Johns to "tack" their ownership onto the Nendls' ownership in order to find that the

Johns met the ten year period for adverse possession. That argument is based on a complete misunderstanding and/or misrepresentation of the trial court's decision.

The trial court did not allow the Johns to "tack" onto the Nendls' period of adverse possession because "tacking" was not necessary. The trial court found that the Nendls had gained title to the disputed area by adverse possession prior to 1999 as a result of having used the disputed area under a claim of ownership for a period of more than ten years. The trial court further found that it was not disputed that there was privity between the Johns and the Nendls, such that the Johns acquired title to the disputed strip from the Nendls. The Judds do not challenge that finding. Thus, the Johns acquired title to the disputed area by deed, not by tacking their use of the disputed area onto the use by the Nendls. The Judds' argument that the trial court erred by "tacking" the Nendls's and Johns' ownership together is completely meritless.

Inexplicably, the Judds also argue that "tacking" is not allowed where, as here, a prior owner has obtained perfected title through adverse possession. (Appellants' Opening Brief, p. 31-33) The Judds then argue that, in such cases, title can only be transferred by conveyance. By making that argument, the Judds necessarily concede that the trial court

correctly found that the disputed area had been adversely possessed prior to 1999. It is undisputed that the Johns purchased from Mrs. Nendl and received a statutory warranty deed. Thus, title to the disputed strip, which was perfected in the Nendls before September 1999, was conveyed to the Johns by deed.

The Judds then appear to argue that the conveyance from Mrs. Nendl to the Johns did not transfer title to the disputed strip because the Johns acted in "bad faith" when purchasing their property. Again, this issue is raised for the first time on appeal and should not be considered on appeal. The Judds did not argue at trial that any bad faith on the part of the Johns precluded transfer of title to the disputed strip to them by deed. Nor did the Judds ask the trial court to make any finding that the Johns acted in bad faith when they purchased their property.

In any event, the privity rule suggested by the Judds is contrary to law and would cause significant problems with property transfers. A neighboring property owner could prevent the sale of almost property simply by claiming ownership of some portion of the property being sold. Any prospective buyer would then be required to conclusively determine the boundaries of the property prior to completing the purchase. Furthermore, prospective purchasers would not be able to rely on long-

established and well-defined boundary markers, such as fences. Such a situation would make the sale of property extremely cumbersome and, in many instances, impossible.

4. Appellants' Remaining Arguments are Similarly Without Merit.

The Judds also argue that the trial court erred by denying their statute of limitations defense. The Judds state that they asserted a statute of limitations defense at trial and that the trial court rejected "their defense." However, the portion of the record cited by the Judds refers only to the trial court's Memorandum Opinion and Order Quieting Title. In fact, the Judds did not assert any statute of limitations defense at trial or ask the trial court to make any findings of fact relating to a potential statute of limitations defense.

The Judds also claim the trial court erred by denying them reimbursement for a pro-rata share of taxes paid on the disputed area pursuant to RCW 7.28. Once again, the Judds did not ask for a ruling on that issue at trial, but made the request only in a motion for reconsideration. CP 722-724. As noted by the trial court in its letter ruling denying the motion for reconsideration, the Judds failed to comply with the requirements of RCW 7.28.160 by failing to present any evidence

as to the amount of taxes or assessments they had paid. CP 729-30. On appeal, the Judds fail to challenge that finding or to cite any portion of the record showing that they complied with the requirements of the statute. The Judds arguments in this regard are completely without merit.

5. Respondents Should be Awarded their Attorney Fees and Costs for Responding to a Frivolous Appeal.

None of the arguments raised by the Judds on appeal has any merit whatsoever. The Judds do not argue that the testimony and other evidence presented at trial was insufficient as a matter of law to support the trial court's findings of fact. Instead, the Judds attempt to raise new issues on appeal for the first time without having given the trial court the opportunity to consider and rule on those same issues. Respondents should be awarded their reasonable attorney fees and costs on appeal pursuant to RAP 18.14.

**Cross Appeal:**

1. Plaintiffs' Action Was Frivolous in Its Entirety Because the Facts Essential to the Outcome Were Not Disputed and the Law of Adverse Possession in Washington is Well-Settled.

RCW 4.84.185 provides for an award of reasonable attorney fees and costs for opposing any claim or defense that "was frivolous and advanced without reasonable cause." The purpose of RCW 4.84.85 is to discourage abuse of the legal system by providing for an award of expenses and legal fees to any party forced to defend against meritless claims asserted for the purpose of harassment, delay, nuisance or spite. *Biggs v. Vail*, 119 Wn.2d 129, 134-36, 830 P.2d 350 (1992).

In ruling on a motion for fees and costs under RCW 4.84.185, the court is to consider all the evidence presented at the time of the motion to determine whether the action was frivolous and advanced without reasonable cause. *Ahmad v. Town of Springdale*, 178 Wn. App. 333, 343-44, 314 P.3d 729 (2013). A frivolous claim or defense is one that cannot be supported by any rational argument on the law or the facts. *Id.*

Here, the Judds' claims were advanced without reasonable cause from the very outset. The Judds acknowledged even in their Complaint that they were aware of the fence between their property and the Healy-Johns properties at the time they purchased their property. They became aware that the fence was approximately 50 feet east of the survey line at least as early as November 1999, when Larry Judd spoke to Mr. Healy about it. It is undisputed that the Judds then waited 12 years to commence the present action. The Judds never put forward any rational

argument why their claims were not barred by the 10 year statute of limitations provided by RCW 4.16.020(1) as found by the trial court.

All of the testimony at trial, including the testimony of the Judds, established that the fence was very old and had been in that location for many years. The Judds apparently made no effort prior to filing a lawsuit to speak to persons familiar with the area or otherwise investigate the history of the fence and prior use of the property on either side of the fence. At trial, the Judds presented no evidence whatsoever to contradict the testimony of Edith Nendl, Tom Wiley, Matt Wiley, Jay Healy and Eric Healy regarding the historical use of the disputed area prior to September 1999. That testimony clearly established the elements of adverse possession under Washington law.

Instead of disputing the facts at trial, the Judds attempted to argue that the trial court should ignore the law of adverse possession and rule in their favor based upon comments made by Chief Justice Madsen in *Gorman v. City of Woodinville*, 175 Wn.2d 68, 283 P.3d 1082 (2012). However, even Justice Madsen acknowledged in her comments that any change in the law of adverse possession in Washington would have to be accomplished by the State Legislature and not by the courts. Thus, any argument that *Gorman v. City of Woodinville*, which actually applied the doctrine of adverse possession in a manner contrary to the Judds' position

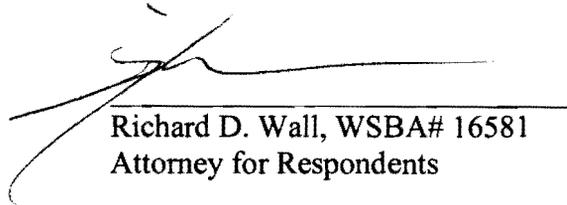
at trial, somehow supported the Judds' claims was clearly unreasonable and untenable.

None of the claims or defenses raised by the Judds in this action can be supported by any rational argument on the law or the facts. Therefore, the action as a whole was frivolous. The trial court erred by not awarding reasonable attorney fees and costs to Healy and Johns.

#### CONCLUSION

For the foregoing reasons, the Court should affirm the decision trial court quieting title in the Respondents, reverse the trial court's denial of Respondents' motion for attorney fees and costs pursuant to RCW 4.84.185, and award attorney fees to Respondents on appeal.

Respectfully submitted this 17<sup>th</sup> day of August, 2015.

  
Richard D. Wall, WSBA# 16581  
Attorney for Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 17<sup>th</sup> day of August 2015, a true and correct copy of the foregoing RESPONDENTS' OPENING BRIEF was sent via legal messenger to the following:

ROBERT DUNN  
Dunn Black & Roberts  
111 North Post, Suite 300  
Spokane, WA 99201-0705

Alyson Marie