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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 344886-III

**COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON**

CHARLES AND BAMBI COMPTON,

Respondents,

v.

LEWIS CLARK SADDLE CLUB,

Appellant.

BRIEF OF APPELLANT

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I.

ASSIGNMENTS OF ERROR & ISSUES

- A.
1. The Court erred by ruling that the property in dispute to the west of the chain-link fence is owned by Plaintiffs as a result of adverse possession.
 2. The Court erred when it says that the defense of adverse possession was properly raised by Respondent's Answer to Counterclaim, which did not require or allow Appellant's time or opportunity to respond to the allegation?
 3. The Court erred when it attempted to award adverse possession without a proper legal description.
 4. Should the Superior Court have ruled against the Appellants in regards to statutory trespass as a result of it's finding adverse possession for the Respondents?
 5. Did the Court violate Civil Rule 15 by improperly raising the issue of adverse possession in the case and advanced to nearly conclusion.

6. Was adverse possession by the Respondents upheld by the facts of the case when the elements of adverse possession were not clearly proved?
 - B. The Court erred by finding adverse possession on the facts of this case.
 - C. Restraining order RCW 10.14.
 - D. Was the Court in error for failing to establish boundaries and the failure of Plaintiff to properly plead boundaries, legal descriptions or provide surveys or testimony thereof at trial?
 - E. The Court erred by not finding and awarding damages for Respondent's trespass and malicious trespass .
 1. Did the Court fail to find waste and award damages when it found that the measure for damages for trespass were not real and substantial, after finding fence old and decrepit.
 - F. The Court erred by not awarding attorney fees and treble damages pursuant to 4.24.633 and 4.24.630.

II.

STATEMENT OF THE CASE

Plaintiffs, Charles Compton and Bambi Compton (“the Comptons”), are residents of Clarkston, Washington. Defendant, Lewis Clark Saddle Club, is a Washington not for profit corporation that operates on property located in Clarkston, Asotin County, Washington (CP 022).

In 2008, the Comptons purchased a single-family residence at 1354 Pound Lane (“Property”) and moved there with their then 8-year-old son, Charles E. Compton, on July 9, 2008. The Property is located next to the Lewis Clark Saddle Club (“Club”), and is directly adjacent to the Club arena.

The land that is now the Saddle Club was purchased in 1962 from Ed and Vera Jungert (CP 026).

That the real property located at 13th Street and Pound Lane, at the address of 1330 Pound Lane, Clarkston, Washington, has been used continuously since 1963 for purposes of the Club (CP 026).

The primary purpose of the Club is promoting a greater knowledge, understanding and appreciation of horses and horsemanship, providing training, instruction and other educational opportunities, the humane handling, raising and breeding of horses to encourage members to participate in Omoksee, rodeos, playdays, horse shows, trail rides and other activities

sponsored by the Club, to provide, so far as is possible and practical, useful, safe and effective facilities for the holding of sponsored Club events, with a primary view toward junior members. Members benefits include the right of participation of events sponsored by the Club, the use of the area and/or portable or stationary games or equipment (CP 026).

All of the land is zoned light commercial by Asotin County. There are no prohibitions against the use of horses or riding areas for locations in that spot. That any use as it relates to the zoning ordinance is grandfathered and a permissible use of the zoning ordinance(s) of Asotin County (CP 026).

That the Plaintiff moved onto the property immediately west of the Lewis Clark Saddle Club in 2008. From the time that they moved in, Bambi Compton showed interest in the horses and in the Saddle Club. In approximately 2010, Mrs. Compton bought a horse. Mrs. Compton joined the Saddle Club and started riding in events. She actively used the area. To the best of Defendant's knowledge there were no complaints from the Plaintiffs about the dust or anything else while Mrs. Compton was a member of the Saddle Club. (Court's Memorandum Opinion, CP 170-173).

On the single family residence side there is a "retaining wall" along the fence for the first approximately 80 feet. It is about 2 feet in height. The retaining wall is constructed of recycled lumber which is 2 X 12 standing on

edge with one over the other (VT 377).

Defendant is a Washington not for profit corporation, incorporated in Asotin County in 1958. The Club was founded in 1950. Their principal place of operation is the corner of 13th Street and Pound Lane, Clarkston, Washington (CP 001-005 & CP 022-033)

The fence was installed when all soil was against the fence on either side. It would not be possible to install the concrete footings so that the fence posts set in all the way around the posts and the soil appears to have the same consistency with the post locations as compared along the fence line (VT 377-378).

The top of the concrete posts on the single family home side have been buried under 2.5 to 3 feet of fill material, which material is east of the property line. Metal fence concrete anchors were placed in the ground earlier than the dirt and debris that covered it. The source of this material is from the property that adjoins the Lewis Clark Saddle Club to the west (VRP 378).

A property owner at 1354 Pound Lane not only filled in the space between his home and the property line with dirt and debris, replaced railroad ties and planks adjacent to the fence. This material was not compacted and does not provide a solid base for the concrete that was poured over IT (VRP 380-381 & CP 383-384).

The planks and railroad ties used as a barrier are leaning and/or pressing against the metal fence that was erected against the property and has damaged the fence constructed by Lewis Clark Saddle Club. As the fill settled, it has shifted from east to west and has deformed the fence. (VRP 456-457).

That Plaintiffs has encroachments attached (nailed and/or screwed) directly to the fence (VRP 460-463).

The Saddle Club fence is approximately 12 inches on Saddle Club property line. The Compton's fence and "retaining wall" is on Saddle Club property (VRP 448-450).

In the last three years Mr. Compton has been harassing, complaining and interfering with the peaceful operations of the Saddle Club, it's officers, Directors and members.

On October 6, 2013, during an Omoksee, someone came charging onto the property yelling, "Who is in charge?" It turned out to be Mr. Compton, he started yelling to Susan Berghammer, the Club Vice-President, about the dust. He kept yelling about the dust even after she offered to turn on the sprinklers. Mr. Compton threatened to turn the Club into the EPA. In response to his screaming and yelling, the Club people were asked not to ride in the warm-up arena adjacent to his house until it could be watered down.

The Club then proceeded to turn the sprinklers on and water it down.(Transcript Proceedings 316-320,344-357,360-405,417-418,433-441, 444-508).

On October 19, 2013, the Club had a trail challenge at the arena. Mr. Compton came over onto the property, yelling again, papers in hand yelling that he was going to sue us over the dust. Mr. Compton was asked if he thought it was too dusty to come over and let us know. That we needed to run the sprinklers before he got to the stage of anger. He said it was not his job to let us know. He was still upset and yelling at this point. Tracy Storey physically fearing his behavior to be dangerous called the Asotin Sheriff's office. The Sheriff's office came and investigated. (VRP 316-320, 344-357, 360-405, 417-418, 433-441, 444-508).

The Plaintiffs' behavior as alleged above constitutes numerous acts of both single and continuing trespass causing substantial damage to the fence, to the land itself of respondents and to the members. Plaintiff has continuously invaded the property. That he could reasonably foresee this action would disturb Defendant's possessive property interest and physical property status. This invasion has caused actual damages.

Defendant's actions, and particularly with the fence and the failure of lateral support has caused waste and real and continuing damages (VRP 451-457).

As further previously alleged, Defendants, because of plaintiff's actions, have suffered substantial damages in amounts to be proven at trial.

Plaintiffs' Complaint asked for relief under Paragraph 6 as follows:

- “6.1.1 Treble damages in amounts to be established at trial as allowed under RCW 4.24.630 for Defendant's continuous trespass and excavation by the sprinklers which has resulted in removal of lateral support from the Property.
- 6.1.2 A preliminary injunction and a permanent injunction abating the churning up of dust on the land and preventing water from the sprinklers from trespassing on the Property and excavating the Property.
- 6.1.3 Attorney's Fees and costs as allowed under RCW 4.24.630.” (CP 005).

Defendant, in their Answer and Counterclaim, asked for the following relief:

- “1. Dismissing Plaintiffs' complaint and having them take nothing thereby.
- 2. For treble damages in amounts to be established at trial as allowed under RCW 4.24.633, for Plaintiffs continuous trespass, failure to provide lateral support and destruction of the fence.
- 3. For damages in amounts to be proven at trial for:
 - A. Trespass and malicious trespass.

- B. Waste.
 - C. Harassment and malicious harassment.
 - D. Surveillance/stalking.
4. For attorney fees and costs as allowed under RCW 4.24.630.
 5. For permanent restraint and permanent anti-harassment order forbidding the Comptons, plaintiffs, and either of them, or anybody on their behalf, from having any contact with the Saddle Club or it's members while on the Saddle Club property, from coming upon the property and from stalking, harassing and keeping under surveillance the Saddle Club and it's members, officers, employees and guests.
 6. For such other and further relief as the Court may deem warranted upon hearing." (CP 030-031).

Plaintiffs in their Answer allegedly pled adverse possession ineffectively (CP 065).

The Court issued Commissioner's Memorandum Opinion (CP 170-178). Both parties submitting written closing argument as ordered by Memoranda (CP 107-127 & CP 160-169). This is significant because there is no mention or argument in that document that pertains to adverse possession. The Court then entered it's Memorandum Opinion referenced above.

The Court denied entry of Defendant's proposed Findings of Fact and Conclusion of Law . The Court then entered Plaintiffs' second set of Findings of Fact & Conclusions of Law (CP 214-218).

Defendant then filed a Motion for Summary Judgment and Affidavit of Scott C. Broyles (CP179-191). Plaintiff filed (Dukes' pleading and response to my Motion for Reconsideration). Defendant filed Defendant's Response to Plaintiff's Response to Defendant's Motion for Reconsideration (CP 192-194).

Defendant then filed a Motion and Declaration for Reconsideration (CP 181-191).

The Court then finally entered the Court's Motion Denying Motion to Reconsider (CP 211-213).

IV.

ARGUMENT

A. Lack of Due Process/Lack of Subject Matter Jurisdiction

The Court violated due process requirements sua sponte raising the issue or "defense" of adverse possession. The defendants were never provided notice and opportunity to be heard on this adverse possession. RCW 7.28, part of Title 7 - Special Procedures and Actions. The defendants were wrongfully deprived of their real property.

I. The Court never acquired jurisdiction of the cause of ejectment, quieting title, also known as adverse possession.

First, there are a number of documents that the Court needs to take into account in review of this Motion:

Comptons v. Lewis Clark Saddle Club

Superior Court Case No. 14-2-00183-1

SUB#	DATE	CODE/CONN	DESCRIPTION/NAME
001-006	07/10/2014	CMP	COMPLAINT
007-010	10/07/2014	MT	PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION
011-021	10/07/2014	MM	MEMORANDUM OF AUTHORITIES SUPPORTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION
022-034	10/14/2014	AN	ANSWER AND COUNTERCLAIM
046-057	11/04/2014	MT	MOTION FOR PARTIAL SUMMARY JUDGMENT
061-069	11/12/2014	RSP	PLAINTIFF'S RESPONSE TO DEFENDANT'S COUNTERCLAIM
070-077	11/26/2014	RSP	PLAINTIFF'S RESPONSE TO MOTION FOR SUMMARY JUDGMENT
078-080	01/13/2015	MM	MEMORANDUM DECISION ON PARTIAL SUMMARY JUDGMENT

083- 087	05/01/2015	BR	PLAINTIFF'S TRIAL BRIEF
107- 159	05/26/2015	RPT	PLAINTIFF'S CLOSING ARGUMENT
170- 188	06/30/2015	MM	COURT'S MEMORANDUM OF OPINION

Plaintiff/Respondent makes two references as part of their mandatory answer to adverse possession as follows:

A. Plaintiffs lack sufficient information to admit or deny the allegations made in paragraph 3.9, however, they deny paragraph 3.9 to the extent that they believe that their possession of the property, when tacked onto the possession of previous owners of the strip of land in question, meets all the elements of adverse possession. Therefore, they assert that they are the owners of the property.

B. Plaintiffs deny paragraph 3.20 to the extent that they, and through tacking, their predecessors in interest, meet the requirements for adverse possession.

II. Strangely enough, Plaintiff's Response does not include a prayer for relief or assertion in a positive manner other than as an aside in two answers.

At Paragraph 1.9, there is no further mention of that issue, which is not a defense, but is a cause of action that should have been pled by a motion to amend Plaintiff's complaint under CR 15A.

The Court in its ruling on January 13, 2015, Clerk's Document #34 - Memorandum Decision on Partial Summary Judgment, indicates that:

“Whether or not the current occupants of the home should be allowed to claim the benefit of the previous use of their predecessors is not a question before the Court at this time.”

Then the Court said,

“Significant factual questions remain as to nature and extent of defendant's alleged incursions onto plaintiff's property, as well as with respect to the boundaries themselves. “

”Therefore, a question remains as to whether or not defendant's activities unreasonably interfere with plaintiff's use and enjoyment of the property. If the inference is reasonable in light of all existing circumstances, defendant's activities are permissible regardless of the burden placed upon plaintiffs. That is a question which involves a weighing of evidence.”

No mention other than the declaratory statement of the Court that what was probably adverse possession was not before the Court. Which is true, because it has not been properly pled.

Clerk's Document #30 - Plaintiff's Response to Motion for Summary Judgment at 2.2.1.1:

“Plaintiffs were given permission to build the small retaining wall, and they have submitted photographic evidence showing the Saddle Club’s trespass on their own property.”

and 2.2.1.3:

“The most significant evidence needs no inference however. Even if the property line is where the Defendant claims it is, the Plaintiffs have submitted numerous photos and video clips showing the Saddle Club trespassing on their property and evidence of the damage the trespass has caused.”

There are no other mentions in that document and in fact everything is couched as trespass and not adverse possession. The facts alleged on Page 2 of said document say, “the property is located next to the Lewis Clark Saddle Club and is directly adjacent to the Club arena.” In the trial brief I found absolutely no adverse possession language whatsoever, nor a citation of the statutory sections controlling that. The reason this is significant is that the Plaintiff Comptons, whose issues are contained in Rules 7 through 16, in particular Rule 8(f)(9)(j)(10)(b). Rule 15 amended and supplemental pleadings have failed to comply.

Plaintiffs, generally, in their Response to Motion for Reconsideration alleges:

“The Defendant knew that adverse possession would be an issue when Plaintiffs answered its counterclaims, which they did in November 2014 due to Defendant’s own dilatory conduct in not responding to the Complaint with its Answer and Counterclaims until October 10, 2014. The Plaintiff in their Response defended against allegations of trespassing, stating of themselves: “they believe that their possession of the property, when tacked onto the possession of previous owners of the strip of land in question, meets all the elements

of adverse possession. Therefore, they assert that they are the owners of the property.” Plaintiffs’ Response to Defendant’s Counterclaims, p.3 The Defendant was thus very clearly alerted at the beginning of the action that the Plaintiffs would defend themselves against trespassing claims by claiming adverse possession. Defendant had months of notice and ample time to prepare to litigate this matter - which it did at trial by producing maps and testimony regarding the location of the property line.”

Unfortunately, there isn’t any proof that Defendants knew and, in fact, they believe that the “notice” was not sufficient, since it did conform to 15(a) and (b) and the case law to be discussed in a minute, Plaintiff went on to say in it’s conclusion:

“Defendant has known all along that the Plaintiffs claimed adverse possession, which Plaintiffs asserted early in the proceedings. Their very clear assertion meets notice pleading requirements, but even if the Plaintiffs had not made their intent clear, Defendant fully engaged in this issue, therefore it could be treated in all respects as if it had been raised in the pleadings under CR 15(b),”

Not only is this in error because there isn’t substantial and satisfactory proof that there isn’t compliance with the case law as to the opportunity to be heard on what was improperly pleaded as a defense and should have been in the Amended Complaint.

III. Secondly, the RCW 10.14 orders tend to ignore that is the correct place for amendment to conform to the pleadings, particularly in light of the Court’s ruling. Midway through Item 4, the Court missed the points

contained in the case law cited further down, requiring opportunity to be heard and plead of which Defendant was denied applies in either case with amendment or in this case where the Court is raising it on its own, and particularly in its closing paragraph indicating that cases that would dismiss cases like this on a technicality if not properly pled, really isn't the issue, the issue is did the Defendants get an opportunity to garner a response (see case law discussion), i.e. was it fair and equitable.

The Court violated CR 15 by raising the issue or defense of adverse possession. The appellants were never provided notice and opportunity to respond to the issue of adverse possession. RCW 7.28, part of Title 7, Special Procedures and Actions. As a result, the appellants were wrongfully deprived of their real property. The appellants further allege that even if the complaint was properly amended to include adverse possession, the respondents cannot prove adverse possession on the facts of the case.

Improper Amendment of Pleadings Under CR 15

The appellants never had the chance to respond to the issue of adverse possession (also known as quieting title). The court, by raising adverse possession sua sponte during the case as a defense, effectively ruled against the Appellant as regards to adverse possession, even though that was not a cause of action in the case and even though the appellant was not granted the

opportunity to respond to a nonpleaded issue that would affect their rights in property. Civil Rule 15 comes into play here.

CR 15(a)

In CR 15(a), the other party may move to amend/supplement the pleadings.

Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise, a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. If a party moves to amend a pleading, a copy of the proposed amended pleading, denominated "proposed" and unsigned, shall be attached to the motion. If a motion to amend is granted, the moving party shall thereafter file the amended pleading and, pursuant to rule 5, serve a copy thereof on all other parties. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders. CR 15(a).

The responding party may respond to the amended pleading. Adverse possession is another cause of action, RCW 7.28.120, which should have been pled by a motion to amend Respondent's complaint under CR 15(a). In its ruling on January 13, 2015, Clerk's Document #34 Memorandum

Decision on Partial Summary Judgment, even the Court admitted that adverse possession was not before the court when discussing whether the Respondents' could claim the time of the previous owners of their property to piece together the statute of limitations period:

“Whether or not the current occupants of the home should be allowed to claim the benefit of the previous use of their predecessors is not a question before the court at this time.”

Further, the Respondents, in their Plaintiff's Response to Motion for Summary Judgment (Clerk's Document #30), discussed the facts in terms of trespass and made no mention of adverse possession (see at 2.2.1.1 and 2.2.1.3.). It is very clear from the pleadings that adverse possession was not even an issue. Therefore, the pleadings would have to be amended according to CR 15(a).

The civil rule and case law is very clear in regards to CR 15(a). The party moving to amend their pleadings may do so by leave of the court and with the written consent of adverse party. *Del Guzzi Construction Co., Inc., v. Global Northwest, Ltd., Inc.*, 105 Wn. 2d 878, 888 (Wash. 1986 (citing the civil rule).

The civil rule clearly indicates that when moving to amend the pleadings, the responding party must be given time to respond the amended

pleadings. Adverse possession is a cause of action, RCW 7.28.120, and it was not properly included in an amended complaint. CR 15(a).

CR 15(b)

There is another subsection of CR 15 that bears consideration. CR 15(b) allows the court, at its discretion, to amend the pleadings to include another cause of action.

Amendments To Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence. CR 15(b)

Here the statute states that the Court may allow the pleadings to be amended to reflect the issues not raised in the pleadings, but that were tried by express or implied consent of the parties. In *Harding v. Will*, the court states that the court may realign the issues when necessary to adjust the pleadings so as to accurately reflect the proceedings in court. *Harding v. Will*,

81 Wn.2d 132, 135-36 (Wash. 1972). As mentioned above, the pleadings did not mention adverse possession and there was not indication that the parties tried the issue via express or implied consent (see at Plaintiff's Response to Motion for Partial Summary Judgment, Clerk's Documents #30).

However, even if there is consent or evidence, the court has to allow notice to the parties. In *Harding v. Will*, the Washington State Supreme Court states (citing *Kuhn v. Civil Aeronautics Bd.*, 87 U.S. App.C.C. 130, 183 F.2d 839, 841 (1950)):

"A court may amend the pleadings to realign parties and issues as was done here. However, amendment under CR 15(b) cannot be allowed if actual notice of the unpleaded issue is not given, if there is no adequate opportunity to cure surprise that might result from the change in the pleadings, or if the issues have not in fact been litigated with the consent of the parties." *Harding v Will*, 137.

In this case, there was neither express nor implied consent to the issue of adverse possession, further, there was no notice given for Appellants to present further evidence responding to the newly raised issues of adverse possession. In *MacCormack v. Robins Construction*, the Whatcom Superior Court sua sponte transformed a suit brought under the Consumer Protection Act into a claim for common law breach of warranty theory and granted monetary relief. The court in its oral decision stated that although the

plaintiffs were not entitled to relief under the Consumer Protection Act, they were entitled to relief under breach of warranty. The defendants moved for a new trial to litigate this new issue, but the court did not grant that. Instead, the court, over the objection of the plaintiff, continued to allow the defendants time to prepare to present evidence relating to the breach of warranty. *MacCormack v. Robins Construction*, 11 Wn.App. 80, 81 (Wash.App. Div. 1 1974). The Court of Appeals, citing *Harding v. Will*, stated that the court may amend the pleadings; however, the amendment under CR 15(b) can't be allowed if actual notice of the unpleaded issue is not given and there is no opportunity to cure the surprise that might result from such a change in the pleadings, or if the issues have not been litigated with the consent of the parties. *MacCormack*, 82. The Court of Appeals found no error in the trial court's rulings. This case mirrors *MacCormack* closely in regards to the sequence of events and procedures. The distinguishing factors are that, unlike the Whatcom Superior Court, the court in the instant case did not give notice or allow the Appellants to present evidence in response to the issue of adverse possession raised by the court sua sponte.

Further, the Court did not state that its intention was to comply with CR 15(b) to allow the pleadings to be amended to reflect the issue (adverse possession) not raised by the pleadings. While this may have been an option

to be properly utilized, the Court did not use it, but improperly raised the issue of adverse possession. Finally, even if the court raised the issue properly under CR 15(b), the lack of notice or ability to cure the surprise was not granted to the Appellants.

By not providing notice, not amending the pleadings according to CR 15, and by not allowing the Appellants to answer, respond and to present evidence on the issue of adverse possession, the Appellants' due process rights have been violated, and because the proper procedure was not followed, the court never had jurisdiction over the issue.

What is significant is we are into November before Plaintiff makes any mention of adverse possession (CP 061-067) Plaintiff's Response to Defendant's Counterclaims.

Also when you look at Plaintiff's closing there is no claim or argument for adverse possession.

In the end what we have to say is that this isn't merely an abuse of discretion on behalf of the Court, but is a substantial error of law, which dispositively counters the Court's "mere technicality."

B. Adverse Possession

The Appellants allege, even if the complaint was properly amended, the Respondents' still cannot prove adverse possession on the facts of the case. "In order to establish a claim of adverse possession, there must be possession for 10 years that is: (1) open and notorious, (2) actual and uninterrupted, (3) exclusive, and (4) hostile. *ITT Rayonier, Inc. V. Bell*, 112 Wash.2d 754, 757, 774 P. 2d 6 (1989); RCW 4.16.020. The holder of legal title is presumed to have possession; the party claiming to have adversely possessed the property has the burden of [83 Wn.App. 853] establishing the existence of each element. *ITT Rayonier*, 112 Wash.2D at 757, 774 P.2d 6. Adverse possession is a mixed question of law and fact; whether the essential facts exist is for the trier of fact, but whether the facts constitute adverse possession is for the court to determine as a matter of law. *Peeples v. Port of Bellingham*, 93 Wash.2d 766, 771, 613 P.2d 1128 (1980), overruled on other ground, *Chaplin v. Sanders*, 100 Wash.2d 853, 676 P.2d 431 (1984)."

In this case, the Respondents' have not satisfied all of these elements and the burden is theirs.

1. Statute of Limitations

The Respondents did not possess the property for 10 years. For the Respondent to acquire title in fee to the property in dispute, they must have

adversely possessed the property for the statutory period of time. The Respondents built a retaining wall on an area of the Appellants' property. *See*, Exhibit D-7. At this point the Respondent could claim that they were "adversely possessing" the property. However the retaining wall was built many years before this action was taken up. Therefore, it will not meet the requirements of the statute of limitations. Further, the Respondents will not be able to tack the time the prior owners of the property resided there, since there was no hostility by the prior owners.

2. Hostile, Open and Notorious

The Respondent was not hostile for the statutory period. The possession of the property must be hostile. The chain link fence was not a boundary or line fence, rather it was a random fence. While a line fence will establish hostility, *Wood v. Nelson*, 57 Wn.2d 539, 541 (Wash. 1961) the court assumes in its analysis that a random fence will not. *Acord v. Petit*, 174 Wn.App. 95, 107-09 (2013). There is no testimony or evidence that the fence was treated as a line fence by any of the prior owners or by the Respondents until the Respondents built the retaining wall. At no time did the Appellants allege that the fence was a line fence or establish a legal description for it. Absent a showing that there was hostility until the Respondents built the retaining wall, there is not a showing of hostility for the statute of limitations.

For all those reasons, the trial court was incorrect in reasoning that the Respondents adversely possessed the property on which the retaining wall was built.

C. RCW 10.14 Restraining Order

What is really interesting in all of this is that the RCW 10.14 restraining orders are just such case and the real issue is that the Plaintiffs brought an action for trespass when their action should have been for quiet title and/or ejectment and then to come back and say they pled a defense which should have been part of the Complaint is nuts. The Plaintiffs are offense, Defendants are defense. The Defendants did not raise that issue. The Findings of Fact at 1.18, the Saddle Club is not a specific person as juxtaposed to the Court's Memorandum Opinion (CP 170-179, where the Court said in closing:

“In the case at hand, Defendant Saddle Club is not a “specific person.” While certain members of Defendant Saddle Club may have a basis to seek anti-harassment orders individually, Defendant Saddle Club is not a “specific person” to which this statute affords protection. Furthermore, Plaintiffs conduct in requesting dust reduction, installing security cameras and protecting their property is done for a legitimate purpose. Defendants counterclaim for harassment and stalking is denied and dismissed.”

That is exactly the kinds of situation where 15(a) to amend the pleadings to conform and the Court should have granted “certain members

of the Defendant Saddle Club anti-harassment orders individually based upon the testimony given at trial

The record is replete with testimony of harassment by Mr. Compton. Milton Campbell (VRP 319), Tina Luper (CRP 344-358), Rebecca Wright (VRP 360-393), Casey Storey (VRP 407-419) and particularly VRP 412, Line 19 through 23, being physically afraid (VRP 418), starting at Line 13, feeling harassed, violated and unsafe, the testimony of Allen Klein running from VRP 420-431, particularly describing behavior (VRP 424-429), Susan Berghammer (VRP 433-442), specifically testimony at 439, and finally the testimony of Mark Fleming (VRP 444-458). All of these people, based on their fears, should have been awarded restraining orders against Mr. Compton and particularly Ms. Storey, her father and Mr. Fleming among others.

D.

The court was in error for awarding a prescriptive easement, without proper legal description of the new line. The Findings of Fact are in error in a number of places. At 1.1, a street address is insufficient, a legal description of the Compton's property should be inserted there. I don't believe one was ever admitted into evidence. At 1.2, the legal description of defendant's property is not included. In fact, there isn't even any street address. Defendant's posed this in a number of places: a) Answer and Counter-claim,

the testimony of Ed Spears (VT 241-246). At 1.5, alleges the chain link fence without legal description, location or identification. 1.6 has the same problem. Prescriptive land needs to be described by a legal description as the Court agreed by rejecting the inadequate legal description on Page 3. The Conclusions of Law are in error as 2.7 says the Plaintiffs own the adversely possessed property described in Section 1.16 of the findings as a result of adverse possession. There is no legal description at 1.16. The Conclusions of Law at 2.7 is inadequate and should be stricken in it's entirety. As mentioned earlier in this brief, the property belongs to the Defendant based on the original description for failure of Plaintiffs to legally provide a survey and develop a legal description.

In fact, this whole thing of boundaries has been done in a deplorable manner in the pleadings. In Plaintiff's Complaint they never plead property description, nor do they plead that as a representative of metes and bounds, nor do they plead a description with location and boundary line for Defendant's property. I submit to you that is a failure of due diligence in pleading and a Rule 11 error to plead and file a trespass or adverse possession claim without first having the boundary surveyed so the Court can have enough facts to make a decision. While Defendants did, in Exhibit D-15 (VT 241-246) through both pleading and through Ed Spear's testimony, establish

the true and correct exterior legal boundaries and did sketch in on said exhibit a rough estimate, Defendant's had no need and did not develop a legal description either for the triangle or for the true location and description of the fence that the Court decided to use as the boundary. There are a number of solutions, 1) I proposed to Plaintiff's counsel was she get that surveyed and 2) I referenced her in general terms to the statute that allows you to make a motion to amend the pleadings, i.e., get a legal description. At this point counsel's own actions traps Plaintiff, her client, in court with no way for the court to award the judgment for adverse possession because she did not prove the location of the alleged new boundary line.

E. Trespass and Damages

Was the defendant entitled to a finding of trespass (and/or waste) for the plaintiff: 1) building a crude retaining wall that pushed the fence out that was entirely on defendant's property; and 2) should defendants have been awarded damages therefor, including fence damage and the damage to the fence in the front from the retaining wall and the damage to part of the fence down the line as a result of the plywood "sight obscuring fence" (and/or sale board) which caused actual destruction?

A trespass involves "an intentional or negligent intrusion onto or into the property of another, or 'an unprivileged remaining on land in another's

possession.” *Fradkin v. Northshore Util. Dist.*, 96 Wn.App. 118, 123, 977 P.2d 1265 (1999) (quoting “*Bradley v. Am. Smelting & Ref. Co.*, 104 Wn.2d 677, 693, 709 P.2d 782 (1985)). To show an intentional trespass, the plaintiff must establish (1) an intentional invasion of property affecting an interest in exclusive possession, (2) reasonable foreseeability that the act would disturb the plaintiff’s possessory interest, and (3) actual and substantial damages. *Wallace v. Lewis County*, 134 Wn.App. 1, 15, 137 P.3d 1-1 (2006).

A trespass may be permanent or continuing. See *Wallace*, 134 Wn.App. At 15. A continuing trespass occurs where the intrusion is reasonably abatable. See *Fradkin*, 96 Wn.App. at 125. An intrusion is abatable ‘so long as the defendant can take curative action to stop the continuing damages.’ *Fradkin*, 96 Wn.App. at 125-26.

Whether a trespass is permanent or continuing determines the proper measure of damages, The measure of damages for a permanent trespass is the diminution of the property’s value caused by the trespass. *Keesling v. City of Seattle*, 52 Wn.2d 247, 253, 324 P.2d 806 (1958) (citing *Messenger v. Frye*, 176 Wash. 291, 298-99, 28 P.2d 1023 (1934)). The measure of damages for a continuing trespass is the cost of restorative and the loss of use. See *Keesling*, 52 Wn.2d at 253 (citing *Messenger*, 176 Wash. at 298-99). A plaintiff failing to show the proper measure of damages fails to show the

actual and substantial damages element of a trespass claim. *Wallace*, 134 Wn.App. at 17.

The trial court properly granted the Gardners summary judgment on the trespass claim. The Gardners established the absence of a genuine issue of material fact by pointing out Pope and Stacey's failure to establish actual and substantial damages. *Young*, 112 Wn.2d at 255, 255 n. 1 (quoting *Calotex Corp. V. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). In response, the only evidence Pope and Stacey produced showing actual damages was the Wilmovsky declaration, which incorporated his opinion letter. [2] That opinion, however, used the wrong measure of damages, diminution in value instead of loss of use. That error necessitated summary judgment in the Gardners' favor. *Wallace* 134 Wn.App. at 17.

Pope and Stacey argue that summary judgment was inappropriate because whether a trespass is continuing or permanent is a question of fact that the jury must resolve, citing *Fradkin*, 96 Wn.App. at 123-26. While the nature of the trespass is typically a question of fact, here it is not; nor is it material. As the Gardners implicitly argue, reasonable minds could only reach the conclusion that this was an abatable and, therefore, continuing trespass: the Gardners removed the encroachment quickly after the mediation. *Rucker v. Novastar Mortg., Inc.*, 177 Wn. App. 1, 10, 311 P.3d 31 (2013). The nature

of this trespass is therefore a question of law. *Rucker*, 177 Wn. App. at 10. Further, the nature of the trespass does not affect the outcome of Pope and Stacey's claim, making it immaterial. CR 56(c); *Barrie*, 94 Wn.2d at 642, If the trespass were continuing, Pope and Stacey's claim was properly dismissed for failure to establish one of its elements, actual and substantial damages. If the trespass were permanent, Pope and Stacey's claim was untimely, given the three year time bar for trespass claims and the fact that they knew of the intrusions onto their land seven years before they filed suit. *See* RCW 4.16.080(1).

In their reply brief, Pope and Stacey argue that they did not need to show actual and substantial damages because *Bradley* and *Wallace*, the cases on which the Gardners rely, concerned only transitory trespasses. If this is to argue that the requirement of actual and substantial damages applies only to transitory trespasses, it is inconsistent with *Bradley*, 104 Wn.2d at 691-92, as well as counter to common sense. Actual and substantial damages are a requirement of any continuing trespass claim. *See Woldson v. Woodhead*, 159 Wn.2d 215, 219, 149 P.3d 361 (2006). In a continuing trespass suit, it is plaintiff's receipt of a new injury daily, manifested by actual and substantial damages, that allows the plaintiff to escape the three year statute of limitations applicable to the original intrusion and instead recover damages

for the three years before the filing of the suit. *Woldson*, 159 Wn.2d at 219; *Pac. Sound Res. V. Burlington N. Santa Fe Ry. Corp.*, 130 Wn. App. 926, 941, 125 P.3d 981 (2005). Pope and Stacey allege a continuing trespass. The failure to show actual and substantial damages was fatal to their claim.

(I want to give credit for the above paragraphs which I plagiarized from that unpublished opinion *Stacey v. Gardner* attached as Appendix 1. It's not here as precedential material but the Court writes a lot better than I do).

The substantial damages issue is much better explained and with some definition in *Keesling v. The City of Seattle*, 52 Wn.2d 247 (1958):

“[7] Where pecuniary damages are sought, there must be evidence not only of their actuality but also of their extent, and there must be some data from which the trier of the fact can with reasonable certainty determine the amount. *Wappenstein v. Schrepel*, 19 Wn. (2d) 371, 142 P. (2d) 897.”

If the invasion was permanent, the damages would be the reduction in market value due to its presence, and if it was temporary, the damages would be the cost of restoration and the loss of use. *Papac v. Montesano*, 49 Wn. (2d) 484, 303 P. (2d) 654, *Messenger v. Frye*, 176 Wash. 291, 28 P. (2d) 1023. The plaintiff offered no evidence that his property had been reduced in market value or in use value, other than his own testimony that his view was obstructed.

Having established a technical trespass, the plaintiff was entitled to nominal damages, *Keesling v. City of Seattle*, supra. A very interesting discussion is here because the court has missed analysis in simple areas. First, if there is an adverse possession, a trespass is very clear even if there is adverse possession, the “retaining wall” pushing over and permanently damaging the fence, and the attachments or screening of Mr. Compton bolted to the Saddle Club fence easily constitutes trespass, waste and the restraining wall is clearly encroachment as it needs to be removed. It is clearly established in the testimony of Mark Fleming, the Saddle Club President, in Pages 58, Line 13-471 of the Verbatim Transcript and Clerk’s Papers, Exhibits D-3.1 through 9, D-4.1 through 4.3, D 6.1-6.8, D-5.1-5.2. Further damage and dollar damages can be found in Verbatim Proceedings testimony of Mark Fleming, Page 487, with express damages being clearly on 489-491. Damage to the fence alone is \$15,000 to repair the base damage, put in a new foundation so the fence in and of itself is as a result of the trash fill and the replacement of the fence then would have to be moved to get at that, but also has been severely damaged in the \$15,000 range, attorney fees (VRP 487-492).

Even if you don’t believe that the damages are real and substantial in the range of \$15,000 projected by a former contractor, you still have clearly

technical trespass entitling the Defendants to award of nominal damages, i.e.

\$1.

F. Attorney fees and treble damages

It is clear to us that there are actual and substantial damages in this situation that are either waste, temporary trespass or encroachment, which brings us all out to the same place. RCW 4.24.60 directs:

§4.24.630. Liability for damage to land and property-Damages-Costs-Attorneys' fees - Exceptions

- (1) Every person who goes onto the land of another and who removes timber, crops, minerals, or other similar valuable property from the land, or wrongfully causes waste or injury to the land, or wrongfully injures personal property or improvements to real estate on the land, is liable to the injured party for treble the amount of the damages caused by the removal, waste, or injury. For purposes of this section, a person acts "wrongfully" if the person intentionally and unreasonably commits the act or acts while knowing, or having reason to know, that he or she lacks authorization to so act. Damages recoverable under this section include, but are not limited to, damages for the market value of the property removed or injured, and for injury to the land, including the costs of restoration. In addition, the person is liable for reimbursing the injured party for the party's reasonable costs, including but not limited to investigative costs and reasonable attorneys' fees and other litigation-related costs.
- (2) This sections does not apply in any case where liability for damages is provided under RCW 64.12.030, *79.01.756, 79.01.760, 79.40.070, or where there is immunity from liability under RCW 64.12.035.

Defendant has clearly proven damages for \$15,000. The construction of the "restraining wall" pushing again, damaging and weakening the

underpinnings, the “garbage fill” and the erecting of barriers is all very much intentional and wrongful, and entitles the Saddle Club to treble damages. In addition, the Plaintiffs/Cross-Defendants are liable for reimbursing the injured party for the parties’ reasonable costs, including but not limited to investigative costs and reasonable attorney fees and other related costs. Those can and will be submitted by cost bill. At this point the attorney fees alone through appeal run in excess of \$16,000.00.

Attorney fees on appeal

Pursuant to Rule 18.1(b), this form and argument is made in lieu of a motion on the merits. We have made motion for fees at the lower - level at statutory 4.24.630 should continue to apply here. We also believe that the lawsuit itself filed in Superior Court was frivolous at it’s filing, lack of accuracy and substance, failed to conform to the law in it’s execution causing the court unwittingly to make substantial errors of law and justify the award of attorney fees at this level.

V.

CONCLUSION

Appellant has assigned error to several different issues in the Asotin County Superior Court's Ruling.

The Superior Court should not have raised adverse possession as a cause of action/defense without either the Respondent amending the complaint under CR 15(a) or the Superior Court itself amending under CR 15(b). Since adverse possession was not properly raised, the Court should quiet title to the Appellant to the property in dispute.

Further, even if the adverse possession had been raised properly under CR 15, the facts of the case do not support all the elements of adverse possession. There was not hostility for the statutory period of 10 years. The fence that the Respondent alleges was a line fence was never held out to be anything more than a random fence, which did not mark a boundary line. Until the Respondent built the landscaping and retaining wall, there had been no hostility in the possession of the property. Further, the Respondents will not be able to tack their time with the predecessors of interest, since none of the predecessors were hostile in their actions towards the Appellant. Finally, the Respondent never properly obtained a legal description in order to allow the Superior Court to make a decision regarding the adverse possession claim.

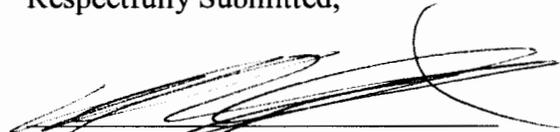
Also, as a result of the issue of adverse possession being improperly raised, and further, even if properly raised, there being no adverse possession,

the Superior Court improperly ruled against the Appellant on whether the Respondent trespassed on Appellant's property and caused waste by building the retaining wall. There was damage to the Appellant's fence which are actual and substantial. The Respondent did not establish adverse possession, and coupled with the waste/damage caused by the Respondents' actions and retaining wall the Superior Court should have ruled that there was trespass.

Finally, the Court should award attorney's fees and treble damages and attorney's fees on appeal. Whether or not the Court decides that the actual and substantial damages are a result of waste, temporary trespass or encroachment, the statute directs the Court to award attorney's fees and treble damages. Further, we believe that consistent with RCW 4.24.630's directions at the lower level, attorney's fees on appeal should also be awarded since the lawsuit filed by the Respondents at the lower level was frivolous, lacked accuracy, failed to conform to the law and because there are substantial errors of law.

DATED this 16th day of May, 2017.

Respectfully Submitted,



ELLIS E. EIPERT, WSBA # 45229
Attorney for Defendant/Appellant

GWYNETH POPE and DANIEL STAGEY, wife and husband, Appellant/Cross-Respondents,

v.

BRUCE GARDNER and PATRICIA GARDNER, husband and wife, Respondents/Cross-Appellants.

Nos. 45927-2-II, 46127-7-II

Court of Appeals of Washington, Division 2

October 6, 2015

UNPUBLISHED OPINION

BJORGEN, J.

Gwyneth Pope and Daniel Stacey appeal (1) an order dismissing their trespass claim against Bruce and Patricia Gardner on summary judgment and (2) a judgment awarding attorney fees to the Gardners for defending against a quiet title claim made by Pope and Stacey. The Gardners cross-appeal an order denying CR 11 sanctions against Pope and Stacey for pursuing the trespass claim. We affirm (1) the dismissal of Pope and Stacey's trespass claim because they fail to show actual and substantial damages, an essential element of their claim, (2) the award of attorney fees to the Gardners for defending against the quiet title claim because Pope and Stacey have waived any claim of error, and (3) the denial of CR 11 sanctions because the Gardners fail to show an abuse of the trial court's discretion.

FACTS

In 2002, the Gardners bought a parcel of land in Thurston County. In 2003, they hired a surveyor to locate their property boundaries so that they could build on the lot. With the help of James Heath, who owned the adjacent parcel, the surveyor found nearby plat monuments and then used those monuments, along with recorded plat distances, to locate what he believed were the corner markers of the Gardners' lot. The Gardners then built a house, deck, external staircase, and retaining wall set back from the boundary drawn using the ostensible corner markers.

In 2004, Pope and Stacey bought Heath's parcel and commissioned a survey of their own. That survey indicated that the Gardners' retaining wall and deck encroached slightly onto Pope and Stacey's property. The survey also revealed that other improvements built by the Gardners violated provisions in the Thurston County Code requiring a six foot setback from the property boundary. A second survey conducted by Pope and Stacey in 2010 confirmed the encroachments and setback violations.

Pope and Stacey had purchased their lot with plans to improve it and live there. When they began taking steps to realize those plans, several of their construction consultants told them Thurston County would likely delay or deny any permit they applied for while the encroachments were in place. The consultants therefore counseled Pope and Stacey to get the encroachments removed before moving forward with their plans. Accordingly, Pope and Stacey contacted the Gardners and asked them to remove the retaining wall and deck. The Gardners refused.

Pope and Stacey turned to the courts, filing a complaint alleging two causes of action. First, Pope and Stacey alleged that the Gardners had trespassed on their land by building structures on it. Second, Pope and Stacey alleged that their predecessor in interest had obtained a prescriptive easement over a driveway on the Gardners' property and asked the trial court to quiet title in the easement in them.

In 2011, the trial court granted the Gardners partial summary judgment on Pope and Stacey's quiet title claim based on a recorded addendum to the real estate contract between each of their predecessors in interest. The addendum gave the Gardners' and Pope and Stacey's predecessors permission to use the portion of the driveway on the property of the other, defeating any claim that any use of the driveway was adverse, and therefore any claim to a prescriptive easement. The trial court later granted the Gardners attorney fees under RCW 4.84.330 for defending against the quiet title action based on a provision in the real estate contract governing the sale of their lot.

In 2012, the parties resolved Pope and Stacey's trespass claim through mediation. The resulting agreement required the Gardners to (1) apply for permits to remove any structures encroaching on Pope and Stacey's property within 14 days of the entry of the judgment, (2) remove the encroachments, and (3) cure the setback violations. Pope and Stacey reserved their right to seek damages for the trespass, and the Gardners reserved their right to contest any such claim.

The Gardners obtained permits in August 2012 to remove the encroachments. They removed the encroachments a few weeks later and cured the setback violations within a year.

Pope and Stacey continued to seek compensation for the trespass after the Gardners removed the encroachments. In October 2013, they obtained an opinion letter from real estate appraiser Todd Wilmovsky, stating that the encroachments had prevented Pope and Stacey from developing their lot, resulting in a \$56, 000 diminution in value. They also stated their intention to seek attorney fees under RCW 4.84.630, which allows for an award of attorney fees for certain trespass actions.^[1]

The Gardners moved for summary judgment dismissal of Pope and Stacey's trespass claim and denial of their request for attorney fees. On the trespass claim, the Gardners argued that Pope and Stacey had failed to show an element of the claim, actual and substantial damages,

because, among other deficiencies, their expert had opined on diminution in value, which was the wrong measure of damages. With regard to the request for attorney fees, the Gardners contended that their trespass, which resulted from an honest mistake contributed to by Pope and Stacey's predecessor in interest, did not have the type of wrongful intent necessary for an award of fees under RCW 4.84.630.

Pope and Stacey opposed the Gardners' motion for summary judgment on the trespass claim by submitting a declaration from Wilmovsky, which incorporated his original opinion letter discussing damages from diminution in value. Pope and Stacey also submitted declarations from their construction consultants, expressing the opinions that the County would not issue construction permits as long as the encroachments were in place and that Pope and Stacy should not attempt to remodel until the encroachments were removed. They also submitted a declaration from Pope, stating that they purchased the property for their primary residence, intended to remodel the existing structures for that purpose, and were unable to do so after negotiations with the Gardners failed.

Because they believed that Pope and Stacey's evidence on diminution in value could not make out a proper claim for damages under Washington law, the Gardners twice notified Pope and Stacey that they would seek sanctions under CR 11 if Pope and Stacey continued to pursue the matter. When Pope and Stacey persisted, the Gardners sought sanctions to reimburse them for their costs in defending against the trespass claim after they had fully complied with the mediated agreement.

After considering the parties' briefing, the trial court granted the Gardners summary judgment on Pope and Stacey's trespass claim. The trial court also denied Pope and Stacey's request for attorney fees under RCW 4.84.630.

During a later argument on the Gardners' CR 11 motion, Pope and Stacey represented to the trial court that their expert had told them that diminution in value was one aspect of the loss of use of property and had actually stated as much in his deposition testimony. The trial court allowed Pope and Stacey to supplement the record with portions of the expert's deposition. Pope and Stacey instead produced a new declaration from their expert equating loss of use and diminution of value. The Gardners moved to strike the declaration, arguing that Pope and Stacey had disregarded the trial court's order, which allowed them to supplement the record with only portions of their expert's deposition testimony. The trial court agreed with the Gardners, granted their motion to strike the declaration and awarded the Gardners attorney fees related to the motion to strike, but otherwise denied the Gardners' request for CR 11 sanctions.

Pope and Stacey appeal the order dismissing their trespass claim and their claim to attorney fees under RCW 4.84.630. Pope and Stacey also appeal the award of attorney fees to the Gardners for defending against Pope and Stacey's quiet title action. The Gardners cross appeal the denial of their request for sanctions under CR 11.

ANALYSIS

I. Standard of Review

We review a trial court's order on summary judgment de novo, performing the same inquiry as the trial court. *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 922, 296 P.3d 860 (2013). We view the evidence, and any reasonable inferences from the evidence, in the light most favorable to the nonmoving party. *Lakey*, 176 Wn.2d at 922. Summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." CR 56(c). "A material fact is one upon which the outcome of litigation depends in whole or in part." *Barrie v. Hosts of Am., Inc.*, 94 Wn.2d 640, 618 P.2d 96 (1980). The party moving for summary judgment "bears the initial burden of showing the absence of an issue of material fact." *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). If the moving party makes this showing, the nonmoving party must "set forth specific facts showing that there is a genuine issue for trial" to avoid summary judgment. *Young*, 112 Wn.2d at 225-26 (quoting CR 56(e)).

We review an award of attorney fees under two different standards of review. We first review de novo whether fees are authorized by statute, contract, or recognized ground in equity, then review any award of fees for an abuse of discretion. *Gander v. Yeager*, 167 Wn.App. 638, 647, 282 P.3d 1100 (2012). A trial court abuses its discretion when its decision is outside the range of acceptable choices, unsupported by the record, or reached using an incorrect legal standard. *In re Marriage of Horner*, 151 Wn.2d 884, 894, 93 P.3d 124 (2004) (quoting *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997)).

We review a trial court's order on a motion for CR 11 sanctions for an abuse of discretion, *Biggs v. Vail*, 124 Wn.2d 193, 197, 876 P.2d 448 (1994), because the trial court "has tasted the flavor of the litigation and is in the best position" to determine whether sanctions are warranted. *Miller v. Badgley*, 51 Wn.App. 285, 300, 753 P.2d 530 (1988) (quoting *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1174 (D.C. Cir. 1985)).

II. Trespass

Pope and Stacey first argue that the trial court erred by dismissing their trespass claim on summary judgment because (1) material issues of fact remain as to whether this was a continuing trespass and (2) they presented evidence of actual and substantial damages in the form of the Wilmovsky opinion letter. The Gardners contend that summary judgment was appropriate because Pope and Stacey failed to show actual and substantial damages, an essential element of their claim. We agree with the Gardners.

A trespass involves "an intentional or negligent intrusion onto or into the property of another,

or 'an unprivileged remaining on land in another's possession.'" *Fradkin v. Northshore Util. Dist.*, 96 Wn.App. 118, 123, 977 P.2d 1265 (1999) (quoting *Bradley v. Am. Smelting & Ref. Co.*, 104 Wn.2d 677, 693, 709 P.2d 782 (1985)). To show an intentional trespass, the plaintiff must establish (1) an intentional invasion of property affecting an interest in exclusive possession, (2) reasonable foreseeability that the act would disturb the plaintiffs possessory interest, and (3) actual and substantial damages. *Wallace v. Lewis County*, 134 Wn.App. 1, 15, 137 P.3d 101 (2006).

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The trial court properly granted the Gardners summary judgment on the trespass claim. The Gardners established the absence of a genuine issue of material fact by pointing out Pope and Stacey's failure to establish actual and substantial damages. *Young*, 112 Wn.2d at 255, 255 n.1 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). In response, the only evidence Pope and Stacey produced showing actual damages was the Wilmovsky declaration, which incorporated his opinion letter.^[2] That opinion, however, used the wrong measure of damages, diminution in value instead of loss of use. That error necessitated summary judgment in the Gardners' favor. *Wallace*, 134 Wn.App. at 17.

Pope and Stacey argue that summary judgment was inappropriate because whether a trespass is continuing or permanent is a question of fact that the jury must resolve, citing *Fradkin*, 96 Wn.App. at 123-26. While the nature of the trespass is typically a question of fact, here it is not; nor is it material. As the Gardners implicitly argue, reasonable minds could only reach the conclusion that this was an abatable and, therefore, continuing trespass: the Gardners removed the encroachments quickly after the mediation. *Rucker v. Novastar Mortg., Inc.*, 177 Wn.App. 1, 10, 311 P.3d 31 (2013). The nature of this trespass is therefore a question of law. *Rucker*, 177 Wn.App. at 10. Further, the nature of the trespass does not affect the outcome of Pope and Stacey's claim, making it immaterial. CR 56(c); *Barrie*, 94 Wn.2d at 642. If the trespass were continuing, Pope and Stacey's claim was properly dismissed for failure to establish one of its elements, actual and substantial damages. If the trespass were permanent, Pope and Stacey's

claim was untimely, given the three year time bar for trespass claims and the fact that they knew of the intrusions onto their land seven years before they filed suit. See RCW 4.16.080(1).

In their reply brief, Pope and Stacey argue that they did not need to show actual and substantial damages because *Bradley* and *Wallace*, the cases on which the Gardners rely, concerned only transitory trespasses. If this is to argue that the requirement of actual and substantial damages applies only to transitory trespasses, it is inconsistent with *Bradley*, 104 Wn.2d at 691-92, as well as counter to common sense. Actual and substantial damages are a requirement of any continuing trespass claim. See *Woldson v. Woodhead*, 159 Wn.2d 215, 219, 149 P.3d 361 (2006). In a continuing trespass suit, it is the plaintiffs receipt of a new injury daily, manifested by actual and substantial damages, that allows the plaintiff to escape the three year statute of limitations applicable to the original intrusion and instead recover damages for the three years before the filing of the suit. *Woldson*, 159 Wn.2d at 219; *Pac. Sound Res. v. Burlington N. Santa Fe Ry. Corp.*, 130 Wn.App. 926, 941, 125 P.3d 981 (2005). Pope and Stacey allege a continuing trespass. The failure to show actual and substantial damages was fatal to their claim.

III. Attorney Fees Awarded in the Quiet Title Action

Pope and Stacey also appeal the judgment granting the Gardners attorney fees for defending against their quiet title claim. They contend that "[b]ecause the Gardners were not entitled to summary judgment as a matter of law, they should not be able to recover attorney fees as the prevailing party." Appellant's Opening Br. at 11. That sentence, which is the totality of their argument on the issue, is unsupported by citation to the record or relevant authority. See *Saviano v. Westport Amusements, Inc.*, 144 Wn.App. 72, 84, 180 P.3d 874 (2008) (citing RAP 10.3(a)(6)). Perhaps more to the point, Pope and Stacey present no persuasive argument that the Gardners were not entitled to summary judgment on the quiet title claim. Pope and Stacey's argument is insufficient to support their challenge to the award of attorney fees.

IV. CR 11 Sanctions

The Gardners cross appeal the trial court's denial of their request for costs under CR 11. They contend that Pope and Stacey's trespass claim was not "well grounded in fact [and] . . . not warranted by . . . law" given the problems in Pope and Stacey's expert's declaration on damages. Br. of Resp'ts/Cross-Appellants at 22-25. The Gardners, however, show no abuse of the trial court's discretion, and we affirm the trial court's denial of CR 11 sanctions.

CR 11 governs sanctions for two different types of filings: those lacking a factual or legal basis and those made for improper purposes. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 217, 829 P.2d 1099 (1992). A court may impose sanctions for either type of filing. See *Harrington v. Pailthorp*, 67 Wn.App. 901, 912, 841 P.2d 1258 (1992).

A pleading, motion, or legal memorandum subjects the filing party or the signing attorney to

sanctions under the first of these categories "if it is both (1) baseless and (2) signed without reasonable inquiry." *Hicks v. Edwards*, 75 Wn.App. 156, 163, 876 P.2d 953 (1994) (emphasis omitted) (internal quotation marks omitted). Under the first prong, a filing is baseless when it is "(a) not well grounded in fact, or (b) not warranted by (i) existing law or (ii) a good faith argument for the alteration of existing law." *Hicks*, 75 Wn.App. at 163. Under the second prong, sanctions are warranted where the attorney "failed to conduct a reasonable inquiry into the factual and legal basis of the claim." *Bryant*, 119 Wn.2d at 220 (emphasis omitted). The reasonableness of the attorney's inquiry is measured objectively and the examination focuses on what "was reasonable to believe at the time" the attorney made the filing. *Bryant*, 119 Wn.2d at 220.

CR 11 imposes a continuing duty to ensure that claims have a factual and legal basis. A court may impose sanctions on a party or attorney who becomes aware that a claim lacks a factual or legal basis as the case progresses, but nevertheless continues to pursue the claim. *MacDonald v. Korum Ford*, 80 Wn.App. 877, 884-91, 912 P.2d 1052 (1996).

The Gardners extensively brief what they consider the failings in Pope and Stacey's claims against them. CR 11, however, was specifically amended to delete language *requiring* sanctions where a party's claim proves baseless. *Snohomish County v. Citybank*, 100 Wn.App. 35, 43, 995 P.2d 119 (2000). Here the trial court chose to impose only limited CR 11 sanctions, awarding the Gardners attorney fees only for their motion to strike Pope and Stacey's declaration that was not in keeping with the trial court's directions. Even if Pope and Stacey's claim were baseless, the Gardners offer no argument to explain how the trial court's choice of limited sanctions was manifestly unreasonable. Thus, the Gardners have not shown the trial court's choice to be an abuse of discretion, and we affirm its order denying CR 11 sanctions. *Snohomish County*, 100 Wn.App. at 43.

V. Attorney Fees on Appeal

Pope and Stacey seek attorney fees pursuant to RAP 18.1 and RCW 4.24.630. RAP 18.1 allows this court to award reasonable attorney fees on appeal where authorized by "applicable law." RCW 4.24.630 allows an award of reasonable attorney fees where a person "wrongfully," meaning "intentionally and unreasonably," causes injury to the land of another. The Gardners inadvertently encroached on Pope and Stacey's land because of a surveyor's error. They lacked the requisite culpable intent, and fees are unwarranted.

The Gardners seek attorney fees under RAP 18.1 and RAP 18.9. RAP 18.9 authorizes this court to award reasonable attorney fees "as sanctions, terms, or compensatory damages" for the filing of a frivolous appeal. *Advocates for Responsible Dev. v. W. Wash. Growth Mgmt. Hr'gs Bd*, 170 Wn.2d 577, 580, 245 P.3d 764 (2010). An appeal is frivolous where we are "convinced that the appeal presents no debatable issues upon which reasonable minds might differ, and that the appeal is so devoid of merit that there is no possibility of reversal." *Advocates for Responsible Dev.*, 170 Wn.2d at 580.

While we hold that the trial court did not abuse its discretion in denying attorney fees as a CR 11 sanction, we exercise our own discretion in determining whether or not to award fees on appeal under RAP 18.9. *Cf State v. Blazina*, 182 Wn.2d 827, 834-35, 344 P.3d 680 (2015) (where different levels of court have discretion with regard to an issue, each must make its own independent determination on how to exercise that discretion).

We hold above that the trial court properly entered summary judgment, because the only evidence Pope and Stacey produced showing actual damages on summary judgment was the Wilmovsky declaration, which used the wrong measure of damages, diminution in value instead of loss of use. On appeal, Pope and Stacey argue that they also produced the declarations from their consultants and from Pope, showing that the presence of the encroachments caused them to delay their planned construction of a residence on the property. CP at 111-14, 118-20, 207-10. These declarations certainly raise genuine issues of material fact as to whether the encroachments delayed the construction of Pope and Stacey's planned residence. They say nothing, though, about what actual and substantial damages Pope and Stacey incurred from this delay. Again, the only evidence of this nature is the Wilmovsky declaration, which improperly used diminution in value as the measure of a continuing trespass. In *Wallace*, 134 Wn.App. at 17-18, we held that the use of diminution in value for a continuing trespass failed to show the actual and substantial damages necessary to avoid summary judgment. That is also the case here. With this clear authority, Pope and Stacey's argument concerning damages presents no debatable issues upon which reasonable minds might differ.

Pope and Stacey also argue on appeal that under *Fradkin* the question whether the trespass was continuing or permanent was a question of fact that must go to the jury. *Fradkin*, however, did not announce a flat rule that this issue must always be decided by a jury. Rather, it simply held on review of summary judgment that there was an issue of fact whether the claimed trespass was continuing or permanent. *Fradkin*, 96 Wn.App. at 118, 126. There is no question of fact on this issue in the present appeal. On this argument also, this appeal presents no debatable issues upon which reasonable minds might differ.

Because Pope and Stacey's claims on appeal present no such debatable issues, they must be deemed frivolous under *Advocates for Responsible Development*, 170 Wn.2d at 580. We award the Gardners attorney fees on appeal, subject to timely compliance with RAP 18.1(d).

CONCLUSION

We affirm the dismissal of Pope and Stacey's trespass claim, the award of attorney fees to the Gardners for defending against the quiet title claim, and the denial of the Gardners' request for CR 11 sanctions. We award the Gardners reasonable attorney fees for defending against Pope and Stacey's appeal under RAP 18.9.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

JOHANSON, C.J., MELNICK, J.

Notes:

[1] RCW 4.24.630(1) provides that

Every person who goes onto the land of another and who removes timber, crops, minerals, or other similar valuable property from the land, or wrongfully causes waste or injury to the land, or wrongfully injures personal property or improvements to real estate on the land, is liable to the injured party for treble the amount of the damages caused by the removal, waste, or injury. For purposes of this section, a person acts "wrongfully" if the person intentionally and unreasonably commits the act or acts while knowing, or having reason to know, that he or she lacks authorization to so act. Damages recoverable under this section include, but are not limited to, damages for the market value of the property removed or injured, and for injury to the land, including the costs of restoration. In addition, the person is liable for reimbursing the injured party for the party's reasonable costs, including but not limited to investigative costs and reasonable attorneys' fees and other litigation-related costs.

[2] At oral argument, Pope and Stacey argued that other evidence in the record showed loss of use damages. Pope and Stacey waived this claim by failing to present it prior to oral argument. *State v. Nelson*, 18 Wn.App. 161, 164, 566 P.2d 984 (1977).

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DATED this 15th day of May, 2017



ELLIS E. EIFERT

Subscribed and sworn to before me on this 15th day of May, 2017, by ELLIS E. EIFERT.



Cindy L Bolen
Notary Public in and for the State of Washington
Residing at: Lewiston, Id
My Commission expires: 8/25/2017