

NO. 344886- III

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

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CHARLES COMPTON AND BAMBI COMPTON,

Respondents,

v.

LEWIS CLARK SADDLE CLUB

Appellant.

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**BRIEF OF RESPONDENT**

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Cody R. Moore, WSBA No. 49816  
Jones, Brower, & Callery PLLC  
Attorneys for Respondent  
1304 Idaho Street  
P.O. Box 854  
Lewiston, Idaho 83501  
208-743-3591

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## STATEMENT OF THE CASE

The parties to this case are Charles and Bambi Compton (“Comptons”) and the Lewis Clark Saddle Club (“Saddle Club”). The parties own real property, which neighbor each other in Asotin County, Washington. RP. at 125: 5-8. The Compton’s property sits directly west of the Saddle Club. CP. at 027:22. The Comptons have resided in their house since 2008. CP. at 002.

The Comptons’ property sits about two feet higher than that of the Saddle Club. *Direct Exam. of Bambi Compton*, RP. at 162:23-163:5; See, Def’s Ex. D2-18. There is an old six-foot tall chain link fence separating the two properties. CP. at 027:20; RP. at 163:8-14. There was indisputable evidence that the chain link fence is old. A former owner of the Comptons home, Jaqueline King, testified the fence was there when she bought it in 1993. RP. at 37:8-10. Defense witness Susan Berghammer testified it had been there at least twenty-five (25) years. RP. at 37:8-10. Until this dispute, this fence was treated as the boundary line. *Direct Exam. of Jimmie Morgan*, RP. at 86:4-21; *Recross Exam. of Jimmie Morgan*, RP. at 99:19-25; *Cross Exam. of Bambi Compton*, RP. at 198:13-24, 199:11-14; *Cross Exam. of Charles Compton*, RP. at 286:19-24. See also, *Direct Exam. of Eric Hasernol*, RP. at 378:21:25 (describing conversation with

appellant and its attorney where all presumed fence line to be property line prior to survey). After this action was commenced, the Saddle Club had the property surveyed and discovered the fence was not on the true boundary line, but is approximately one foot east of the line (one foot inside the Saddle Club's property). CP. at 029:11-12. The Compton's home is only about two feet from the fence and about a foot from the surveyed boundary line. Thus there is a small strip of property between the house and fence, which is about two feet wide. Pls'. Ex. 8, Def's. Ex. 2-18.

In or around 2009, the Comptons began having problems with the amount of dust created by activities at the Saddle Club and requested dust control measures be taken. CP. at 002:28. The Saddle Club did so using sprinklers, which Bambi Compton testified were raised up to twelve-foot high installed against the fence. RP. at 160: 6-13; CP. at 003:1:2. The sprinklers would hit the Comptons house and the small strip of land between the house and the fence. Plf's. Ex. P114; RP. at 288:4-8; The Comptons noticed the soil in the small strip sloughing and eroding away due to the sprinklers (because their property sits higher than the Saddle Club). *Redirect of Charles Compton*, RP. at 290:2-8.

In 2012, the Comptons asked Jimmie Morgan, the maintenance person for the Saddle Club, if the Saddle Club would object to the

Comptons installing a small retaining wall next to the fence (on their side of the fence) to prevent further erosion. RP. at 294:13-21; 249:1-25. After speaking with members of the Saddle Club, Mr. Morgan informed the Comptons that there was no objection and that it was the Saddle Club's opinion that the Comptons could do whatever they wanted on their side of the fence. RP. at 86: 4-21. Thereafter, the Comptons built a two foot tall retaining wall using 2x12 boards, fill, and gravel. The wall was very near the fence but only touches in spots due to bowing. Def's. Ex. D2-18; *Direct Exam. of Norman Bowers*, RP. at 338: 18-21.

Thereafter, the Comptons asked Mr. Morgan if they could install a taller solid fence attached to the chain link fence to help prevent dust from entering their yard and house. They were given permission. *Direct Exam. of Jimmie Morgan*, RP. at 88:1-9; *Direct Exam. of Charles Compton*, RP. at 247:14-15; RP. at 249:1:24; *Cross Exam. of Charles Compton*, RP. at 282:14-18; *Redirect Exam. of Charles Compton*, RP. at 294:8-12. The Comptons then installed their fence, which was connected in part to the existing chain link fence, to a vertical railroad tie sitting on the Saddle Club's side of the fence, and secured in the Compton's yard. *Cross Exam. of Charles Compton*, RP. at 283: 22-23, 285:9-16; Def's. Ex. D6-1. Saddle Club members indicated they were happy about the Compton's

fence because it provided shade in the riding arena. *Redirect Exam. of Charles Compton*, RP. at 293:12-17.

Despite all of this, tensions were growing between the Comptons and the Saddle Club. The Comptons were growing increasingly disturbed at the amount of dust created by Saddle Club activities. The Saddle Club was growing increasingly agitated by the Comptons interrupting riding sessions by confronting Saddle Club members regarding the dust.

The Comptons filed their Complaint in July of 2014. Shortly thereafter, the Appellant accused the Comptons' solid fence of causing damage to the old chain link fence. Club president Mark Flemming testified that the fence bent in a windstorm on July 23, 2014. RP. at 463:21, 466:1-9. Mr. Flemming claimed fence damage of \$15,000. RP. at 490: 3-7. Charles Compton argued, and the trial court agreed, the chain link fence had already been bent and damaged. RP. at 283: 1-19; 293:18-15; 294:1-3. See, *Findings of Fact and Conclusions of Law*. CP. 216: 8-11.

As noted above, on July 10, 2014, the Comptons filed this action in Asotin County Superior Court by and through their trial counsel Lucy Dukes of the Law Office of David A. Gittins. In their Complaint they included claims of Undermining Lateral Support, Negligent Excavation,

Nuisance, and Trespass. CP. at 004: 24 – 005:10. On October 14, 2017, the Saddle Club filed its Answer and Counterclaim by and through its attorney Scott Broyles of Broyles and Laws, LLC, asserting among other things, a counter claim of Trespass and Malicious Trespass and a claim for a civil harassment protection order. CP. 030: 20-25. On November 4, 2014, the Saddle Club filed a Motion for Partial Summary Judgment. CP. at 046-060. On November 12, 2016, the Comptons filed their Response to the Defendants Counterclaims asserting adverse possession as affirmative defense to the Saddle Club's trespass claim. CP. at 063: 24-28.

The trial court denied Saddle Club's Motion for Summary Judgment on January 13, 2015. In the court's decision it stated that "significant factual questions remain as to the nature and extent of defendants alleged incursions onto plaintiff's property as well as with respect to the boundaries themselves. CP. at 079 ¶ 2.

Later, following a two-day trial on May 7 and 8, 2015, the court ruled that no party would prevail on any of their claims. Regarding the Saddle Club's trespassing claims, the court held that the Comptons owned the disputed strip via adverse possession and that the Saddle Club had no damages because the fence was old and damaged prior to any actions by the Comptons. CP. at 216 8:14.

## **ARGUMENT**

### **1. Standard of Review**

This case contains mixed issues of law and fact. When there are mixed questions of law and fact, the court defers to the factual findings of the lower court, while considering the conclusions of law de novo. *Maier v. Giske*, 154 Wn.App. 6, 18 223 P.3d 1265, (Div. 1 2010); *Rainier View Court Homeowners Ass'n, Inc. v. Zenker*, 157 Wn.App. 710, 719 238 P.3d 1217, (Div. 2 2010). Specifically, the court reviews the trial court's findings of fact under a substantial evidence standard. *Rainier View Court Homeowners Ass'n, Inc.* 157 Wn.App. at 719. This review is deferential and requires the court to view the evidence and reasonable inferences therefrom in the light most favorable to the prevailing party. *Sunderland Family Treatment Services v. City of Pasco*, 127 Wn.2d 782, 903 P.2d 986, (1995).

### **2. Adverse Possession Claim was Properly Pleaded as an Affirmative Defense**

The Comptons' adverse possession claim was properly brought when it was raised as an affirmative defense. The bases these assertions are as follows:

- a. Washington law allows for adverse possession to be raised as a defense.
- b. Adverse possession falls within the definition of an affirmative defense.
- c. The civil rules allow adverse possession to be pleaded as an affirmative defense and are designed to ensure cases are decided on their merits and not technicalities, all of which favors the Comptons Washington law allows for adverse possession to be raised as a defense.

**2-a. Adverse possession can be raised as a defense.**

The appellant argues that its due process rights were violated because it did not receive notice of the Comptons' adverse possession claims and that it was surprised when the trial court awarded the Comptons a small strip of real property.

The appellant argues that the Comptons failed to provide notice of their adverse possession claim despite the fact that they raised it as an affirmative defense at paragraph 1.9 of *Response to Def's. Counter Claim*. CP. at 063. Appellant also ignores the fact that the issue was considered at summary judgment. CP. at 079 ¶2 (“significant factual questions remain as to the nature and extent of defendants alleged incursions onto plaintiff's property as well as with respect to the property boundaries themselves”). Appellant ultimately argues that adverse possession cannot be raised as an affirmative defense and that it must be brought forth as a “cause of action”

or presumably as counterclaim. The appellant's arguments are incorrect as demonstrated by Washington case law and statute.

In Washington there are various examples of adverse possession being raised as an affirmative defense to a claim of trespass without a concern such as the appellant has raised. See, *Jacobsen v. State*, 89 Wn.2d 104,106, 111 (1977); *Silver Surprise, Inc. v. Sunshine Min. Co.*, 74 Wn.2d 519, 521 445 P.2d 334, 335 (1968); *Nugget Properties, Inc. v. Kittitas County*, 71 Wn.2d 760, 431 P.2d 580 (1967); *McNeff v. Joyce*, No. 46380-6-II (Wash. App. Div. 2. May 24, 2016)<sup>1</sup>. See also, *Bradley v. American Smelting and Refining Co.*, 104 Wn.2d 677, 709 P.2d 782, 791 (1985) (addressing adverse possession concurrent to discussion about prescriptive easements as affirmative defenses). Finally, that adverse possession can be brought as a defense is confirmed at RCW 7.28.085 (5), which creates an exception for those "asserting a claim or defense of adverse possession" in an action involving forestland of less than twenty acres. By doing so, this statutory Section, which is part of the statutory scheme covering adverse

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<sup>1</sup> This opinion is unpublished and thus has no precedential value, is not binding on any court, and is cited only for such persuasive value as the court deems appropriate pursuant to GR 14.1 and in compliance with *Crosswhite v. Department of Social and Health Services*, 197 Wn.App. 539 (Div. 3 2017). A copy of the unpublished opinion is attached hereto for convenience.

possession, acknowledges a party may raise adverse possession as a defense.

**2-b. Adverse possession is within the definition of an affirmative defense.**

An affirmative defense is a party's assertion of facts and arguments that, if true, will defeat the other party's claim. *Black's Law Dictionary* 482 (9th ed. 2009); See, *State v. Hirschfelder*, 170 Wn.2d 536, 555 (Wash. 2010) (affirmative defense permits a defendant's assertion of facts that, if proved, will defeat the [other party's] claim)."

Here, the appellant made a counterclaim for trespass regarding the small strip of land between the Comptons' house and the fence between the two properties. In response, the Comptons asserted ownership of the strip by adverse possession and thereby put forth an argument to defeat the appellants claim of trespass. As such their claim was properly raised

**2-c. The civil rules allow adverse possession to be pleaded as an affirmative defense and are designed to ensure cases are decided on their merits and not technicalities.**

Washington CR 8, which controls pleading of affirmative defenses, supports the Comptons in three ways: 1) it contains a non-exhaustive list of affirmative defenses which are similar to adverse possession; 2) it explicitly give the court latitude to treat an affirmative defense as a

counterclaim; and 3) it mandates pleadings be interpreted to do substantial justice. CR 8 (c) states the following:

**In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fault of a nonparty, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitation, waiver, and *any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.***

(emphasis added).

A number of the enumerated affirmative defenses in CR (c), such as duress, estoppel, fraud, illegality, and res judicata can just as easily be an affirmative defense as a traditional cause of action pleaded in a complaint. This fact does not preclude them from being raised as affirmative defenses as the appellant argues. Similarly, raising adverse possession as an affirmative defense against a trespass claim is appropriate even though it could just as easily be a claim or counterclaim. But, even if the appellants were correct and the Comptons had to raise adverse possession by counterclaim instead of an affirmative defense, CR 8 explicitly affords the court the right to treat it as if it had been properly pleaded.

Finally, Appellant's arguments demand an unduly strict and incomprehensible construction of laws, rules, and norms of Washington jurisprudence. Washington is a notice pleading state requiring no "technical forms of pleadings or motions." CR 8 (e)(1) . Washington has a liberal "notice pleading regime designed to "facilitate a proper decision on the merits". *State v. LG Electronics, Inc.*, 185 Wn.App. 394, 341 P.3d 346 (Div. 1 2015). Pleadings should be interpreted to do substantial justice. CR 8(f). Quiet title actions based on adverse possession in particular should be construed liberally. RCW 7.28.100. Additionally, the civil rules are generally designed to ensure cases are decided on their merits, as opposed to technicalities. *Vaughn v. Chung*, 119 Wn.2d 273, 284 (Wash. 1992). Appellant's argument goes against all of these key principles.

In sum, the respondents properly raised the issue of adverse possession in the pleading stage of the case and the appellants were given notice thereof. As such, the issues that were raised by the appellants as to Washington CR 15 (a) and (b) are not relevant.

### **3. RCW 10.14 Civil Protection Order**

The trial court properly denied the appellant's claim for a civil

anti-harassment order because the appellant is not a person and thus lacks standing to seek such an order.

RCW 10.14 et seq provides the statutory scheme for civil anti-harassment orders, which are an available remedy in cases of unlawful harassment. RCW § 10.14.040. Unlawful harassment is defined at RCW § 10.14.020 as:

a knowing and willful course of conduct directed at a *specific person* which seriously alarms, annoys, harasses, or is detrimental to such person, and which serves no legitimate or lawful purpose. The course of conduct shall be such as would cause a reasonable person to suffer substantial emotional distress, and shall actually cause substantial emotional distress to the petitioner, or, when the course of conduct would cause a reasonable parent to fear for the well-being of their child.

(Emphasis added).

The appellant is not a “specific person,” it is an entity. The trial court determined that specific members of the Saddle Club could seek their own protection orders under RCW 10.14, but that the appellant could not seek such an order for all of its members. *Commissioners Memorandum of Opinion*, CP. at 177 ¶ 4; *Findings of Fact and Conclusions of Law*. C.P 217 ¶1.17.

Appellant has a section in its opening brief titled “C. RCW 10.14 Restraining Order.” *Appellant Br.* at 25. This section lacks cohesion as well as legal authority or analysis. Within the first sentence of this section,

Appellant seems to abandon the issue of RCW 10.14 and focuses its discussion on the Respondents' adverse possession claim again.

Appellant then states that it should have been allowed to amend its pleading to include individual club members to the suit pursuant to CR 15(a), which allows amendment by right prior to response or otherwise by leave of court. Presumably, the appellant meant to reference CR 15(b), which allows amendment to conform to the evidence. But even if that is the case, CR 15(b) does not apply here. CR 15(b) states that 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." CR 15(b) applies to *issues* left out of a pleading; it does not apply to *parties* left out of a pleading. Appellant's appeal on this issue should be denied.

#### 4. Trespass

Appellant's intentional trespass claim should fail because 1) the Comptons owned the disputed property via adverse possession; 2) the appellant fails to show the Comptons intended to trespass; and 3) the appellant fails to show actual and substantial damages.

A trespass claim may be brought as a negligent trespass or an intentional trespass. *Grundy v. Brack Family Trust*, 151 Wn.App. 557, 566

213 P.3d 619, 624 (Div. 2 2009). Thus, a logical point of beginning when addressing a trespass claim is to ascertain whether the claiming party is asserting an intentional trespass or a negligent trespass.

Here, the appellant appears to be claiming that the Respondents engaged in an intentional trespass. In its Answer and Counterclaim it asserted the counterclaim of "Trespass and Malicious Trespass" CP. at 30: 20-25. At this level, the appellant further couches its argument in terms of intentional trespass by citing the elements of an intentional trespass in its opening brief and then seeming to go on to try to explain the difference between a permanent and continuing trespass. *Appellant Br.* at 29-33. The appellant never pleaded nor appears to ever argue for a negligent trespass.

Intentional trespass law in Washington borrows strongly from the Restatement (Second) of Torts § 158, which states the following One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally (a) enters land in the possession of the other, or causes a thing or a third person to do so, or (b) remains on the land, or (c) fails to remove from the land a thing which he is under a duty to remove. The Restatement (Second) of Torts § 158 (1965). See, *Bradley at 104 Wash.2d 690-692*; *Brutsche v. City of Kent*, 164 Wn.2d 664, 674 (2008); *Kaech v.*

*Lewis County Public Utility Dist. No. 1*, 106 Wn.App. 260, 281 (Div. 2 2001); *Songstad v. Municipality of Metropolitan Seattle*, 2 Wn.App. 680, 687 (Div. 2 1970). There is no trespass if a privilege such as consent exists. See, *Bradley*, 104 Wn.2d at 682.

This basic rule has been further developed and applied slightly differently for cases involving trespass of things (as opposed to people). In the 1985 Washington Supreme Court case *Bradley v. Am Smelting & Ref. Co.*, the court dealing specifically with airborne pollutants, adopted a rule from Alabama jurisprudence and stated that for airborne pollutants, intentional trespass occurs only where there is an unprivileged (1) invasion of property affecting an interest in exclusive possession, (2) an intentional act, (3) reasonable foreseeability that the act would disturb the plaintiff's possessory interest, and (4) actual and substantial damages. *Bradley*, 104 Wash.2d at 690-692 (citing *Borland v. Sanders Lead Co.*, 369 So.2d 523, 529 (Ala.1979)). That test has since been extended to practically all non-human, foreign matter/object trespass cases. See, *Crystal Lotus Enterprises Ltd. v. City of Shoreline*, 274 P.3d 1054, 167 Wn.App. 501 (Wash.App. Div. 1 2012) (trespass of storm water); *v. Lewis County*, 134 Wash.App. 1, 15, 137 P.3d 101 (2006) (trespass by rodent); *Hurley v. Port Blakely Tree Farms L.P.*, 182 Wash.App. 753, 332 P.3d 469 (2014) (land slides); *Grundy* 151 Wn.App. at 566 (sea water).

Since this appeal involves an alleged trespass of 1) a crude retaining wall; and 2) a fence, the *Bradley* rule should likely apply and the elements must be examined. Specifically here, the respondents will focus on the elements of intentional and actual and substantial damages.

#### **4-a. Intentional Act**

The respondents did not intentionally trespass upon the appellant's real property because they owned the property in question by adverse possession and they did the alleged trespassory acts with the knowledge and permission of the appellant.

The issue of intent does not go to the act itself but *whether or not the actor meant for the trespass to occur*. *Brutsche v. City of Kent*, 164 Wash.2d 664, 674 n. 7, 193 P.3d 110 (2008) (citing *Bradley*, 104 Wash.2d at 682). A trespass is only intentional if the actor intends to trespass or if he is substantially certain that a trespass would result from his intentional actions. *Grundy* 151 Wn.App. at 625 (citing *Brutsche* 164 Wash.2d at 674 n. 7).

Here, the Comptons did not intend to trespass. At trial it was established that the respondents built a retaining wall on their side of the fence in order to prevent further erosion of soil just feet from their house resulting from Appellant's activities on its side of the fence. This construction did not trespass because the Comptons built this wall on their

own property as was determined by the trial court's finding of adverse possession. But even if that were not the case, Respondent Charles Compton testified that he requested and received consent/permission from Jimmie Morgan, an agent of the appellant, to install the retaining wall. RP. at 294:13-21; 249:1-25. This fact was clearly corroborated by testimony of Mr. Morrison. RP. at 86:11-21. Finally, there was testimony that all parties believed or treated the fence to be the boundary line prior to the onset of litigation. See, *Direct Exam. of Jimmie Morgan*, RP. at 86:4-21; *Recross Exam. of Jimmie Morgan*, RP. at 99:19-25; *Cross Exam. of Bambi Compton*, RP. at 198:13-24, 199:11-14; *Cross Exam. of Charles Compton*, RP. at 286:19-24. See also, *Direct Exam. of Eric Hasernol*, RP. at 378:21:25 (describing conversation with appellant and its attorney where all presumed that the fence line was the property line prior to survey). For these reasons the Compton's did not intend to trespass nor could they be reasonably certain a trespass would result when they built their small retaining wall on their side of the fence.

Similarly, the respondents did not intend to trespass when they built their tall fence, Appellants appear to argue that the Respondents also trespassed by installing their own fence next to the existing chain link fence, and securing it in parts thereto. As with the small retaining wall, the Comptons sought and received permission for this installation. See, *Direct*

*Exam. of Jimmie Morgan, RP. at 88:1-9; Direct Exam. of Charles Compton, RP. at 249:1:24; Cross Exam. of Charles Compton, RP. at 282:14-18; Redirect Exam. of Charles Compton, RP. at 294:8-12.* Further, as cited above, everyone treated the Comptons' fence as the boundary line. Finally, the Saddle Club was well aware of the fence prior to any alleged damages and its members actually expressed happiness about it. See, *Redirect Exam. of Charles Compton, RP. at 293:12-17.*

#### **4-b (1). Actual and substantial damages**

There are two questions that should be answered when addressing this element: 1) are there actual and substantial damages and if so, 2) what is the measure of those damages? In this case, the appellant fails to answer either of these sufficiently.

The appellant claims some of the fence posts on the old chain link fence were bent in a windstorm as a result of the Compton's tall fence being attached to it in some places. At trial the court considered conflicting testimony on this issue. The court considered the testimony of Mark Flemming, President of the Lewis and Clark Saddle Club, who blamed the bent posts on the Respondents. It also considered the testimony of Respondent Charles Compton, which indicated the fence was already bent when the Respondents moved in to their home. There was

indisputable evidence that the chain link fence is old. Ultimately the court found that the Respondents did not cause any damage to the chain link fence, which was “old and leaning prior to damage alleged by the [appellants].” CP. at 216 ¶ 1.15.

The trial court obviously did not subscribe to the appellant’s narrative and did not believe that the Respondents caused actual and substantial damage to the appellant’s property. In general, the appellate court should defer to the trial court on issues of credibility and weight of the evidence. *Grundy*, 151 Wn.App. at 570 (citing, *Forbes v. Am. Bldg. Maint. Co. West*, 148 Wash.App. 273, 287, 198 P.3d 1042 (2009)). As such, the trial court’s findings should be upheld here.

#### **4-b (2). Measure of Damages**

The measure of actual and substantial damages comes down to the type of trespass involved: a permanent or continuing trespass. A claimant cannot prove the element of “actual and substantial damages” if it fails to demonstrate a proper measure of damages. *Wallace v. Lewis County*, 134 Wn.App 1, 17 (Div. 2 2006).

A cause of action for a continuing intentional trespass arises when an intrusive substance remains on a person’s land, causes actual and

substantial harm to that person's property, and is abatable. *Wallace*, 134 Wn.App at 15 (citing *Bradley*, 104 Wash.2d at 693; *Fradkin v. Northshore Util. Dist.*, 96 Wash.App. 118, 125-26, 977 P.2d 1265 (1999)). A trespass is abatable if defendant can remove the offending condition without unreasonable hardship and expense. *Fradkin v. Northshore Utility Dist.*, 96 Wn.App. 118, 977 P.2d 1265 (Div. 1 1999). If it is a permanent trespass, the damages are the equivalent to the loss in property value, otherwise the measure of damages is loss of use and restorative cost *Messenger v. Frye*, 176 Wash. 291, 28 P.2d 1023 (1934).

In this case, the issue of whether or not the alleged trespass was permanent or continuing was not squarely addressed at trial, though the appellant only put on evidence of damages for restoration and not diminution of market value. Obviously then, if the trespass is permanent, the appellant failed to establish its damages and its claim must be barred. But even if the trespass is continuing, the appellant failed to sufficiently demonstrate damages to prove its claim.

In terms of restorative damages, the appellant argues, based on testimony of Saddle Club President Mark Fleming, that it is entitled to \$15,000 before trebling. This seems to be for the installation of a

completely new fence and to install a concrete retaining wall in place of the respondent's existing retaining wall. RP. at 487:17 - 492:12.

Appellant's argument that it is entitled to a new concrete retaining in place of the Compton's existing retaining wall goes beyond "restorative" damages. There was no wall or form of lateral support there prior to the Respondents' installation of their wooden retaining wall, which was necessary to prevent erosion. And the wall became necessary due to appellant's activities. Thus, damages to build a new wall go beyond that necessary to restore the property to its prior condition.

Appellant's claimed damages calculations as to fence repair lack sufficient detail, are exaggerated and are without foundation. Mark Flemming claims that the whole fence would need to be torn down and replaced with a new fence. RP. at 487:23-25, 488:22-25; This despite the fact that the appellants only appear to argue damage to a few fence posts. RP. at 463:21 - 464:14; See, Def's. Ex. D6-3. Appellants also provide no support for their damages claim except for what appears to be a "ball park" guess by Mr. Flemming as to the cost to replace their old fence with a brand new one. This fails to reasonably demonstrate the amount of money necessary to restore the appellant's property back to its prior condition.

Finally, the appellant's reliance on Mr. Flemming as an expert witness is disingenuous and incongruent with his status as a lay witness at trial. At trial, during introductory direct examination of Mr. Flemming, the respondents' trial counsel Lucy Dukes interjected to ask if the appellant intended to qualify Mr. Flemming as an expert, to which the appellant's counsel stated he did not:

MS. DUKES: Once again, are you attempting to qualify this Witness as an expert? Are you going to ask him construction questions or anything like that?

MR. BROYLES: No, I would have listed him as an expert.

RP. at 444:18-21.

Throughout Mr. Flemming's testimony, Attorney Dukes objected or interceded when it appeared appellant's counsel was trying to use him as an expert. Never did appellant's counsel indicate Mr. Flemming would be utilized as an expert nor was he formally admitted or qualified as such. *See, RP. at 473:19 – 25* ("He's a lay witness"), 474: 21-23 (denying Mr. Flemming is testifying as an expert). Now however, appellants' counsel attempts to bolster the credibility of Mr. Flemming's damages calculations by pointing out his alleged expertise as a former contractor.

*Appellant Br.* at 33 ¶ 2. This "alternative" position wholly contradicts what was expressed at trial by counsel and should not be considered here.

In sum, the appellant's trespass claim fails because the Comptons owned the property via adverse possession, but even if they did not, they did not intend to trespass. What's more, the appellant fails to demonstrate actual and substantial damages because 1) the trial court found that the old chain link fence was damaged prior to the allegations set forth by the appellant; and 2) the appellant's damage calculations were made without basis by a lay witness and generally go beyond the amount necessary to restore the appellant's property to its prior state.

#### **5. Treble Damages & Appellant's Attorney Fees**

The appellants rely on RCW § 4.24.630 to assert their claim for treble damages. With respect to the facts at hand, this statute only applies when the tortfeasor acts "wrongfully." RCW § 4.26.630. A person only acts wrongfully if the person "intentionally and unreasonably commits the act or acts while knowing that he or she lacks authorization to so act." *Id.*

As described above herein, the respondents did not act with the requisite intent. They believed the chain link fence to be the boundary line between the properties and in any case received permission to build their retaining wall and fence.

They also did not act unreasonably. They installed the retaining wall to prevent the ground from sloughing away and they installed their fence to reduce dust, both as a result of the appellant's activities.

## 6. Adverse Possession

To establish a claim of adverse possession, a party's possession of property must be: (1) exclusive, (2) actual and uninterrupted, (3) open and notorious, and (4) hostile for a period of ten years. *Chaplin v. Sanders*, 100 Wn.2d 853, 857, 676 P.2d 431 (1984); RCW 4.16.020. In general, the elements of adverse possession can be boiled down to when the claimant possesses the property as the true owner would and asking no permission for such use. *LeBleu v. Aalgaard*, 193 Wn.App. 66, 83 371 P.3d 76, (Div. 3 2016) (Fearing, J., concurring) (citing, *Kunkel v. Fisher*, 106 Wn. App. 599, 602, 23 P.3d 1128 (2001)).

Here, the court considered a multitude of evidence regarding the boundary line and the parties usage on each side of the chain link fence. The court found that the old chain link fence separating the two properties had been there for more than ten years and that the plaintiffs had used the small strip in dispute in an open, notorious, actual, uninterrupted, exclusive, and hostile manner for over ten years. CP. at 216 ¶ 1.15, 1.16.

The fence is certainly not “random” as appellant argues without explanation. It lies just a foot off of the surveyed boundary line and runs the entire distance between the two properties. It is trivial by inspection that the fence demarks a boundary between the properties. It is also undisputed that the fence had been there for a very long time, at least since at least 1993, and that all parties and their predecessors had always believed and treated the fence line as the boundary line. Both parties filed exhibits showing the obvious: that given the tiny amount of space between the fence and the respondents’ home, the only reasonable conclusion is that the respondents and their predecessors used the “disputed property” while the appellant did not. Def’s. Ex. D2-18, Pls’. Ex. 8. There was no evidence that the appellant ever attempted to utilize the disputed property or otherwise object to the respondents’ or their predecessors’ use prior to suit. With the clear reality of the situation in focus, the trial court weighed the evidence and the equities and made appropriate findings and conclusions. These findings should not be disturbed.

### CONCLUSION

The appellant should be denied on all counts of its appeal. The Comptons properly pleaded their claim of adverse possession when they raised the issue as an affirmative defense. They did not need to amend

their Complaint. The trial court properly granted their claim based on a weighing of the evidence at trial.

The trial court properly denied the appellant's claim for a civil protection order under RCW 10.14. The appellant lacks standing to request such an order. The trial court could not have added parties to the case under CR 15(b) as appellant argues.

The appellant's trespass claim was properly denied. Appellant's claim fails because the Comptons own the disputed strip of property via adverse possession. But, even if they did not the appellant fails to demonstrate that the Comptons trespassed intentionally or that it sustained actual and substantial damages.

DATED this 17th day of August, 2017

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'C. Moore', written over a horizontal line.

CODY R. MOORE, WSBA #49816  
Jones, Brower, & Callery, PLLC  
Attorney for Plaintiff  
1304 Idaho Street/ PO Box 854  
Lewiston, Idaho 83501  
P: 208-743-3591/F: 208-746-9553  
[cmoore@lewiston.com](mailto:cmoore@lewiston.com)

**WILLIAM and ARACEL McNEFF, husband and wife,  
and the marital community comprised thereof,  
Respondents,**

v.

**MARIA JOYCE, Appellant.**

No. 46380-6-II

Court of Appeals of Washington, Division 2

May 24, 2016

UNPUBLISHED OPINION

Bjorgen, C.J.

Maria Joyce appeals the trial court's order quieting title in property located at 133 Loop Road in Grays River, Washington to William and Aracel McNeff with an 87.5 percent majority interest, leaving Joyce with a 6.25 percent interest.

Joyce argues that the trial court should have allowed her claims for adverse possession under RCW 7.28.070 and RCW 4.16.020 to establish that she owns the 133 Loop Road property in its entirety. The McNeffs argue that they are entitled to attorney fees and costs pursuant to RAP 18.1 and 18.9(a) because this appeal is frivolous.

We hold that Joyce waived her adverse possession claims under RAP 2.5(a) because she only raised these claims for the first time on appeal, failed to bring these claims in her pleadings, and represented to the trial court that she was not bringing any adverse possession claim. Furthermore, because this appeal was so lacking in merit that there was no possibility of reversal, attorney fees and costs to the McNeffs are appropriate. Accordingly, we affirm the judgment below and award attorney fees and costs to the McNeffs.

#### FACTS

Harold and Hazel Badger[1] acquired the property located on 133 Loop Road in Grays River, Washington by real estate contract. Hazel passed away, leaving the property solely in Harold's name. Harold then passed away without a will, leaving each of his four sons one-fourth of the property through intestate succession. The three oldest sons'

interests were conveyed to the McNeffs.

The youngest son, Marvin Badger, was married to ShirLee Badger, [2] who was appellant Joyce's mother. Marvin also died without a will, and his one-fourth property interest in 133 Loop Road passed half to his four biological children and half to ShirLee. Marvin's biological children conveyed their total 12.5 percent interest in the property to the McNeffs, leaving the McNeffs with an 87.5 percent property interest in 133 Loop Road. ShirLee eventually died and left an invalid will. Her 12.5 percent property interest in the property passed through intestacy, leaving Joyce with 6.25 percent and ShirLee's other daughter with 6.25 percent.

After a bench trial, where Joyce represented herself, the trial court entered findings of fact and conclusions of law and quieted title as described above. Because the findings of fact are unchallenged, we consider them as verities. *Casterline v. Roberts*, 168 Wn.App. 376, 381, 284 P.3d 743 (2012). Joyce appeals.

#### ANALYSIS

##### I. Waiver of Adverse Possession Claims

Joyce argues that the trial court should have considered her adverse possession claims under RCW 7.28.070 and RCW 4.16.020 in determining her property interest in 133 Loop Road. Because she raised these claims for the first time on appeal, failed to raise these issues in her pleadings, and represented to the trial court that she was not bringing any adverse possession claim, we hold that these claims are waived.

With exceptions not relevant to this appeal, we "may refuse to review any claim of error which was not raised in the trial court." RAP 2.5(a). The purpose of this rule is to afford the trial court an opportunity to correct errors, which avoids unnecessary appeals and retrials. *In re Structured Settlement Payment Rights of Rapid Settlements, Ltd.*, 166 Wn.App. 683, 695, 271 P.3d 925 (2012). Generally, "an argument neither pleaded nor argued to the trial court cannot be raised for the first time on appeal." *Wash. Fed. Sav. v. Klein*, 177 Wn.App. 22, 29, 311 P.3d 53 (2013), *review denied*, 179 Wn.2d 1019 (2014).

Here, Joyce did not raise adverse possession in her answer as a counter claim or affirmative defense to the McNeff's quiet title action. Although she provided evidence at trial that may have supported an adverse possession theory, the trial court asked her if she was claiming adverse possession, and she stated that she was not. Instead, Joyce's theory for ownership of the property was that Harold had passed the property to Marvin and ShirLee only, and upon ShirLee's

passing, her will provided that the property go to Joyce. However, the trial court's unchallenged findings of fact and conclusions of law determined that she was only in possession of a 6.25 percent interest in the 133 Loop Road property based on the process of intestacy after Harold died.

Joyce argues that she in fact pled all of the elements of adverse possession, but simply did not call it that until presentation of the findings of fact and conclusions of law. Even assuming that she did raise her adverse possession claims at this presentation stage, [3] Joyce's representation of her claims during the trial was that she was not claiming adverse possession. After Joyce testified to facts that may have supported an adverse possession claim, specifically that ShirLee paid the taxes for another 10 years after Marvin died, the following exchange with the court occurred:

COURT: I thought you're not claiming adverse possession, though.

JOYCE: I'm not.

COURT: Okay. So what am I supposed to – how am I supposed to consider the tax being – paying the taxes if – because you said it's not an adverse possession. Your mom had quiet title and all that – or quiet enjoyment, that kind of thing, and that's fine. I just want to make sure you said you're not claiming adverse possession.

JOYCE: I'm not.

Report of Proceedings at 122-23. With these categorical statements that she was not claiming adverse possession, Joyce's testifying to facts that may have shown adverse possession cannot be taken to have raised the claim. Furthermore, even if Joyce had brought her adverse possession claims up at presentation, it would have been after trial and thus still too late to litigate any adverse possession claim.

Joyce also argues that adverse possession is a complicated legal issue and "as a non-lawyer she answered truthfully, but her answer should not be read to be a knowing waiver." Reply Br. of Appellant at 1. Although we sympathize with Joyce's position in failing to understand all the legal terminology, she, as a pro se litigant, "is bound by the same rules of procedure and substantive law as everyone else." *Bly v. Henry*, 28 Wn.App. 469, 471, 624 P.2d 717 (1980). This doctrine may seem harsh, but is necessary to achieve fairness to both parties that must navigate and decipher the same legal doctrines and procedural complexities of our legal system. If Joyce were allowed to argue her new adverse possession theory on appeal, it would set precedent for litigation to continue indefinitely, where litigants could bring up new claims at each subsequent appeal. In addition,

even if we were inclined to reach the merits, the record would be insufficient to consider heavily fact-dependent issues in determining whether the adverse possession claims would have been successful. Furthermore, we would be depriving the McNeffs an opportunity to present evidence to contradict Joyce's new claims. Because Joyce failed to plead the adverse possession claims in her answer and affirmatively waived the issue during trial, we decline to review these claims for the first time on appeal. RAP 2.5(a).[4]

## II. Attorney Fees[5]

The McNeffs ask for attorney fees and costs pursuant to RAP 18.1 and 18.9(a). "A party may recover attorney fees and costs on appeal when granted by applicable law." *Pruitt v. Douglas County*, 116 Wn.App. 547, 560, 66 P.3d 1111 (2003) (quoting *Or. Mut. Ins. Co. v. Barton*, 109 Wn.App. 405, 418, 36 P.3d 1065 (2001)); RAP 18.1. The McNeffs argue that Joyce's appeal was frivolous, and RAP 18.9(a) allows this court to "order a party . . . who . . . files a frivolous appeal . . . to pay terms or compensatory damages." "An appeal is frivolous if it presents no debatable issues upon which reasonable minds could differ and is so lacking in merit that there is no possibility of reversal." *Eagle Sys., Inc. v. Emp't Sec. Dept'*, 181 Wn.App. 455, 462, 326 P.3d 764 (2014).

Here, because Joyce unequivocally waived her claims to adverse possession at the trial court level, we deem this appeal frivolous. Accordingly, we award attorney fees and costs to the McNeffs.

## CONCLUSION

We affirm.

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.

We concur: WORSWICK, J., LEE, J.

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## Notes:

[1] We refer to some family members by their first name to avoid confusion throughout this opinion. No disrespect is intended.

[2] According to the record, Joyce stated that her mother's first name is Virginia, but she goes by ShirLee.

[3] This assumption comes with some hesitation, though, since we have no record of what was said at presentation,

but only a docket sheet, which does not indicate that she made any argument related to the adverse possession claims.

[4] Joyce also argues that because she is a "tenant in common, she has the right to occupy the property and no obligation to pay rent." Reply Br. of Appellant at 1. We first note that an issue "raised and argued for the first time in a reply brief is too late to warrant consideration." *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). Even if we were to address her contention, the claim would fail. The case she cites, *Fulton v. Fulton*, 57 Wn.2d 331, 335-36, 357 P.2d 169 (1960), states that "[a]bsent ouster or exclusion of one cotenant by the other from free access to the common property, there can be no liability between cotenants for rental value of portions of the premises occupied by either." (Emphasis added.) The rent payment assessed on Joyce was based on her occupying 133 Loop Road, excluding the McNeffs from access to the property. Therefore, the *Fulton* rule allows the collection of rent for the time period when the McNeffs had a property interest in 133 Loop Road and Joyce excluded them from occupying the property.

[5] Joyce requests attorney fees and costs under RCW 7.28.083(3). However, because we do not reach the merits of the adverse possession claims, we deny this request.

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**JONES, BROWER & CALLERY, PLLC**

**August 17, 2017 - 11:17 AM**

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