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JUN 1 1 2018

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

No. 353087

IN THE COURT OF APPEALS, DIVISION 3
OF THE STATE OF WASHINGTON

DYONNE A. JACOBS as Personal Representative of Stephen A. Jacobs, Jr., deceased, and DYONNE A. JACOBS,

Respondents,

v.

RANDALL C. ROBERTS, SR. and JOYCE L. ROBERTS, husband and wife; and FERNANDO C. RODRIGUEZ and MARIA RODRIGUEZ, husband and wife,

Appellants.

REPLY BRIEF OF APPELLANTS

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I. INTRODUCTION

The Respondent's Reply Brief concedes the open neighborly accommodation usage that existed on roadway until Mr. McCance began interfering with the use. It also fails to cure the indefiniteness of identifying portions of the roadway subject to the claims for adverse possession and easement.

II. ERRORS IN FACTUAL ASSERTIONS

The Jacobs' brief contains several erroneous or misleading factual assertions. Corrections to Jacobs factual assertions are set forth below.

1. "[E]ach parcel has a northern border with Game Farm Road." Respondents Reply Brief at page 1. Contrary to this, only Parcels 1 and 4 have a border with Game Farm Road. Parcels 2 and 3 would be landlocked except for the 20' roadways running to Game Farm Road. Exhibit 102, 103, CP 10 The ownership and use of those roadways is at issue in this case.

2. "The relationship between the neighbors deteriorated over time." Respondents Reply Brief at page 2 Contrary to this, McCance testified that he cut ruts in the roadway, drove T-posts in the roadway, installed gravel on the roadway in 2011, and

generally became violent toward the Roberts and Rodriguez's when they were on the roadway. After that the Roberts and Rodriguez's obtained restraining orders to prevent McCance from using their roadway. RP 255:4-25; 13-18; CP 249-256 The Jacobs were never told they could not use the roadway. RP 357:25 – 358:3; 451:10 – 452:1; 503:3-5

3. "These two fences interfered with the Jacobs ability to access the residence on Parcel 4 from Parcel 1 (and vice versa)." Respondents Reply Brief at page 3. Contrary to this, Mrs. Jacobs initially testified that she was prevented from using the road only because there was an order that prohibited her from using the road. She later admitted she had no such order. RP 115:4-22 Mrs. Jacobs also testified that Mr. Rodriguez's fence never impeded her access to her driveway. RP 88:17-22 Mrs. Jacobs access to Parcel 1 was impeded by other fences prior to the one installed by the Roberts in 2012. According to Jacobs' witnesses, Douglas McCance and Kristine Kohl, there was a fence that ran along Parcel 1 beside the Roberts road as early as 1985. RP 242:10-1; 169:24 – 171:3 Mrs. Jacobs also testified to the fences along Parcel 1. RP 85:12 – 86:21 McCance removed the fence in 2010. RP 242:19 – 243:25 To this day, there is still a chain link fence

that runs along a portion of Parcel 1 next to the road. See RP 334:19 – 335:14; Exhibit 111, photo 8.

4. "The fence also inhibited farming activity upon Parcels 1 and 4." Respondents' Reply brief at page 3. Contrary to this, as noted above, there was another fence along Parcel 1 next to the road that impeded farming activities prior to Mr. Roberts fence. There was also ample video of farming equipment spraying, cutting and baling the property after the fences went up. RP 364:19 – 365:8; 366:20 – 367:16; Exhibits 106 & 107. Furthermore, the presence of a fence along the roadway was not new. According to Douglas McCance, there was a fence that ran along Parcel 1 beside the Roberts road when he moved to the property in 1985. RP 242:10-18 McCance removed the fence in 2010 because it interfered with his ability to fly his radio controlled airplanes between Parcels 1 and 4. RP 242:19 – 243:25

5. Jacobs assert Mr. Rodriguez's testimony "supported the court's finding that Jacobs' pasture was contained with the adversely possessed area. Respondents Reply Brief at page 6. Contrary to this, Mr. Rodriguez testified that he saw Mr. Jacobs farm and cut hay "right up to the road." RP 457:15-21 This farming was outside of the road as the holes or ruts that were dug

by Mr. McCance were along Rodrguez's side of the road. RP 463:3-12; Exhibit 111, Page 11. By the time Mr. Ehlers came to cut the hay, there was a portion of the field along the edge of the roadway with 8 ft ruts that were covered with cheat grass and a little hay that he had to maneuver around when he mowed next to the road. RP 191:24 0 192:6; 207:14-24

6. "McCance testified that the roadway over Parcels 2 and 3 had been used for various purposes for as long as he could remember, dating back to his childhood." Respondents Reply Brief at pages 9-10 Contrary to this, McCance actually testified that he moved to the property in 1985 but that he had visited his sister who moved into a house nearby in 1983 when he was 25. RP 222: 9-17 He testified that when he moved to the property in 1985, they "routinely crossed the road... to do irrigation and move pipes or hand-lines." CP 223: 8-23 Although Mr. McCance didn't begin helping with farming until 2007 or 2008 because he was working full time at Pacific Steel. RP 249:9 – 250:2

7. "Pictures of the property clearly indicated the pasture had grown into/onto the panhandle of Parcel 3. Ex. 111." Contrary to this, Ex. 111 contains approximately 16 photos taken on different over the course of several years. Not all photos depict the

roadway. The pictures depicting the overgrowth of the ruts were taken the following spring after Mr. McCance cut the 8ft. ruts that prevented maintenance of that area of the roadway. RP 304:6-23; 306:24 – 308:1; 311:4-25; 313:15-22; 334:19-25; 343:9 344:11; 345:11 – 346:1.

III. ARGUMENT

A. Certifying the accuracy of a copy does not apply to hearsay statements contained therein.

The Respondents Reply Brief on page 4 concedes the presence of hearsay statements in the 2012 survey but argue that since the survey has been recorded with the auditor's office, but argues: 1) the hearsay is admissible pursuant to ER 803(14) & (15) and RCW 5.44.040; 2) there was sufficient evidence to corroborate the hearsay statements in the survey; and 3) the court did not rely exclusively on the survey. The court's reliance on the survey was pervasive. In the findings of fact and conclusions of law, the court cited to the survey at least 6 times to support its findings and conclusions and attached it as an exhibit adopting it as part of the ruling. CP 668-676.

1. ER 803 only applies to documents that "establish or affect an interest in property.

Jacobs first argue that the hearsay on the survey was admissible under ER 803(14) & (15). (Respondents Reply Brief at page 5). The hearsay exceptions in ER 803(14) and (15) apply to documents which purport to establish or affect an interest in property such as deed, conveyances, bonds, mortgages, etc. Here the survey was not designed to establish or affect anyone's interest in property and was commissioned to outline the location of the roadways already owned by the Roberts and Rodriguez's. In fact, Mr. Roberts has the surveyor place survey stakes every 100 feet along the road so they would know where to put their fences. RP 346:2-6.

Since the survey does not purport to establish or affect an interest in property, the statements in the survey do not fall within the exception to the hearsay rule, but if it did, the exception would only serve to provide proof that the copy provided to the court accurately reflects the contents of the original document. Rule 803 is not designed to provide an exception to the hearsay statement of a third party contained within the document. For example, a judgment is admissible to show the existence of a judgement, but the rule is not intended to allow the hearsay statement within the judgement to be admitted. Here, the auditor's certification on the 2012 survey only certifies that it is an accurate copy of the original

survey. It is not intended to certify the accuracy of the statements made by the author of the survey.

The court could presume that the author of the survey was available to testify but the Jacobs decided not to call him because his testimony would not be favorable. The record shows that the Jacobs took no action to try to secure testimony from the author of the survey and there was no evidence that the author of the survey was unavailable to come testify regarding his observation. The Jacobs used his absence to argue that the survey "indicated an area of the Rodriguez's panhandle (hereinafter the 'adversely possessed area') that was pasture ground farmed by Jacobs. The court then relied on the same hearsay statement to fix the area it awarded to the Jacobs.

The prejudice of the court's reliance to the Roberts and Rodriguez's was significant and given the court's decision to allow the claim for adverse possession to be added at the time of trial, the Roberts and Rodriguez's were deprived of any opportunity to secure the testimony of the author who could certainly have rebutted the interpretations given to the hearsay statements by the Jacobs and the court.

2. RCW 5.44.040 does not apply to hearsay statements based on conclusions or opinions by third parties.

Certified copies of public records are deemed authenticated

when certified by the officer having custody of them pursuant to RCW 5.44.040. Although the copy of the survey admitted may be authenticated to be a true and correct copy of the original by the auditor's office, it does not follow that the auditor is also authenticating the accuracy of the hearsay statements by third parties within the document. *Brundridge v. Fluor Federal Services, Inc.*, 164 Wash.2d 432, ¶¶ 33-34, 191 P.3d 879 (2008).

While the auditor's office has certified that the copy provided of the survey was a true and accurate copy of the original, the auditor cannot certify as to the accuracy of the statements within the survey. Thus the court erred in accepting the hearsay statements of the survey author without giving the Roberts and Rodriguez's a chance to challenge the interpretation given to those terms by the Jacobs and adopted by the court.

3. Corroboration of hearsay

Jacobs next argue that there was hearsay statements in the survey should be admissible because they were corroborated by other witness testimony. But hearsay testimony that is used to strengthen the testimony of a present witness is not permissible. *Spokane & V. Gold & Copper Co. v. Colfelt*, 24 Wash. 568, 570-71, 64 P. 847 (1901).

Here the Jacobs attempt to use comments made by a surveyor who observed the property at issue on a single occasion in 2012, to bolster their claim that they had been farming the property for the statutory time period. Yet even with the survey in front of them, Mrs. Jacobs was still unable to tell the court with any certainty what area of Mr. Rodriguez's road she had actually farmed. At one point she testified that it was 20' and at another is was 20'-30', yet the Rodriguez road is only 20' wide. RP 75:23-25; 76:11-21; exhibit 12).

Despite these issues, the court erroneously relied on the hearsay statements in the survey for the purpose of affixing the areas that the Jacobs had been farming. In the memorandum decision, the court stated that the "2012 survey was performed to determine the current location of the roadway." CP 541. Yet there was no evidence to support this conclusion. Based on this misconception, the court later found that "according to the survey, the current location of the roadway along Parcels 1 and 4 had changed since the 1976 subdivision." CP 541.

B. Adverse Possession

Jacobs argue that the facts in the record supported the court's finding of adverse possession.

> "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."

Lloyd v. Montecucco, 83 Wn.App. 846, 853, 924 P.2d 927 (1996). Thus questions of law are reviewed de novo. *Bryant v. Palmer Coking Coal Co.*, 86 Wn.App. 204, 210, 936 P.2d 1163 (1997).

1. A legal description must be provided.

Every conveyance of real property in Washington, requires a legal description of the property and a party claiming rights to the property of another bears the burden of proving what property they used. See Brief of Appellants at page 20. Yet, Mrs. Jacobs not only didn't have a legal description, she could only vaguely describe the area she claimed to have adversely possessed as 20'30' of some unknown portion of the roadway or roadways. Mrs. Jacobs witness, Mr. Ehlers testified that the fence only cut off 7-8 feet of the field area. RP 212:7-13. There was no description of a specific width and breadth to set the boundaries of their claim.

Since the Jacobs couldn't identify the area, they argued that the court should rely on hearsay statements in the survey, and the court's findings and conclusions demonstrate that is exactly what it did. Yet even the survey does not contain a legal description for the area. The Jacobs argue that *Kane v. McIntosh* does not require a formal legal description, but there is nothing in the case that indicates a court can fashion an award

without a legal description. *Kane v. McIntosh*, 198 Wash.App. 812, 394 P.3d 446 (Div. II, 2017).

The law is supposed to provide certainty and clear direction to the parties. Here, the Roberts and Rodriguez's are left in a quandary as to which portions of their fences they must tear down, which portions of their roadway they no longer own and can no longer maintain.

2. The testimony did not establish exclusive use.

Jacobs argue that there was sufficient evidence to show use as an owner, but fail to cite to the record. While it's true that Mr. McCance mowed, Mr. McCance testified that he mowed two or three feet of the field beside the road. RP 237:17-21. Mrs. Jacobs testified that from the time she moved to the property in 1983, their family walked across the roadways between Parcels 1 and 4; used a portion of the roadways as a driveway when they put in the trailer on Parcel 4. She also testified that they drove farm equipment or the people working for them drove farm equipment across the roads. RP 81:3-7; RP 83:1-7. These activities were not hidden but were open and obvious to the Roberts and the Rodriguez's and their predecessors and the Roberts and Rodriguez's and their predecessors were using the roadway in the same manner. 83:13 84:1; 84:2 – 85:14. Where all the parties are using the roadway in the exact

same way, and that use is open and not hidden, the presumption of permissive use and neighborly accommodation has not been overcome.

3. Jacobs failed to show use as an owner uninterrupted for a period of 10 years.

While the Jacobs showed some farming of a portion of Rodriguez's roadway, they failed to show that they had farmed any specific portion of the Rodriguez's road for a consecutive 10 year period. The ruts dug in the road in 2011 by Douglas McCance were in the Rodriguez's road, not in the field. Exhibit 111, page 9. They were put there by Mr. McCance to force drivers to slow down on the Rodriguez driveway and to prevent vehicles from driving out onto the field of Parcel 4. RP 125:25 – 126:3.

Mr. Ehlers testified that he found cheat grass and some hay grown out over the ruts and he assumed the ruts had been cut in the field by Mr. Roberts. RP 193:2-9; 194:20-24. When the Rodriguez fence went up, the 8' ruts were once again outside of the field. RP 193:7-9; 194:7-9. As the ruts were cut into the road in 2011, and the fences went up in the fall of 2012, at most, the Jacobs farmed a portion of the Rodriguez road area for one season and not the requisite 10 years.

Prior to digging the ruts, the Jacobs hadn't farmed any of their fields for several years. Mr. Roberts farmed Parcels 1 and 4 from 1996 to

2007 with his own equipment. RP 100:1-11; 301:6-10. After that, the land was not farmed for a period of time. Mr. Roberts testified that it was 2008-2011. RP 306:23; 311:4 – 312:21; Exhibit 111, pages 13 & 15. The Jacobs believed it only sat fallow in 2011. RP 100:23 – 11; 131:14 – 132:3; 225:23 – 226:1. Either way, at best the Jacobs only farmed the land from 2007-2012. But if the Jacobs farming of the Rodriguez road had been exclusive, then the ruts that Mr. McCance cut in 2012 would have been inside the field rather than in the road, and he would not have had to cut them to interfere with people driving on the Rodriguez roadway.

C. The Jacobs have failed to overcome presumption of permissive use.

The Jacobs continue to argue that their use of walking across the roadways or driving farm equipment across the roadways was adverse to Roberts and Rodriguez's. There is no evidence that the use was anything less than neighborly accommodation. *Gamboa v. Clark*, 183 Wash.2d 38, 47, 348 P.3d 1214 (2015). The Jacobs argue that they believed they owned the road but there is no testimony by Mrs. Jacobs to that effect. Instead the testimony of the Jacobs and their witnesses demonstrated that all the owners of the surrounding parcels used the roads and no one objected to anyone's use, until Mr. McCance began interfering with the that use.

D. Easement by necessity must be necessary rather than just more convenient.

The Jacobs argue that under *Woodward v. Lopez*, an easement by necessity can be obtained if it is more convenient than using the appurtenant roadway. Woodward sought an easement across the Lopez property on the basis that: 1) the common owner had intended to reserve an easement; and 2) creating a new access to the neighboring roadway was through a swamp and would cost the property owners approximately $200,000 to build. The common owners' intent to preserve an easement was evident in several documents including the subdivision application which created the subject lots. These facts are significantly different than the facts here.

When Mr. Jacobs subdivided the property, he clearly deeded ownership of the roadways to Parcels 2 and 3 rather than giving them an easement to Game Farm Road. There are no documents showing any intent by Mr. Jacobs to preserve an easement to himself. The Jacobs do not have to create access to Game Farm Road, it already exists. The evidence provided only shows that it would be slightly more convenient to use the Roberts and Rodriguez's roadway, but nothing more. Mr. McCance testified that he could not get more modern equipment in to Parcel 4 with the fence up. RP 212:14-23. According to Mr. Ehlers, he is

already using modern equipment to farm the parcels even with the fences up. The only equipment that he couldn't get in was a new type of sprayer that had never been used on the Jacobs property previously. RP 212:14-23.

E. A fence is not spiteful if it serves some useful purpose to the owner and causes no damage to the neighbor.

The Jacobs cite to *Baillargeon v. Press* to argue that the Roberts and Rodriguez's fences are "spite fences. There, the Press's were constructing a sight obscuring fence between their home and the Baillargeons. The Baillargeons brought suit to enjoin the construction and claimed prescriptive rights to the area. The court noted that the spite fence statute only applies if: 1) the fence damages the neighbors use or enjoyment of his property in a significant degree; 2) the primary purpose for the fence was to annoy the neighbor; and 3) the fence serves no reasonable purpose. *Baillargeon v. Press*, 11 Wash.App. 59, 63-4, 521 P.3d 746 (Div. 1, 1974).

Here, the Roberts and Rodriguez's did not construct a site obscuring fence. Their fence consists of T posts and three strands of barbed wire. RP 377:21 – 378:19; Exhibit 111, at photo 5. It matched the fence that existed along Parcel 1 until 2010 when Mr. McCance took it

down. RP 246:25 – 247:11. Thus it was not an unusual structure or out of place with preexisting use.

There was no evidence that the fences were erected to annoy the Jacobs. Roberts and Rodriguez's testified that they stopped the fences short to not interfere with Mrs. Jacobs accessing her driveway, and never revoked her permission to use the road for any purpose. Instead, all the evidence indicates that the fences were erected to protect the Jacobs and the Roberts from the harassment of Mr. McCance that resulted in the court granting them restraining orders against him in 2012. Mr. Rodriguez describes Mr. McCance chased his wife with the tractor and she had to run down the middle of the road and other harassment of his family. RP 449:22 – 450:2; 451:18 – 452:9; 465:24 – 466:1.

There is no evidence that the Jacobs use and enjoyment of their property is damaged in any degree. They have continued to be able to farm without restriction and the fences were stopped short of Game Farm Road so as to not impede Mrs. Jacobs access to her driveway or her ability to walk across the road between Parcels 1 and 4.

F. Amendment not warranted when Party knew about claim for more than 3 years.

After filing suit in July 2013, the Jacobs waited over 3 ½ years to assert a claim of adverse possession. Then they brought the claim after

discovery had closed and on the eve of trial. Their only defense to the delay is that the Roberts and Rodriguez's should have known they would bring the claim, and that counsel hid the survey from them. Both are not supported by the record.

Jacobs assert that the survey was hidden from them and they did not see it until after discovery had passed, but according to the auditor's certification, the 2012 survey was filed and of record on September 5, 2012, ten months before the Jacobs filed their suit. The Jacobs then asserted that they tried to get a copy of the survey but couldn't. RP 24:17 – 25:7. Unfortunately Jacobs first exhibit shows the Jacobs' counsel received a copy of the 2012 survey in the litigation guarantee they ordered in October, 2014. Consequently the Jacobs counsel was in possession of the 2012 survey for more than 2 years before they sought to amend their complaint.

Jacobs next claim that the "Counsel for Roberts/Rodriguez had the survey in her possession for years, while the litigation was pending and prior to the deposition in December of 2016." Respondents Reply Brief at page 17. A review of the record cited by the Jacobs demonstrates that this was a conclusory statement given by Jacobs counsel and was wholly unsupported by any evidence. Contrary to this, the evidence demonstrated

that the Jacobs were well aware of the survey and that their attorneys had it in their possession as early as 2014. RP 27:9-25, 29:9-15.

The Jacobs conduct had run up legal costs for the Roberts and Rodriguez's. Roberts and Rodriguez's prepared for trial and appeared for settlement and pretrial conferences on March 17, April 14, and August 11, 2016, but the Jacobs did not appear and as a consequence, the court imposed sanctions. CP 66-72, 74-75, 106-109. New counsel appeared for the Jacobs on September 14, 2016 and obtained another continuance of trial to January 9, 2017. CP 115-116.

Jacobs filed a motion to amend their complaint on November 22, 2016 specifying their claims as: implied easement, easement by prescription; and spite fence. The motion included several pages from the litigation guarantee they had received. CP 148-185. The motion was not argued. On December 21, 2016, the Jacobs answered Defendants first discovery requests identifying no witness testimony or documents to support a claim for adverse possession. Eight days later, on the eve of a January 9 trial date, the Jacobs filed a motion to amend their complaint to add a claim of adverse possession of an unidentified portion of the Rodriguez's property. CP 194-231.

The parties reached a settlement agreement on January 8, 2017 and postponed the trial to prepare final documents. CP 233-234, 239-257. A

month before the new trial date, the Jacobs notified the Roberts/ Rodriguez that they were backing out of the settlement agreement and wanted to go forth to trial. CP 236, CP 239-248. During that time, the Jacobs never filed a witness list identifying witnesses who would testify regarding the claim for adverse possession in violation of LCR 4(h)(A) & (C) (requiring disclosure 8 months prior to trial); Jacobs never provided any documentation in discovery to support their new claim, and they did not participate in preparing a trial management report two weeks prior to trial in violation of LCR 16(b) & (c); LCR 4(f)(2). Instead, they filed their trial management report on the day of trial. CP 259-272.

The rules are designed to "secure the just, speedy, and inexpensive determination of every action." CR 1. By ignoring the rules, the Jacobs were allowed to hide their claim for adverse possession and conceal the evidence they intended to use until the day of trial. In granting the amendment, the court offered to continue the trial a 6th time because of the Jacobs conduct. Yet each time the case was set for trial, the Roberts and Rodriguez's were forced to pay counsel to issue subpoenas and prepare for trial. They chose not to incur such costs again and should not be penalized for that decision. RP 38:3-11.

The Jacobs had this survey they claim as the smoking gun in their possession for more than two years. When they decided to amend their

complaint to add a claim of adverse possession, they failed to take steps necessary to limit the prejudice to the Roberts and Rodriguez's by providing a new witness list, supplementing discovery answers, and timely filing a trial management report. Such behavior should not have been rewarded by the trial court.

G. Rodriguez parcel is landlocked absent an easement.

Jacobs argue that there is no evidence that the Rodriguez's needed an easement across the adversely possessed portion of their roadway to access their property. The test for necessity outlined in the *Woodward v. Lopez* case cited by the Jacobs is instructive here. "The test of necessity is whether the party claiming the right can, at reasonable cost, on his own estate, and without trespassing on his neighbors, create a substitute." *Woodward v. Lopez* , 174 Wash.App. at 469-70, citing *Bays v. Haven*, 55 Wash.App. 324, 329, 777 P.2d 562 (1989).

There is no question that the Rodriguez property would be landlocked absent the roadway that Mr. Jacobs deeded with the parcel when he subdivided the property. Exhibit 100. There is no substitute access available except to seek an easement across his neighbors' property. The Jacobs fail to identify any facts in the record that support the court's ruling on this issue because it is not supportable and it must be overturned.

H. Attorney fees.

Jacobs never asked for an award of fees and costs in the complaint or amended complaint. Jacobs present two interesting arguments to shore up the court's award of fees and costs, yet neither is supported by any legal authority. First they argue that the reference to RCW 7.40.030 in the amended complaint filed the morning of trial was sufficient to put the parties on notice that the Jacobs would seek fees. In the alternative, they argue that the court can award fees and costs on its own without any legal basis just because they are "equitable and just." This court has already ruled that a party must give notice of an intent to claim for attorney fees. *Tatum v. R &R Cable Inc.*, 30 Wash. App. 580, 585-6, 636 P.2d 508 (Div. 3, 1981). Jacobs argument that the Roberts and Rodriguez's should have guessed they would ask for fees and costs is not supported by any case law.

This court has also ruled that "[a]ttorney fees and costs are permitted only if based on a statutory, contractual, or equitable ground." *Colwell v. Etzell*, 119 Wn. App. 432, 442, 81 P.3d 895 (Div. 3, 2003), citing *In re Impoundment of Chevrolet Truck*, 148 Wash.2d 145, 160, 60 P.3d 53 (2002); and *King County v. Squire Inv. Co.*, 59 Wash.App. 888, 896, 801 P.2d 1022 (1990). There is no case law to support the Jacobs position that a court can just award fees and costs because it feels like it,

nor is there anything in the record indicating why such an award would be "equitable and just."

Jacobs also argue that an award of full fees and costs is appropriate because all of their claims fall under RCW 7.28.083. That statute entitles the prevailing party to reasonable attorney fees and costs in an action asserting title to real property by adverse possession. Jacobs cite no authority that extends the application of the statute to their other claims.

Finally, Jacobs argue that the court should not be required to segregate fees and costs among the claims because it is too difficult. There is no citation to the record, to demonstrate their claim that "the facts giving rise to the spite fence claim were almost identical to the adverse possession and prescriptive easement." Respondents Reply Brief at page 21. The elements that must be proved for claims for spite fence, implied easement, prescriptive easement, and adverse possession are not the same. Consequently the facts required to prove each are not the same.

I. The trial court erred in not requiring the Jacobs to pay current taxes and future taxes.

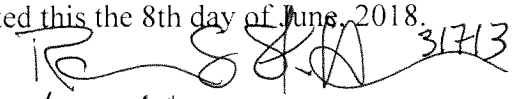
The trial court erred in not requiring the Jacobs to pay anything for the current taxes and assessments owed and requiring them to pay all future taxes and assessments on the property the court has determined they

adversely possessed. The court cited no basis for forcing the Rodriguez's to continue to pay taxes on property it has awarded to the Jacobs.

IV. CONCLUSION

The trial court's evidentiary errors and procedural errors deprived the Roberts and Rodriguez's of a fair trial. Even if those errors are allowed to stand, the record reflects that the Jacobs failed to meet their burden of going forward and proving each element of their claims. Thus the matter should be dismissed as a matter of law. The Roberts and Rodriguez's continue to ask for attorney fees on appeal.

Respectfully submitted this the 8th day of June, 2018.



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CERTIFICATE OF SERVICE

On June 8, 2018 I served the Reply Brief of Appellants via first class mail, postage pre-paid to:

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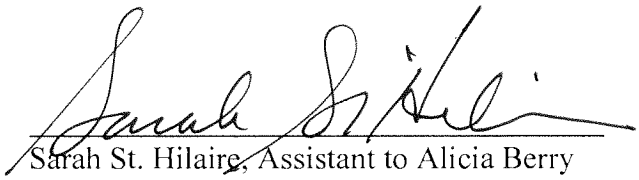

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