

**FILED**

JAN 16 2018

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

No. 353087

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

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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,

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BRIEF OF APPELLANTS

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## **I. INTRODUCTION**

Jacobs as common owner of the property subdivided creating 4 parcels. Parcels 1 and 4 were on a public road. To prevent parcels 2 and 3 from being landlocked, each contained a 20 foot roadway. Jacobs sold or otherwise conveyed Parcels 2 & 3 but retained ownership of Parcels 1 and 4. Jacobs now seeks to adversely possess a portion of Parcel 3's roadway and seeks an easement across the roadways of both Parcel 2 and 3.

## **II. ASSIGNMENTS OF ERROR**

1. The trial court erred in relying on hearsay testimony in Jacobs's exhibits 2 and 12 to reach its decision.

2. The trial court erred in finding that it had authority to grant Jacobs the equitable relief they sought.

3. The trial court erred in finding that Jacobs had adversely possessed a portion of Rodriguez's property.

4. The trial court erred in finding that Jacobs had acquired a prescriptive easement over the Defendants' properties.

5. The trial court erred in finding that Jacobs had acquired an easement by necessity over the Defendants' properties.

6. The trial court erred in finding that Jacobs had proven that Defendants fences were erected as spite fences.

7. The trial court erred in granting the Jacobs' motion to amend their complaint the first day of trial to add a claim for adverse possession against defendants Rodriguez.

8. The trial court in denying the Rodriguez's claim for an easement by necessity.

9. The trial court erred in its award of attorney fees and costs against Defendants.

10. The trial court erred in failing to award taxes and assessments against Jacobs in favor of Rodriguez.

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did the trial court improperly rely on hearsay testimony contained in a survey ordered by Defendants testimony for purposes of affixing the boundary line of their roadways?

2. Did the Jacobs fail to meet their burden of proof regarding describing with specificity the property they asserted a claim for adverse possession?

3. Did the Jacobs fail to use the land exclusively?

4. Did the Jacobs fail to show that they used the land as an owner uninterrupted for a period of 10 years?

5. Did the Jacobs fail to meet their burden of proof regarding describing with specificity the property they asserted a claim for prescriptive easement?
6. Did the Jacobs overcome the presumption of permissive use?
7. Can the Jacobs claim an easement by necessity when the purpose is not to access a public road?
8. Did the Jacobs fail to meet their burden of proof regarding describing with specificity the property they asserted a claim for implied easement by necessity?
9. Did the Jacobs meet their burden of proof to show that the Defendants fences were spite fences?
10. Was the amendment of Jacobs's complaint on the day of trial improperly prejudicial?
11. Did the Rodriguez's need an easement over the portions of their roadway adversely possessed by Jacobs to reach a public road?
12. Are the Jacobs required to plead or otherwise give notice of an intent to seek attorney fees and costs in order to recover the same?
13. Was there evidence in the record sufficient to identify the legal basis and amount of fees being awarded against each Defendant?

14. Did the Jacobs provide any basis in law to justify an award of costs beyond statutory costs?

15. Are the Rodriguez's entitled to past taxes and assessments and future taxes and assessments over the land that has been adversely possessed?

16. Are Appellants entitled to Attorney fees and costs on appeal pursuant to RAP 18.1?

#### **IV. STATEMENT OF THE CASE (10.4(f))**

##### **1. Stephen Jacobs was sole owner of all parcels.**

In 1963, Stephen Jacobs and his wife, Juleta Jacobs, purchased a large parcel of land in Benton County, Washington. Transcript at 178:2-3; Defendants exhibit 102; Plaintiff exhibit 2. In Approximately 1976 the Jacobs subdivided the property into four parcels of land. Parcels 1 and 4 abutted a public roadway, Game Farm Road. Parcels 2 and 3 were landlocked except each parcel had a 20' strip of land that ran between Parcels 1 and 4 to Game Farm Road. Plaintiffs' exhibit 2 & 12; Defendants exhibits 100, 102 & 103.

The Jacobs sold Parcel 3 to William and Rose Merrick in 1977. Plaintiffs exhibit 5. In 1983, Stephen and Juleta Jacobs divorced and Juleta Jacobs was deeded Parcel 2 as her separate property pursuant to the

divorce decree. Plaintiffs exhibit 6.

**2. Stephen Jacobs marries Dyonne Jacobs 1983.**

Later that same year, Stephen Jacobs married Dyonne Jacobs. Transcript at 60:10-14; CP 322 (Jacobs deposition at 13:14-15.) Mrs. Jacobs had no knowledge of the property prior to her marriage to Stephen Jacobs in 1983. Transcript at 77:8-17; CP 323 (Jacobs Deposition at 14:18-20). At the time Stephen and Dyonne Jacobs married, there was a home on Parcel 1 but Parcel 4 was farm land. Transcript at 79:5-13

On September 12, 1984, the Jacobs obtained a permit to relocate Dyonne's mobile home from 19<sup>th</sup> in Kennewick to Parcel 4. CP 323-4 (Jacobs deposition at 14:3-8; 14:25 – 15:6); Transcript at 60:14-15; Plaintiffs exhibit 7). The driveway for the new home on Parcel 4 entered onto the roadway owned by Parcel 3 near Game Farm Road. Defendants' exhibits 100 & 101. In October 1984 Stephen Jacobs filed a quit claim deed creating a marital community with Dyonne Jacobs in Parcel 1. Plaintiffs exhibit 6.

The house on Parcel 1 was rented out and occupied by renters. Transcript at 79:16-20. Dyonne Jacobs' son, Douglas McCance, moved into the house on Parcel 1 in 1985. Transcript at 79:21 – 80:5; 222:9-10.

The parties agree that Mr. Jacobs farmed the back portions of Parcels 1 and 4 for either alfalfa or grass hay. Mr. Jacobs did not have any

equipment so he would hire others to cut and bale his fields when they were ready. Transcript at 99:8-22; 297:24 – 298:13.

**3. Roberts buy Parcel 2 in 1992.**

At some point, Juleta Jacobs sold or conveyed Parcel 2 to another party. In 1992, Randall and Joyce Roberts purchased Parcel 2. Transcript at 273:15-19; Plaintiffs' exhibit 1; Defendants exhibit 104. Mr. Roberts was informed by the sellers that he had a 20 foot road and Merrick, who resided on Parcel 3, had a 20 foot road. Transcript at 275:17-20. When Mr. Roberts inspected the property, the 20 foot roads were obvious as the fences and plants on Parcels 1 and 4 were all at least 40' apart. Transcript at 276:4 - 278:14.

The parties agree that at the time the Roberts purchased Parcel 2, there was a fence consisting of metal posts and barbed wire running from the Roberts' driveway towards Game Farm Road adjacent to Parcel 1. Transcript at 85:21-25. Mrs. Jacobs testified that the fence was on the pasture. Transcript at 86:12-15. In 2003, the Roberts had a new manufactured home delivered and the fence posts for this fence are visible in the video taken at that time. Transcript at 355:14-19; Defendants exhibit 106 or 107.

When the Roberts moved in, Randall observed Bill Merrick, owner

of Parcel 3, mowing down the sides of the roadway for Parcels 2 & 3. Randall began mowing it also. Transcript at 278:15 – 279:7; 419:24 – 420:3. Randall mowed the sides of the road regularly and maintained the road. Transcript at 313:7-14; 442:19 – 443:4. Another neighbor, Kelly Cutler, remembers that both sides of the roadway were mowed. Transcript at 424:7-1.2. The residents of Parcel 3 and Mr. McCance also mowed the sides of the road from time to time. Transcript at 443:5-16; 490:5-10.

#### **4. Neighborly accommodation.**

In 1995, the person cutting and baling for Jacobs retired and sold his equipment to Randall Roberts. Transcript at 300:25 – 301:3. Mr. Roberts began farming his own property that year and agreed to cut and bale Mr. Jacobs's parcels in exchange for a portion of the crop. Transcript at 269:22-24; 301:5-10. Mr. Roberts also cut hay for other neighbors. Transcript at 147:22-25.

During the summer of 2007, Douglas McCance removed the fence along Parcel 1 because it interfered with his ability to fly his radio controlled airplanes between Parcels 1 and 4. Transcript at 243:1-6; 487:1-24. That same summer, Mr. Roberts stopped cutting and baling Mr. Jacobs land. Transcript at 308:2-4. After the 2007 farming season ended, until 2011, Parcels 1 and 4 were not farmed or were not farmed every year. Transcript at 311:1 – 312:21; 472:2 - 473:5; Defendants exhibit 111

at page 13 & 114. While the land was not farmed, the usage of the roadway by the Jacobs was very limited. Transcript at 322:22 – 323:25.

The Defendants testified that they had observed the Jacobs and the other neighbors using the roadway from time to time over the years and never objected. Transcript 293:7- 294:21; 295:10-24; 451:10 – 452:1; 502:16 – 503:2. That changed for one neighbor in 2011. Transcript at 324:1-11.

#### **5. McCance restraining orders in July 2012.**

In 2011, Mrs. Jacobs's son, Douglas McCance, who resided on Parcel 1, began interfering with the Defendants use of their roadway. First, he spread a heavy layer of gravel across the roadway so thick it bogged down Mr. Roberts's vehicle and caused rock damage to their vehicles. Transcript at 112:25 – 113:3; 255:22-25; 258:13-14; 324:7 – 326:14; 418:20 – 419:9. According to the testimony of Mr. McCance, he laid down a layer of material that was around a foot deep. Transcript at 256:5 -257:20.

In 2011, Mr. McCance also dug trenches or ruts with a tractor on Mr. Rodriguez's side of the road to block vehicle traffic. The ruts were 8 ft. wide. Transcript at 125:8 – 126:5; 194:7-9; 255:14-17; 255:25-5; 338:12 – 339:7; 417:24 – 418:14; 451:7-9; 453:11-22; 491:19 – 492:4  
Plaintiffs exhibit 111 at photographs 9, 10 and 11. Mr. McCance testified

that he cut these ruts before the field was plowed and that they “[m]arked the edge of the field.” Transcript at 263:15-16. Mr. Roberts testified that the ruts were just inside the mow strip. The mow strip was distinguishable from the field only because the vegetation was lower in height. Transcript at 340:2 20; Defendants Exhibit 111 at photos 2, 10 & 11.

Once Mr. McCance put the ruts in the road, the Defendants could no longer drive on that portion of the road. 339:21 – 340:20; 342:3-9; 454:22-24. The lack of use resulted in vegetation growing out over the ruts making the road bed narrower. Transcript at 343:9 – 344:11; 490:14-22; Defendants’ Exhibit 111 at photos 1 & 9. Mr. Roberts also stopped mowing or maintain the road as the Benton County Sheriff, who was called out about the ruts, left him with the understanding that he could do nothing more to the road until the issue of ownership was resolved. Transcript at 344:17 – 345:10.

Mr. McCance terrified the Rodriguez’s family. Mr. Rodriguez has four daughters ages 16, 10, 10 and 3. Transcript at 440:22 – 441:1. Mr. Rodriguez described an incident where his wife and daughters had been walking down their roadway towards home and were chased by Mr. McCance on a tractor. When he got home, he found his wife scared and his daughters crying. Mr. Rodriguez testified that this type of behavior continued. Transcript at 449:24 – 451:3.

McCance also drove T-posts into the roadway to block vehicle travel. Transcript at 113:4-7; 255:7-9, 18-21; 326:22 – 327:10; 329:3 – 330:24. In July 2012, the Roberts and Rodriguez's obtained restraining orders against Douglas McCance which prevented him from coming on to their property and messing with the road. Transcript at 348:20 – 349:17, 22-24; Transcript at 349:18-21. After the restraining orders were obtained in 2012, Randall Roberts removed the T-posts that Mr. McCance had driven in to the road. Transcript at 336:21 – 337:3; Plaintiffs exhibit 111 at photo 7. The Defendants never withdrew their permission allowing the Jacobs to use the roadway. Transcript at 357:25 – 358:3; 505:17-24.

#### **6. Survey and Fences.**

Following the problems with McCance, the Roberts and Rodriguez's had a survey done of their roads in August 2012. Transcript at 360:16 – 361:4; 517:15-6. They subsequently installed fences in October of 2012 along the survey stakes marking their roads. Transcript at 361:7-8. The Rodriguez's fence stopped approximately 200 feet from Game Farm Road so as not to interfere with Stephen and Dyonne Jacobs driveway. Transcript at 258:19 – 259:1; 362:18-22. The Roberts fence stopped approximately 20 feet from the center line of Game Farm Road leaving walking space between the road and the end of the fence. Transcript at 377::21 – 378:10; Defendants exhibit 111 at photograph 5.

Neither fence impeded the Jacobs ability to access their driveway. Transcript at 88:17-22. Once the fences were up, Mr. Roberts used his tractor to smooth out the ruts in the road. Transcript at 347:14-18; 348:11-12. Mr. Rodriguez testified that the fence made him feel that his family was safer from Mr. McCance's harassment. Transcript at 465:24 – 466:1.

Even with the fences, farming activities were not impeded on the back of Parcels 1 and 4. Transcript at 364:10 – 371:18; Defendants exhibit 106. Mr. Ehlers testified that he accessed the back of parcels 1 and 4 from Game Farm Road. Transcript at 185:3-17.

#### **7. Litigation begins July 2013.**

In July 2013 the Jacobs brought suit against the Roberts and the Rodriguez's asking the court to find that they had easements across the Defendants roadways expressly, by implication, or by prescription. The Jacobs also asked that the court order the Defendants to remove their fences. CP 1–21. In December 2013 Stephen Jacobs died. Transcript at 103:17-20.

On December 29, 2016, after the discovery deadline had passed and 10 days before trial, Jacobs filed a second motion to amend their complaint to add claims of implied easement, for "spite fence" pursuant to RCW 7.40.030, and a claim of adverse possession only against the

Rodriguez's.<sup>1</sup> CP 194 – 232. Thereafter the parties reached a settlement agreement on the eve of trial and the motion and trial date were stricken. CP 233 – 234. 35 days before trial, the Jacobs notified Defendants that they were backing out of the settlement agreement. CP 239 – 258. The Jacobs renoted their motion to amend for the first day of trial. The morning of trial, the court granted Jacobs's motion to amend adding new claims for adverse possession against the Rodriguez's and spite fence against all Defendants. CP 276-274; Transcript at 24:2 – 43:25.

**8. No legal description of disputed property.**

Jacobs did not have a survey done to identify the property they claimed by easement or adverse possession. The only evidence provided was testimonial. Mrs. Jacobs testified that when the Rodriguez's put up their fence, it intruded into the existing field. When asked what portion of it intruded into the field, Mrs. Jacobs testified that the Rodriguez's fence "came in probably 20 feet and cut out 20 feet of the pasture" Transcript at 75:23-25. At another point she testified that "20-30 feet" of the pasture was cut off. Transcript at 76:11-21. Since Mr. Rodriguez's road is only 20 feet wide, if Mrs. Jacobs's testimony is to be believed, not only did she adversely possess all of Mr. Rodriguez's roadway, but also ½ of Mr. Roberts's roadway as well.

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<sup>1</sup> Jacobs never brought their first motion to amend their complaint on for hearing. CP 148-150, 201-231

Mrs. Jacobs' granddaughter, Kristine Kohl testified that it was "maybe ten feet on each side." Transcript at 165:13-16. Mr. McCance testified that the Rodriguez's had "moved the fence 20 feet over into Lot No. 4's property." Transcript at 233:13-19.

Jacobs' witness Mr. Ehlers testified that he was hired by Mrs. Jacobs to cut, rake, bale, fertilize and spray the fields behind Parcels 1 and 4. Transcript at 184:25 – 186:1; 189:13-20; 191:5-7. He testified that when he cut the hay, there was a portion along the edge of the roadway that was cheat grass with a little hay and there were 8ft ruts that he had to carefully maneuver around. The ruts were no longer an issue once the fence went up. Transcript 191:24 – 192:6; 207:14-24; Transcript at 193:5-13, 194:8-9. Mr. Ehler's testified that the fence only shrunk the field by "seven or eight feet." Transcript at 212:9-13.

Jacobs also asked the court to rely on the survey the Defendants had done in 2012 because it had some additional notes regarding "edge of field," "field," and "edge of lawn." Plaintiffs exhibit 2 & 12. Although the survey was admissible as a business record, Defendants objected to its use for other purposes. Transcript at 51:22 – 52:13, 53:7- 22; 70:10 72:18. The purpose of the survey was to mark the boundaries of the Defendants roads. Transcript at 92:10-17; Plaintiffs' exhibit 2 & 12. There was no definition or explanation of what the author intended to convey, the survey

was obviously not accurate as to the state of the roads as it did not depict the vegetation that was clearly growing along Mr. Roberts side of the road, and there was no explanation of the type of vegetation present on the roadway. Transcript at 378:20 – 381:3; 518:12-19; Defendants exhibit 111 at photograph 1. Jacobs did not put on testimony from the author of the survey.

### **9. Court's Ruling**

This matter was tried to the bench in March 2017, the Honorable Joseph Burrowes presiding. The parties submitted closing argument by brief on March 27, 2017. CP 476-539. The court issued a memorandum decision on April 14, 2017 awarding Jacobs by adverse possession an unspecified "strip of land on Parcels 1 and 4 along the roadway." The court also awarded Jacobs easements by prescription and implied by necessity over unspecified portions of the roadways. The court advised that it would issue an order "to remove or move the fencing consistent with the Court ruling." CP 540-546.

On May 15, 2017, Defendants filed their notice of appeal in this matter. CP 547-548. On May 16, 2017, Jacobs sent proposed findings of fact and conclusions of law to the court, a proposed order and proposed judgment. In addition, Jacobs brought a motion seeking an award of attorney fees and costs against all defendants pursuant to RCW

7.28.083(3) and CR 37(c). CP 556-587. Defendants objected to an award of fees and costs for lack of notice. Defendants had never pled fees and costs in any of their complaints. Defendants further argued that there was no basis in law for an award of all fees and costs incurred by the Jacobs, and the Defendants could not be held jointly responsible as the basis for seeking fees were unique to each Defendant. CP 616-637, 658-664. By memorandum decision on June 13, 2017, the court granted Jacobs an award of full fees and costs against all Defendants. CP 666-667.

On May 17, 2017, Defendants sent proposed findings of fact and conclusions of law to the court. Defendants also brought a motion seeking an award of property taxes and assessments for the property adversely possessed and or obtained by prescriptive easement by the Jacobs and asking the court to order the Jacobs to pay a portion of the pending and future taxes and assessments commiserate with the portion of the land they were awarded. CP 588-606. Jacobs objected to an award for the Roberts on the basis that Jacobs had not adversely possessed any portion of their property and asked the court for a reduced award for the Rodriguez's to \$1,291.51. CP 607-615. By Memorandum Decision on June 15, 2017, the court granted Mr. Rodriguez \$1,291.51 in property taxes and assessments but declined to award pending taxes or future property taxes. The court denied the Roberts request for taxes and assessments. CP 666-667.

On June 15, 2017, the trial court signed the Jacobs proposed findings of fact and conclusions of law. CP 668-676. This was problematic as many of the findings were actually conclusions and the conclusions were just restatements of the findings. The findings and conclusions demonstrated that the court relied in large entirety on the 2012 survey in making its decision and award. CP 673. The findings and conclusions provided no legal description of the portion of the road that had been acquired by the Jacobs by adverse possession or what portions they had acquired easements across.

On June 15, 2017, the trial court signed the Jacobs proposed order awarding Jacobs adverse possession of some portion of the Rodriguez's roadway and awarding the Jacobs easements across some portion of the Defendants properties. No legal descriptions were provided. CP 677-679. The court ordered Defendants to "remove all encroachments" including "fence posts, shrubs, trees, decorative vegetation, vehicles, trailers, yard waste..." CP 678. This was further confusing as there had been no evidence that Defendants had "shrubs, trees, or decorative vegetation." The court also awarded the Jacobs fees and costs in the amount of \$28,992.88 plus an unidentified sum for statutory costs. CP 678. The court did not award Mr. Rodriguez his taxes and assessments.

On June 15, 2017, the trial court signed Jacobs proposed Judgment

awarding \$29,724.18 in damages against all Defendants. The judgment included \$1,850.38 in damages that were not specified. The judgment did not include an award to Mr. Rodriguez of his taxes and assessments. CP 680-683.

Defendants brought a motion for Reconsideration on Award of Attorney Fees and Costs on June 15, 2017 and proposed a corrected judgment that included Mr. Rodriguez's award of taxes and assessments. CP 684-692. Defendants filed a response on June 26, 2017. CP 695-704

On June 26, 2017, Defendants filed a notice of cash supersedeas of \$50,000. CP 693-694. The Jacobs objected to the superseadeas amount on July 5, 2017 and requested the court increase the amount required to \$78,587.58. CP 705-723. On July 11, 2017, Defendants filed a response to the objection. CP 724-729. The court entered an order on August 4, 2017 declaring Defendants supersedeas bond deficient and required Defendants post another \$10,000. CP 730-731. Defendants filed a notice of cash supplemental supersedeas on August 10, 2017. CP 732-733.

## **V. ARGUMENT**

### **A. The trial court erred in its use of the 2012 survey of the roadways.**

Jacobs offered as evidence a survey the Defendants had ordered in July 2012. The author of the survey was no subpoenaed to testify.

Plaintiffs exhibits 2 & 12. Jacobs argued that the survey was admissible as a business record under ER 902 and ER 1005. Defendants admitted that the survey was a business record but objected to its use concerned that the court would be swayed by its interpretation of hearsay that the survey contained and treat it as an expert opinion. That concern was warranted as that is exactly what the court did.

Certified copies of public records, including surveys, are self-authenticating. ER 902 & ER 1005. Just because a document is self-authenticating does not mean that it is admissible for all purposes. A party can object to a document being admissible because it contains unsupported expert opinion or contains hearsay. A party can even challenge the document by offering evidence to impeach the content of the document. *State v. White*, 72 Wash.2d 524, 530, 433 P.2d 682 (1967).

The statements made in the survey regarding “existing field,” “existing lawn,” and “existing driveway” were made by the author of the survey who was not present to give testimony as to what he meant by those terms or why he recorded them there. The courts writings clearly indicate that it used the hearsay statements in the survey to guide its decision. In the memorandum decision, the court espoused the belief that the “2012 survey was performed to determine the current location of the roadway.” Emphasis mine. Based on this interpretation of the hearsay

statements, the court 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.

When the Jacobs failed to describe the property they claimed to have adversely possessed, the court improperly turned to the survey to try to identify the property. Since the survey was not created for that purpose, it contained no legal descriptions of the property at issue.

The court’s interpretation of the hearsay statements on the survey were not supported by extrinsic evidence. For example, the court’s position that the survey depicts the current location of the road are disproved by the photograph provided by Defendants showing vegetation growing on both sides of the road, not just one side as depicted in the survey.

The evidence that the court relied on the hearsay statements in the survey as “evidence” is further confirmed in Finding of Fact #13 which provides:

The evidence established by the Record Survey attached hereto as Exhibit ‘A’ accurately depicted the historic location of the private roadway and the boundary locations of Jacobs’ farmland, yard and driveway.

The court’s reliance on the hearsay statements in the 2012 survey to establish evidence of adverse possession was improper

and should be overturned on appeal.

**B. The trial court erred in finding that the Jacobs had adversely possessed a portion of the Rodriguez roadway.**

The trial court concluded that Jacobs prevailed on their claim for adverse possession. Conclusions of Law 1. On appeal, the trial court's factual findings are reviewed for abuse of discretion but the trial courts determination that the facts constitute a right to another's property is subject to de novo review. *Gamboa v. Clark*, 183 Wash.2d 38, 44, 348 P.3d 1214 (2015) citing *Lee v. Lozier*, 88 Wash.App. 176, 181, 945 P.2d 214 (1997). To establish a claim of adverse possession, the Jacobs must show that their possession was: 1) exclusive; 2) actual and uninterrupted, 3) open and notorious; and 4) hostile and under claim of right. *LeBleu v. Aalgaard*, 193 Wash.App. 66, 71, 371 P.3d 76 (Div. 3, 2016), citing *Chaplin v. Sanders*, 100 Wash.2d 853,857, 676 P.2d 431 (1984).

**1. Jacobs failed to identify the land they had possessed.**

Every conveyance of real property in Washington, requires a legal description of the property. *Key Design Inc., v. Moser*, 138 Wash.2d 875, 881-2, 963 P.2d 653 (1999). A party claiming rights to the property of another bears the burden of proving what property they used. *LeBleu* Id. citing RCW 4.16.020. It is error for the court to quiet title in property without regard to the legal description and it has no authority to do so.

*Kave v. McIntosh Ridge Primary Road Association*, 198 Wash.App. 812, 814, 394 P.3d 446 (Div. 2, 2017). Review of the court’s authority to order equitable relief is a question of law and is reviewed de novo. *Kave* Id. at 819.

Here, the trial court made findings about the legal descriptions of the individual parcels, but made no findings as to the legal description of the property the Jacobs had adversely possessed.<sup>2</sup> The court was unable to provide a legal description as the Jacobs failed to provide a legal description of the property they were claiming. Even their own testimony as to what they had possessed was imprecise and ranged from 7 feet to 30 feet without any designation of whether that was the width or length of the road. Many times the testimony was simply, “from here to here.”

With the absence of concise testimony, the court attempted to rely on the hearsay statements in the 2012 survey to affix a description of the area that had been adversely possessed. The court concluded that Jacobs “have possessed a portion of the panhandle of Parcel 3,” and identified that portion “as depicted on Exhibit ‘A’ as the land to the East of the record boundary of Parcel 4 and West of the dotted line marked ‘FIELD’.” (Finding of Fact 4 & 8; Conclusions of law 1).

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<sup>2</sup> The legal description provided by the court in Finding of Fact 2 for Parcel 2 did not match the legal description in the litigation guarantee. Plaintiffs exhibit 1.

Since the survey was not ordered for the purpose of identifying the disputed strip, it failed to provide the court with the requisite legal description.

Absent a legal description, the court had no authority to order equitable relief and award an unidentified portion of the Rodriguez's roadway to the Jacobs by adverse possession and must be reversed.

**2. Jacobs failed to use the land exclusively.**

The trial court found that the Jacobs had proved that their use of the road was exclusive. (Finding of Fact 4). Contrary to this, the evidence showed that many people used this strip of land including the Roberts, Rodriguez's and their predecessors. It was mowed, driven on, parked on, used to transport farm equipment, children played on it, parked bikes on it, rode horses on it, and played with radio controlled planes across it between Parcels 1 and 4. Even Mr. McCance acknowledge this use when he testified that he cut the ruts and put in the T-posts to keep people from driving on that area. In other words, the road was used as a true owner would use it, as a road.

The use made by the Jacobs did not differ fundamentally in scope or substance from that of the Defendants. *Crites v. Koch*, 49 Wash.App. 171, 175, 741 P.2d 1005 (Div. 3, 1987). The Jacobs mowed, drove on,

parked on, used to transport farm equipment, and Mr. McCance played with radio controlled planes across it.

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

The court found that the Jacobs had possessed the land for a period of 10 years. (Finding of Fact #5 & 6). Yet the evidence at trial failed to establish a consistent 10 year period when the roadway was farmed. The parties agreed that after the 2007 season, there was a period of time ranging between 1 and 3 years that the parcels were not farmed. Jacobs could not establish a 10 year period from 1995 – 2007 because Mr. Roberts did all the cutting and baling of hay on Parcels 1 and 4 and did not farm a portion of Mr. Rodriguez’s road.

The evidence at trial only demonstrated that farming of Mr. Rodriguez’s road occurred between 2011 when the ruts were cut, and 2012 when the fence went up. All other uses of the road made by the Jacobs were identical to that of the Defendants, to transport vehicles and persons and to occasionally mow.

The court also found that the Jacobs had “made improvements to the road” but did not specify which portions of the road that it was referring to or identify who and what improvements were made. (Finding of Fact 6). The testimony at trial was that Mr. McCance made changes to

the road but Mr. McCance is not a Plaintiff in this action. Furthermore, the changes made by McCance weren't improvements in the Defendants eyes and they sought restraining orders to prevent further "improvements."

Contrary to the court's finding, the testimony of all the witnesses was that the owners and residents of all the parcels used the roadway for vehicle and foot traffic and Mr. McCance even occasionally mowed the sides of the road. This use was open and obvious and no one objected to their neighbors use. Objection only arose when Mr. McCance, who was only a tenant on Parcel 1, began treating the roadway as if he was the owner. At that point, the Defendants took prompt action to stop his behavior and revoked his permission to use the road. The evidence showed that the Jacobs permission to use the road was never withdrawn.

**C. The trial court erred in finding that the Jacobs had acquired an easement by prescription over the Defendants roadways.**

The trial court concluded that Jacobs had had acquired an easement by prescription over a portion of the Defendants property. Conclusion of Law 2. Adverse possession and prescriptive easements are treated as equivalents by the courts as the elements required to establish adverse possession and prescriptive easement rights are the same. *Kunkel v. Fisher*, 106 Wash.App. 599, 602 – 3, 23 P.3d 1128 (Div. 1, 2001). The

only difference here is that Jacobs' claim for prescriptive easements applies to both defendants.

**1. Jacobs failed to identify the land they had possessed.**

The trial court found that the Jacobs had used “the historical road, which is located on the panhandle of Parcel 2 and Parcel 3.” (Finding of Fact 5). No evidence was provided as to what specific areas of the road were used for what purposes. Jacobs obtained no survey of the areas they sought a prescriptive easement over and provided no legal descriptions for the court to use in awarding them an interest in the Defendants property. Jacobs position is similar to that in *Kave v. McIntosh*. The McIntosh's did not have a survey of the trail so they asked the trial court to award them “wherever the trails are right now.” *Kave*, Id. at 820.

Once again the courts reliance on the 2012 survey to try to affix a description of the portions of Parcels 2 and 3 that had been acquired by prescriptive easement results in uncertainty. In Finding of Fact 8, the court found that “the location of the gravel road was historically consistent with the depiction of the “EXISTING DRIVEWAY” as shown on the [2012 survey]” and granted Jacobs a prescriptive easement only of that area. (Conclusion of law 2). The words “EXISTING DRIVEWAY” only appear on Parcel 2 and not on Parcel 3, and nowhere does the survey use the term, “gravel road.” Furthermore, as already shown, the area labeled

“EXISTING DRIVEWAY” does not show the vegetation area on the Roberts roadway.

In Finding of Fact 9, the court found that the Jacobs had “demonstrated that they had used the gravel roadway located on Parcel 2 and Parcel 3....” The survey does not have the term “gravel roadway” on it. The term “gravel” only appears on the survey on Parcels 3 & 4 and not on Parcel 2. The imprecision of the court’s ruling leaves great confusion as to the ownership and use rights of the property in question, which is the reason why Washington courts have always required a legal description. The court cannot quiet title without a legal description of the property at issue. *Kave Id.*

**2. Jacobs' use is presumed permissive.**

The Supreme Court noted in *Gamboa*, that the court should begin with the presumption that the use is permissive when there is a “reasonable inference of neighborly accommodation.” *Gamboa Id.* at 47. The evidence presented at trial clearly supported this inference. The testimony by both parties was that the Jacobs and the Defendants and their predecessor’s uses of the roadway were open and obvious and neighborly. The use was observed by both parties, neither whom have ever objected to that use. In fact it was conceded that the Defendants have never revoked the Jacobs permission to keep using the roadway. Only the Jacobs tenant,

Mr. McCance, was barred from using the roadway once his actions were contrary to the true owners.

To defeat the presumption of permissive use, the burden falls on the Jacobs to show that they interfered with the Defendants' use of the land in some manner. The Jacobs provided no testimony that they interfered with the Roberts use of his roadway. The Jacobs provided testimony about farming an unspecified portion of the Rodriguez's roadway, but failed to identify with specificity what portion they farmed and failed to prove conclusively that they did so for 10 consecutive years.

**D. The trial court erred in finding that Jacobs had acquired an "implied easement by necessity" over the Rodriguez and Roberts' properties.**

The trial court found that Jacobs had established an easement by necessity to use the road to access Parcels 1 and 4 for farming purposes. Finding of Fact 7. The court awarded Jacobs "an implied easement by necessity over the gravel road located on Parcel 2 and Parcel 3 for ingress and egress to their home as well as for farming purposes." Conclusion of law 3.

**1. Easement by necessity limited to public roads.**

The trial court awarded Jacobs an easement by necessity to make it easier to travel between their properties, not to reach a public road. Easements by necessity only arise for landlocked parcels that require an

easement to reach a public street. *Hellberg v. Coffin Sheep Co.*, 66 Wash. 2d 664, 667, 404 P.2d 770 (1965); RCW 8.24.010. The statute provides:

An owner, or one entitled to the beneficial use, of land which is so situate with respect to the land of another that it is necessary for its proper use and enjoyment to have and maintain a private way of necessity or to construct and maintain any drain, flume or ditch, on, across, over or through the land of such other, for agricultural, domestic or sanitary purposes, may condemn and take lands of such other sufficient in area for the construction and maintenance of such private way of necessity, or for the construction and maintenance of such drain, flume or ditch, as the case may be. The term "private way of necessity," as used in this chapter, shall mean and include a right-of-way on, across, over or through the land of another for means of ingress and egress, and the construction and maintenance thereon of roads, logging roads, flumes, canals, ditches, tunnels, tramways and other structures upon, over and through which timber, stone, minerals or other valuable materials and products may be transported and carried.

RCW 8.24.010. Jacobs's parcels 1 and 4 are not landlocked and several hundred feet of each parcel sits on Game Farm Road.

Jacobs provided no evidence that they could not access their parcels from Game Farm Road. In fact, according to Mr. Ehlers, once the fences went up, he uses Game Farm Road to access the back of Parcels 1 and 4 for farming. Jacobs testified that they have continued to farm the back of Parcels 1 and 4 the entire time the Defendants fences have been in place. Mrs. Jacobs only complaint was that farming equipment could no longer be driven across the Defendants roadways, and that she had to walk a

little bit further to get around Mr. Robert's fence to get to Parcel 1 from her residence on Parcel 4.

It would be quite a scam for an original owner to convey and sell property a portion of his property to another, and, after having received the money for the conveyance, to then claim that he actually has an easement by implication over the sold property which he created by his use prior to selling. *Adams v. Cullen*, 44 Wash.2d 502, 268 P.2d 451 (1954). Certainly errors can be made wherein the original owner accidentally leaves himself landlocked and an easement by necessity arises. But allowing such an owner to wrest a right to use the property he has sold for his convenience is another thing. To do so, absent proof of a clear necessity would arguably be the equivalent of the court promoting the perpetration of a theft.

**2. Jacobs failed to identify the land they needed.**

Once again, the Jacobs failed to meet their burden of identifying with specificity the portions of Parcels 2 and 3 they needed to cross. As a consequence, the court turned again to the 2012 survey of the Defendants roads and tried to fashion a description from it.

Plaintiffs are entitled to an implied easement by necessity over the gravel road located on Parcel 2 and Parcel 3 for ingress and egress to their home as well as for

farming purposes. This road is depicted on Exhibit "A" as that portion of Parcel 2 and Parcel 3 labeled "EXISTING DRIVEWAY."

Conclusion of Law 3. As noted previously, a review of the 2012 survey shows that the term "gravel road" never appears on the survey and there is no evidence of a "gravel road located on Parcel 2 and Parcel 3." The portion of the survey labeled, "EXISTING DRIVEWAY" is only on Parcel 2 and is not on Parcel 3. Plaintiffs exhibit 2 and 12.

The courts award is clearly ambiguous and confusing leaving the parties without a clear understanding of exactly what property the court intends to award. Fashioning legal descriptions to property is not the court's responsibility. The party bringing a case is charged with the duty of proving their case and the Jacobs have failed to do so. The trial court erred in trying to create a description and should have ruled that the Jacobs failed to meet their burden of going forward.

**E. The Trial Court erred in concluding that Defendants' fences were spite fences.**

In reliance on RCW 7.40.030, Jacobs asserted a claim for "spite fence." The statute provides for an injunction to restrain the "malicious erection" of a "structure intended to spite, injury or annoy" an adjoining property owner. A petitioner under the statute must post a bond and give notice of the hearing but the Jacobs did not. RCW 7.40.080. Remedies

available under the statute are limited to an injunction to prevent construction and/or compel removal of the structure. An injunction may be granted “at the time of commencing the action, or at any time afterwards, before judgement in that proceeding.” RCW 7.40.040

The trial court found that the Jacobs had proved that Defendants fences served no useful purpose and were intended to spite Jacobs and concluded the same. Finding of Fact 10; Conclusion of Law 4.

The elements required to prove a claim for spite fence are:

(1) that the structure damages the adjoining landowners enjoyment of his property in some significant degree;

(2) that the structure is designed as the result of malice or spitefulness primarily or solely to injury and annoy the adjoining landowner; and

(3) that the structure serves no really useful or reasonable purpose.

*Baillargeon v. Press*, 11 Wn.App. 59, 66, 521 P.2d 746, review denied, 84 Wn.2d 1010 (1974).

The trial court made no findings with regard to these specific elements nor could it do so as the Jacobs provided no evidence to establish these elements. “Generally, the failure of the trial court to make an express finding on a material fact requires that the fact be deemed to have been found against the party having the burden of proof.” *Crites v. Koch*, 49 Wn. App. 171, 176, 741 P.2d 1005, 1009 (Div. 3, 1987) *Baillargeon v.*

*Press*, 11 Wash.App. 59, 67, 521 P.2d 746 (Div. 1, 1974), review denied, 84 Wash.2d 1010 (1974).

The Defendants provided ample evidence to defeat the claim. There evidence to support the useful purpose of the fences included testimony that the fences were put up after they sought restraining orders against Mr. McCance. Mr. Rodriguez testified that the fence made him feel that his family was more protected from Mr. McCance's harassment which was continuing.

There was no evidence that the fences were erected for the sole purpose to spite, injure or annoy the Jacobs. Instead, the evidence showed that the Rodriguez's chose to stop their fence short of Mrs. Jacobs's driveway because they didn't want to interfere with her access. The Defendants testified that Mr. Roberts's fence stopped 20 feet from the center of Game Farm Road. This allowed pedestrians to walk from Parcel 4 to 1 without having to go onto the pavement of Game Farm Road.

The Jacobs also presented no evidence that the fences caused them harm. Instead, the evidence showed that Jacobs continued to be able to farm their property the entire time the fences were up with no impediment.

**F. The Trial Court erred in allowing Jacobs to amend their complaint on the first day of trial.**

The first morning of trial, the court allowed the Jacobs to amend their complaint pursuant to CR 15 adding new claims for adverse

possession and spite. The rules allows for amendment “when justice so requires.” But a motion to amend brought after the discovery deadline has passed where the claims involve new evidence or new witnesses may be properly denied as prejudicial. *Shepard v. Holmes*, 185 Wash.App. 730, ¶ 48, 345 P.3d 786 (Div. 3, 2014), citing *Karlberg v. Otten*, 167 Wash.App. 522, 529, 280 P.3d. 1123 (Div. 1, 2012). Review of a trial court’s decision on amendment is abuse of discretion. *Shepherd* Id. at ¶ 50.

There a significant difference between a claim for a right to use another’s property by easement, and a claim seeking to change ownership of the property by adverse possession. *Karlberg* Id. at 530. The evidence the Jacobs relied on, the 2012 survey, were not relevant to the easement claims, and Defendants were given no opportunity to conduct discovery or try to obtain witnesses to oppose the claim. Such evidence as testimony of prior residents of Parcels 2 and 3 and historic photographs of the area would be extremely germane to Jacobs claim for adverse possession, but not relevant to the claims for easement. Defendants pointed out that the prejudice was even more poignant in this case where, if successful, Jacobs’s new claim could potentially render Mr. Rodriguez’s parcel 3 landlocked and inaccessible.

**G. The trial court erred in denying the Rodriguez’s claim for an easement.**

The Rodriguez's only access to a public road is across the roadway that Stephen Jacobs included in Parcel 3 when he subdivided his land. See Defendants exhibit 102. An award of Mr. Rodriguez's roadway to the Jacobs would result in Parcel 3 being landlocked. Consequently when the court allowed Jacobs to amend their complaint the first day of trial, the Rodriguez's sought and were granted the right to amend their answer to add a claim for easement by necessity pursuant to RCW 8.24.010. CP 273-274.

Despite awarding the Jacobs adverse possession of Rodriguez's road, the court found that Mr. Rodriguez "failed to establish that an easement over Jacobs' land was necessary." Finding of Fact 14. The court then concluded that Mr. Rodriguez had "failed to meet his burden of proof" on the claim. Conclusions of Law 5. The court made no findings which demonstrated how Mr. Rodriguez would be able to access the public roadway. For example, there is no finding indicating that a portion of Rodriguez's road had not been adversely possessed and that portion was sufficient to support vehicle traffic. The lack of a clear description of the amount of roadway that had been awarded to Jacobs and the lack of clear findings makes it impossible for the Rodriguez's to correctly identify and ascertain what the court's error was.

**H. The trial Court erred in its award of attorney fees and costs against Defendants.**

Post-trial, Jacobs brought a motion for an award of all the attorney fees and costs they had incurred in this matter against all Defendants pursuant to RCW 7.28.083, CR 37, and RCW 4.84.110. Jacobs also sought an award of statutory fees and costs. CP 556-587. Defendants challenged the amounts claimed by Jacobs on several grounds. CP 607-615. The trial court awarded all of the attorney fees and costs incurred by Jacobs in the amount of \$28,992.88, plus and unspecified amount for statutory costs. CP 677-679. The court then entered a judgment against all Defendants in the amount of \$29,724.18 consisting of \$27,142.50 in attorney fees, \$731.30 in statutory costs, and \$1,850.38 specified as “other” but listed as “costs” in the ruling. CP 680-683. Defendants filed a motion for reconsideration on June 15, 2017. CP 684-688

**1. Jacobs failed to give notice of their intent to seek fees.**

Neither Jacobs’ original complaint nor their amended complaint filed on the first day of trial sought and award of attorney fees and costs. CP 1-21, 275-305. Jacobs gave no notice of their intent to seek fees and costs pretrial or even during trial. Defendants objected to an award of fees based on a lack of notice.

Washington is a notice pleading state. The only requirement for a complaint is that it contains “a short and plain statement of the claim showing that the pleader is entitled to relief” along with a demand “for the relief to which he deems himself entitled.” CR 8(a). Although Jacobs’ attorneys usually draft complaints with considerable detail, it is not necessary that the complaint contain detailed facts supporting the plaintiff’s cause of action. *Shoening v. Grays Harbor Community Hospital*, 40 Wn.App. 331, 337, 698 P.2d 593 (1985). Yet some notice of a claim for attorney fees is required. *Tatum v. R &R Cable Inc.*, 30 Wash. App. 580, 585-6, 636 P.2d 508 (Div. 3, 1981). The requirement arises out of common law which “required that a party from whom attorney’s fees are sought receive notice before trial. *Target National Bank v. Higgins*, 180 Wash.App. 165, 174, 321 P.3d 1215 (Div. 3, 2014) citing *Lay v. Hass*, 112 Wash.App. 818, 824, 51 P.3d 130 (Div. 2, 2002).

Based on the lack of notice of Jacobs’s intent to seek an award of attorney fees, the prejudice to the Defendants was evident at trial and the trial court erred in making such an award.

**2. Court erred in not identifying legal basis for award of fees against each party.**

Defendants’ Amended Complaint filed in March 2017 asserted claims against Rodriguez for adverse possession; easement and spite fence. The same complaint asserted claims against Roberts for easement

and spite fence. Jacobs's motion for attorney fees post trial included RCW 7.28.083 for adverse possession claims; CR 37 for discovery abuse, and 4.84.110 where tender of payment is made pretrial. The court's award did not identify the legal basis upon which the court awarded fees and costs against each party or how the court calculated the amount of fees and costs that were appropriate.

Washington follows the American rule that attorney fees and costs are only available when there is a recognized basis in statute, contract or equity for such an award. *Colwell v. Etzell*, 119 Wash.App. 432, 442, 81 P.3d 895 (Div. 3, 2003). Yet the Jacobs sought recovery of all of the fees they had expended in the action from the time their counsel was hired in 2016 through post trial proceedings. Jacobs provided no segregation as to which fees and costs were associated with which claims. The Court awarded all fees and costs sought by the Jacobs without identifying which claims each award was related to.

Generally there is no statutory basis for an award of fees and costs in a quiet title action. *Colwell* Id. When a case involves various claims, only some of which authorize an award of attorney fees, the court is required to segregate the time spent on the claims for which attorney fees are available and only award attorney fees for those services specifically related to that claim. It is improper for a court to award legal fees for time

spent on claims for which fees are not allowed. *Gaglidari v. Denny's Restaurants, Inc.*, 117 Wash.2d 426, 450, 815 P.2d 1362 (1991); citing *Travis v. Washington Horse Breeders Ass'n, Inc.*, 111 Wash.2d 396, 410–11, 759 P.2d 418 (1988); *Boeing Co. v. Sierracin Corp.*, 108 Wash.2d 38, 66, 738 P.2d 665 (1987); *Nordstrom, Inc. v. Tampourlos*, 107 Wash.2d 735, 744, 733 P.2d 208 (1987); *Fisher Properties, Inc. v. Arden–Mayfair, Inc.*, 106 Wash.2d 826, 849–50, 726 P.2d 8 (1986); *Kastanis v. Educational Employees Credit Union*, 122 Wash.2d 483, 859 P.2d 26 (1993); and *Hume v. Am. Disposal Co.*, 124 Wn.2d 656, 672–73, 880 P.2d 988, 997 (1994).

The court erred in failing to identify the legal basis upon which it awarded fees and costs against each defendant and in specifying what fees were spent on each claim for which fees were sought. This court should remand for entry of findings and conclusions to support the court's award of fees and costs against each defendant.

### **3. Court erred in awarding full costs.**

Jacobs sought an award of \$1,850.38 in costs incurred in litigation which included: photocopying costs; postage; mileage costs; and transcription fees for all depositions taken regardless of whether they were used at trial or not. Jacobs provided no legal authority for recovery of

these costs. The trial court awarded Jacobs every cost they sought without reference to legal authority for such an award.

The costs allowed to a prevailing party are identified in RCW 4.84.010 as: filing fees; fees for service of process; notary fees; expenses to obtain reports and records which are admitted at trial; statutory attorney fees; witness fees; and the reasonable expense to transcribe a deposition use at trial if it was reasonably necessary to win the case. Deposition expenses are allowed only on a pro rata basis for the portions actually used at trial.

Defendants request the court overturn the trial courts award of costs and remand for an award of costs pursuant to RCW 4.84.010.

**I. The trial court erred in its failure to award full Taxes and Assessments against Jacobs.**

Based on the evidence presented by Jacobs at trial, they were claiming that they had been in possession of a portion of Mr. Rodriguez's roadway for the entire time he owned the property, never told Mr. Rodriguez that they owned it, and allowed Mr. Rodriguez to pay all the taxes and assessments on the property. Defendant's Rodriguez asked the court to order the Jacobs to reimburse them for the taxes and assessments they had paid for the property awarded to the Jacobs by adverse possession; to order Jacobs to pay a portion of the pending taxes and

assessments; and to order Jacobs to pay a portion of future taxes and assessments pursuant to RCW 7.28.08,. CP 588-606. Given the imprecision of the amount of land awarded to Jacobs, Defendants were unable to provide a calculation to the court.

Jacobs asked the court to find that the total square footage of the Rodriguez property was 214,518 feet and that the Jacobs had only acquired by adverse possession approximately 622 feet x 20 feet. There was no evidence presented which showed how Jacobs arrived at this calculation. Jacobs then calculated the amount of taxes and assessments as 1,291.51 for the years that the Rodriguez's had resided on the property. CP 607-615.

Without making any findings, by memorandum decision, the court awarded Mr. Rodriguez \$1,291.51 and made no award for current taxes or future taxes. CP 666-676. The court entered Judgment on June 15, 2017 and did not award Mr. Rodriguez any monies at all. CP 680-683.

Rodriguez's ask this court to remand for findings on how the trial court arrived at the calculation of \$1,291.50 including how the determined the amount of property that had been adversely possessed. Rodriguez also asks that this court direct the trial erred to make an award of current taxes and assessments and future taxes and assessments; and to order the trial

court to amend the judgment and order to reflect the award of taxes and assessments to the Rodriguez's.

**J. Should Appellant be awarded attorney fees and costs on appeal?**

The trial court ruled that the Jacobs were entitled to an award of fees and costs. If this court reverses the trial court and finds that the Jacobs failed to meet their burden of proof in providing a legal description for the property they sought to acquire by adverse possession and by easement, Defendants are likewise entitled to an award of fees and costs. Defendants request an award of fees and costs pursuant to RCW 4.84.010 and RCW 7.28.083. As applicable law grants Defendants the right to recovery attorney fees and costs, Plaintiff asks this court to likewise award fees and costs pursuant to RAP 18.1.

## **VI. CONCLUSION**

The Jacobs failure to provide a legal description for the property over which they sought adverse possession and easements deprived the trial court lacked authority to grant Plaintiff the relief they sought. The trial court erred in relying on the 2012 survey as evidence. The hearsay statements on the survey were inadmissible and the survey was insufficient to provide the legal description required of the Jacobs to meet their burden of proof. In the alternative, Defendants ask this court to find

that there was insufficient evidence presented to overcome the presumption of neighborly accommodation across this roadway and that there was insufficient evidence that the Jacobs needed the roadway. Defendants ask this court to remand to the lower court to find accordingly and direct the court to determine the amount of attorney fees and costs that should be awarded to the Defendants.

Defendants ask the court to find that there was insufficient evidence to find that the fences erected by Defendants constituted spite fences under the statute and reverse the trial court's order that the fences be removed. In the alternative, Defendants ask that the issue be remanded to the trial court for specific findings of fact on each element of the claim.

Defendants ask this court to find that the trial court erred in allowing Jacobs to amend their complaint the morning of trial as amendment was prejudicial to the Defendants and remand with instructions accordingly.

Should this court find that Jacobs have proven their claim for adverse possession of a portion of Rodriguez's roadway, the Rodriguez's ask this court to find that the trial court erred in not awarding Rodriguez's an easement by necessity across the roadway to and from his home. Defendants further ask that this court remand for finding of fact on Mr. Rodriguez's claim for taxes and assessments and entry of an order that

awards the same.

Finally, Defendants ask this court to find that the trial court erred in awarding fees and costs, other than statutory costs, on the basis that the Jacobs failed to give notice of the claim pretrial. In the alternative, Defendants ask this court for remand to the lower court for identification of what fees are awarded against each defendant and the legal basis for the same.

Respectfully submitted this the 12<sup>th</sup> day of January, 2018.

 31713

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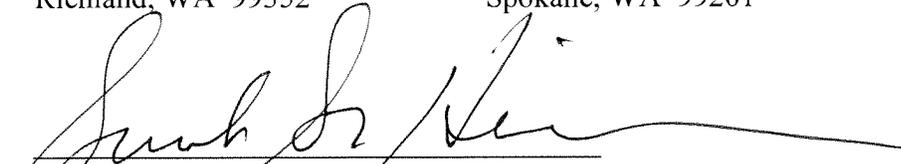
**CERTIFICATE OF SERVICE**

On January 12, 2017 I served the Brief of Appellants via first class

mail, postage pre-paid to:

Mr. Robert McMillen  
Mr. Allen Benson  
1321 Columbia Park Trail  
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