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Benton County Superior Court Cause No. 13-2-01885-1

WASHINGTON STATE COURT OF APPEALS
DIVISION III

DYONNE A. JACOBS, as Personal Representative of
STEPHAN A. JACOBS, JR., Deceased, and
DYONNE A. JACOBS,

Respondent/Petitioner,

vs.

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

Appellant/Respondent.

RESPONDENT'S REPLY BRIEF

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	1
II. ASSIGNMENTS OF ERROR.....	1
III. STATEMENT OF THE CASE	1
IV. ARGUMENT OF LAW	4
A. Response to Assignment of Error #1 - In re: hearsay testimony and Exhibits 102 and 12.....	4
A.1 Response to Assignment of Error #2. – In re: Court’s authority to grant the Plaintiff equitable relief sought	7
B. Response to Assignment of Error #3 – Finding that Jacobs adversely possessed a portion of Rodriquez property.....	8
C. Response to Assignment of Error #4 – Jacobs’ prescriptive easement.....	11
D. Response to Assignment of Error #5 – Jacobs acquired an easement by necessity.....	13
E. Response to Assignment of Error #6 – Fences erected as spite fences.....	14
F. Response to Assignment of Error #7 – Plaintiffs’ motion to amend Complaint	16
G. Response to Assignment of Error #8 – Court denied Rodriquez’s claim for easement by necessity.....	18

H. Response to Assignment of Error #9 – Jacobs’ awarded attorney’s fees.....	19
I. Response to Assignment of Error #10 – Trial court failed to award taxes and assessments.....	21
V. ATTORNEY’S FEES ON APPEAL.....	22
VI. CONCLUSION.....	22

TABLE OF AUTHORITIES

Page

WASHINGTON SUPREME COURT CASES:

Anderson v. Secret Harbor Farms, Inc.,
47 Wash.2d 490, 494, 288 P.2d 252 (1955)).....12

Criscola v. Guglielmelli,
50 Wash.2d 29, 31, 308 P.2d 239 (1957).....18

Croton Chem. Corp. v. Birkenwald, Inc.,
50 Wash.2d 684, 314 P.2d 622 (1957).....8

Dunbar v. Heinrich,
95 Wash.2d 20, 22, 622 P.2d 812 (1980)).....11, 12

ITT Rayonier v. Bell,
112 Wash.2d 754, 757, 774 P.2d 6 (1989).....8

Karasek v. Peier,
22 Wn. 419, 425, 60 P. 33 (1900).....15

Landmark Development, Inc. v. City of Roy,
138 Wash.2d 561, 573, 980 P.2d 1234 (1999).....4

Malnati v. Ramstead,
50 Wash.2d 105, 108, 309 P.2d 754 (1957)).....12

Sanwick v. Puget Sound Title Ins. Co.
70 Wash.2d 438, 444-45, 423 P.2d 624, (1967).....18

Wenatchee Sportsmen Ass'n v. Chelan County,
141 Wash.2d 169, 176, 4 P.3d 123 (2000).....8

Wilson v. Horsley,
137 Wash.2d 500, 505, 974 P.2d 316, 319 (1999).....17

WASHINGTON APPELLATE COURT CASES:

Baillargeon v. Press,
11 Wash.App. 59, 66, 521 P.2d 746 (1975).....15

<i>Crites v. Koch</i> , 49 Wash.App. 171, 175, 741 P.2d. 1005 (Div. III, 1987).	10
<i>Ives v. Ramsden</i> , 142 Wash.App. 369, 387, 174 P.3d 1231, 1240 (2008).....	17
<i>Kane v. McIntosh Ridge Primary Road Association</i> , 198 Wash.App. 812, 394 P.3d. 446.(Div. II 2017).....	9
<i>LeBleu v.Aalgaard</i> , 193 Wash.App. 66, 80-81, 371 P.3d 76 (2016).	10
<i>Lingvall v. Bartmess</i> , 97 Wash.App. 245, 249-50, 982 P.2d 690, 694 (1999)	11, 12
<i>McPhadden v. Scott</i> , 95 Wash.App. 431, 437, 975 P.2d 1033 (1999)).....	13, 14
<i>Nickell v. Southview Homeowners Ass'n</i> , 167 Wash.App. 42, 50, 271 P.3d 973 (2012).....	8
<i>Shelton v. Strickland</i> , 106 Wash.App. 45, 52, 21 P.3d 1179 (2001).....	19
<i>Woodward v. Lopez</i> , 174 Wash.App. 460, 469, 300 P.3d 417, 421 (2013).....	13

STATUTES:

RCW 5.44.040	5
RCW 7.40.030.....	14, 15
RCW 7.28.083.....	19, 22
RCW 4.84.110.....	19
RCW 7.28.083.....	19
RCW 7.28.083(3).....	20

CIVIL RULES:

CR 1517
LCR 15.....17
CR 3719

OTHER AUTHORITIES:

WASH CONST., Art. IV, §68
RAP 18.1.....22

I. INTRODUCTION

This is an action relating to a spite fence, a prescriptive easement and for adverse possession. Plaintiffs had used a common roadway for various purposes for almost 30 years before the Defendants erected fences to prevent the historical uses. Plaintiffs prevailed at trial and the court entered judgment, noting the Defendants acted with spite and that the fences served no useful purpose. The trial court also awarded attorney's fees and costs.

II. ASSIGNMENTS OF ERROR

Respondent asserts no assignments of error.

III. STATEMENT OF THE CASE

This matter relates to possession of real property located in Benton County, Washington. The Plaintiffs¹ (hereinafter "Jacobs") acquired the real property on May 28, 1963 and subdivided the twenty-acre parcel into four separate parcels, each approximately five acres. See, Ex. 102, 103; see also, CP 10. The subdivision occurred in 1984. *Id.* Each parcel has a northern border with Game Farm Road. *Id.* The parcels are numbered clockwise from 1-4 with parcel 1 being the northeast parcel. *Id.* There is a 20-foot-wide "panhandle" for both parcel 2 and parcel 3 which was intended

¹ The original parties were Stephen A. Jacobs, Jr. and Dyonne A. Jacobs as husband and wife. Mr. Jacobs died on December 8, 2013, and the Estate became a real party in interest. For ease of reference, this responsive memorandum will refer to "Jacobs" collectively as the party in interest.

to provide vehicle access to the southern end of those two parcels (where the residences of Roberts and Rodriguez are located) and from Game Farm Road. *Id*; see also, RP 92:6-9.

Over time, the boundaries between the various parcels around the common driveway and the panhandle, became blurred. See, Ex. 11, 111, 113 and 114. Furthermore, Jacobs and their agents would frequently cross over the panhandles of Parcel 2 and 3 to access their residences, for farming purposes and for recreational purposes. RP 223-233. This activity occurred frequently over the course of many years and dating back to 1984. RP 78:12-20; RP 225-228; RP 229:16-20.

The relationship between the neighbors deteriorated over time. The relationship between Roberts and, Doug McCance (Dyonne Jacobs' son) was particularly strained. Cf. RP 258:15-18. McCance lives in the home upon parcel 1 and many interactions between McCance and Roberts resulted in flared tempers, visits from the local sheriff, and restraining orders. *Id*. There was some suggestion that the deteriorated relationship had at its roots a dead dog, owned by Roberts and allegedly shot by Mr. Jacobs. RP 100:6-9; RP 397:19-23.

Tensions were so great that in the fall of 2012 Roberts and Rodriguez commissioned a survey of the property, presumptively to identify boundary lines with certainty. Ex. 12. Based upon that survey,

Rodriquez and Roberts both erected barbed wire fences along the common panhandle property lines of parcels 1 and 2 and parcel 3 and 4. CP 24 (Answer ¶14 (admitting erection of the fences in August 2012)). These two fences interfered with the Jacobs' ability to access the residence on Parcel 4 from Parcel 1 (and vice versa). RP 114-115. The fence also inhibited farming activity upon Parcels 1 and 4. RP 233:18-25. Ultimately, the trial court ruled this fence served no useful purpose and impaired the Plaintiff's use of the property. CP 672 (Findings of Fact, ¶ 10).

This lawsuit was filed on July 30, 2013. CP 1. The original attorney for Jacobs retired in September 2016 and Jacobs retained the law firm of Telquist Ziobro McMillen Clare, PLLC. CP 115-117. Little discovery had occurred and depositions were had in December 2016. At the deposition of Roberts, counsel for Jacobs was provided the survey and that became the basis for the Amended Complaint that added a cause of action for a spite fence and adverse possession of the pasture ground upon Parcel 3. CP 199-200 (survey was provided in December of 2016); CP 275-305. A three-day trial occurred in March of 2017. The Court issued its Memorandum decision on April 14, 2017. CP 540-545. Findings of Fact and Conclusions of law were entered June 15, 2017. CP 668-674. Judgment was entered that same day. CP 680-682. This appeal asserts error relative to various factual issues that arose during that trial.

IV. ARGUMENT AND AUTHORITY

Most of the issues presented on appeal (appear to) relate to factual determinations made by the trial Judge. See, *Brief of Appellant*, pg. 1-2 (“the court erred in finding . . .”). The standard of review for a trial court’s factual determinations and conclusions of law is well settled.

The standard of review for a trial court's findings of fact and conclusions of law is a two-step process. First, we must determine if the trial court's findings of fact were supported by substantial evidence in the record. If so, we must next decide whether those findings of fact support the trial court's conclusions of law.

Landmark Development, Inc. v. City of Roy, 138 Wash.2d 561, 573, 980 P.2d 1234 (1999). Here, the Court’s findings were supported by substantial evidence and thus should not be disturbed upon appeal.

A. Response to Assignment of Error #1 - In re: hearsay testimony and Exhibits 102 and 12.

Roberts/Rodriquez asserts “[T]he 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.” See, *Brief of Appellant*, pg. 19-20. The 2012 survey (Exhibit 12) indicated an area of Rodriquez’s panhandle (hereinafter the “adversely possessed area”) that was pasture ground farmed by Jacobs. The survey also noted the location of the existing driveway upon the panhandle of parcel 4. The survey had been recorded with the Auditor’s office (by Roberts) and a certified copy of the survey was admitted at trial. RP 178.

As a preliminary matter, to the extent Exhibit 12 contains hearsay, that document contains admissible hearsay pursuant to ER 803(14) and (15), as well as RCW 5.44.040.

Regardless, essentially every witness that testified corroborated the statements relative to the driveway being located upon parcel 2, that Jacobs had used that roadway for farming and other purposes, and that the Jacobs' pasture was located upon parcel 3.

Mrs. Jacobs testified that her husband, son, and agents farmed the adversely possessed area as indicated by various pictures and the survey. See, RP 61-63. She testified that the Jacobs used the panhandles to access their homes. *Id.* She also testified that the "dotted line" on Exhibit 12 was her pasture "where we were harvesting the hay off until the fence went up ...". RP 68. Again, Mrs. Jacobs corroborated the evidence indicated by the survey and was an obvious basis for the Court's ruling in relation to the adverse possession claim.

Jacobs' son, Doug McCance, also testified that Jacobs utilized the adversely possessed area for farming, recreational use, to access the houses, and for other uses. See, RP 226-233, 255.

Defendant Randall Roberts testified that he commissioned a survey with Defendant Rodriguez and erected the fence based upon its contents. RP 346, 360-363. Defendant Roberts also testified at length about the fact

that foliage, fences, railroad ties, etc., had infringed upon the panhandle. RP 278-281; RP 379-381; RP 389-392.

Other witness also corroborated the evidence contained within the survey. Charlotte Tracey, a neighbor that has resided in the area for over fifty years testified that Jacobs had used the property for farming activities for over 50 years and until his death. RP 138-139. Jacobs' granddaughter, Kristine Kohl, who recalled being familiar with the road for over 33 years and since she was two years old (see, RP 158-159), testified that the fences cut off a portion of the pasture that had been historically farmed by her family (RP 164-165) and that she had used the driveway. RP 167. Another witness, Wade Ehlers, who was familiar with the property since he was a boy, and had farmed the adversely possessed area for years (as an agent for the Jacobs) also testified that the road across the panhandle on Parcel 2 had "always been" there. RP 188:2-9.

Glaringly, even testimony of the Defendant Rodriguez supported the court's finding that Jacobs' pasture was contained within the adversely possessed area. See, RP 440 (Rodriguez indicates his driveway is across parcel 2 over Roberts' property); RP 456-457. (Rodriguez testified that prior to the fence being put up, he never used the pasture area and only used the road across parcel 2).

Finally, there was also documentary evidence to support the decision. Exhibit 100 was an aerial photo of the disputed property that clearly showed the historical use. A video played for the court clearly showed the location of the road and the pasture. See, Ex. 106 and 107. Pictures of the property also clearly indicated the pasture upon the panhandle. See, Ex 111.

In sum, there is nothing in the record indicating the court relied exclusively upon Exhibit 12 in making its conclusion and an abundant amount of testimonial and documentary evidence that supports the court's ruling relative to the adversely possessed area and the Jacobs' use of the panhandles.

A.1 Response to Assignment of Error #2. – In re: Court's authority to grant the Plaintiff equitable relief sought².

The second assignment of error asserted by the Defendant is that “the trial Court erred in finding that it had the authority to grant Jacobs the equitable relief they sought”. See, *Brief of Appellant*, II.2, pg. 1. There cannot be any real legal dispute as to the court's ability to grant the relief that the Plaintiff sought in this circumstance.

This is a dispute related to real property located within Benton County. See, Findings of Fact #1-3. Jurisdiction was never disputed. CP

² It does not appear this issue was briefed by the Appellant.

23 (Answer admitting the allegation of jurisdiction and venue with the Benton County Superior Court). Certainly, a Superior Court acting in equity can grant the relief requested by the Plaintiff. WASH CONST. Art. IV, §6 (Superior courts have original jurisdiction of matters related to possession and ownership of real property). In short, it cannot be reasonably disputed that the Superior Court had the authority to grant the relief requested by the Plaintiff.

B. Response to Assignment of Error #3 – Finding that Jacobs adversely possessed a portion of Rodriquez property.

The trial Court made a finding that Jacobs adversely possessed a portion of Rodriquez's parcel. See, CP 671-672 (Finding of Fact #4 and #5); See also, CP 673 (Conclusion of Law #1). Findings of fact are reviewed under a substantial evidence standard, defined as a quantum of evidence sufficient to persuade a rational, fair-minded person the premise is true. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wash.2d 169, 176, 4 P.3d 123 (2000). If that standard is satisfied, a reviewing court should not disturb the trial court's findings. *Croton Chem. Corp. v. Birkenwald, Inc.*, 50 Wash.2d 684, 314 P.2d 622 (1957).

To establish a claim of adverse possession, the burden is on the claimant to prove by a preponderance of the evidence that the claimant's possession is 1) exclusive, 2) actual uninterrupted, 3) open and notorious, and 4) hostile. *Nickell v. Southview Homeowners Ass'n*, 167 Wash.App.

42, 50, 271 P.3d 973 (2012) (citing *ITT Rayonier v. Bell*, 112 Wash.2d 754, 757, 774 P.2d 6 (1989)). Each of the necessary elements must have existed for ten years. *Id.*

Appellants assert the lack of a definitive description of the adversely possessed area precludes the relief obtained. This argument ignores the plain language of the court's ruling wherein it described the adversely possessed area with reference to the Exhibit 12 that was attached to the Findings and Conclusions. Appellant cites *Kane v. McIntosh Ridge Primary Road Association*, 198 Wash.App. 812, 394 P.3d. 446 (Div. II 2017) for the proposition that a legal description is necessary. *Kane* doesn't require metes and bounds description, it simply requires that there be some description of the easement. See, *Id.* at 822-23 (“[T]he record is unclear how the trail's existing location compared with the easement's legal description.”). A formal legal description isn't necessary and the findings made by the court adequately describe the adversely possessed property and the easement location.

Furthermore, there was ample testimony indicating where the Jacobs had farmed, driven upon and conducted other activity across and upon parcels 2 and 3 for an extended period of time dating back to 1976 when the property was subdivided. See discussion, *supra*, pg. 5-6. Doug 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. See RP 223-233. Rodriguez testified that he had utilized the road across parcel 2 as his driveway since he acquired the property in 2007. RP 440. Pictures of the property clearly indicated the pasture had grown into/onto the panhandle of parcel 3. Ex. 111. Plainly stated, the evidence presented indicated that the pasture had grown into and over parcel 3 and all the parties had used the panhandle of parcel 2 for access. There was ample evidence presented that clearly established the Jacobs' exclusive, actual and uninterrupted, open and notorious, as well as "hostile" use of the property that was the pasture located upon parcel 3 and for access to and from parcels 1 and 4.

Roberts/Rodriguez argue that Jacobs' use was neither "exclusive" nor continuous. *Brief of Appellant*, pg. 22-23. The element of exclusivity relates to the manner in which the claimant utilizes the property; the element does not require that the use be absolutely exclusive. See, *Crites v. Koch*, 49 Wash.App. 171, 175, 741 P.2d. 1005 (Div. III, 1987). Rather, the use must be the type of use anticipated by an owner under the circumstances. See, *Id.* See also, *LeBleu v. Aalgaard*, 193 Wash.App. 66, 80-81, 371 P.3d 76 (2016).

Based on testimony, it was clear to the trial court that Jacobs had used the pasture area as its own over an extended period of time. Mrs.

Jacobs testified that they had behaved as though she and her husband owned the road and the pasture (from 1983 onward) and that Roberts/Rodriquez simply had access across the property. See, RP 78:12-23; RP 91:23-25; RP 92:1-9. McCance's testimony was perhaps most compelling describing in detail the manner in which the Jacobs family used and maintained the road over the course of many years, behaved as though it was their road, utilizing it in a manner consistent with an owner's use of the property and farming the adversely possessed area as pasture ground. See, RP 221-237. Clearly, the Jacobs used the road in an "exclusive" manner for purposes of the adverse possession claim.

C. Response to Assignment of Error #4 – Jacobs' prescriptive easement.

Roberts/Rodriquez assert the trial court erred in finding that Jacobs was entitled to a prescriptive easement over the roadway for access and to undertake farming activities. See, *Brief of Appellant*, at pg. 1.

A prescriptive easement can be established by showing: (1) use adverse to the right of the servient owner, (2) open, notorious, and uninterrupted use for the entire prescriptive period, and (3) knowledge of such use by the owner at a time when he was able to assert and enforce his rights.'" *Lingvall v. Bartmess*, 97 Wash.App. 245, 249-50, 982 P.2d 690, 694 (1999) (quoting *Dunbar v. Heinrich*, 95 Wash.2d 20, 22, 622 P.2d 812

(1980)). “The prescriptive period in Washington is 10 years.” *Lingvall v. Bartmess*, 97 Wash.App. 245, 250, 982 P.2d 690 (1999).

“Adverse use does not import ‘ill will’ but means ‘use of the property as the owner himself would exercise, entirely disregarding the claims of others, asking permission from no one, and using the property under a claim of right.’” *Lingvall v. Bartmess*, 97 Wash.App. 245, 250, 982 P.2d 690 (1999) (quoting *Malnati v. Ramstead*, 50 Wash.2d 105, 108, 309 P.2d 754 (1957)). “Adverse use is measured objectively based on the observable acts of the user and the rightful owner.” *Lingvall v. Bartmess*, 97 Wash.App. 245, 250, 982 P.2d 690 (1999) (citing *Dunbar v. Heinrich*, 95 Wash.2d 20, 27, 622 P.2d 812 (1980)). With respect to a mutually utilized road, the claimant need not be the only person using the driveway ‘so long as he exercises and claims his right independent of others.’ *Lingvall v. Bartmess*, 97 Wash.App. 245, 252, 982 P.2d 690 (1999) (quoting *Anderson v. Secret Harbor Farms, Inc.*, 47 Wash.2d 490, 494, 288 P.2d 252 (1955)).

In much the same way that Jacobs demonstrated they adversely possessed the pasture upon parcel 3, Jacobs also demonstrated its adverse use of the roadway for the prescriptive time period. Mrs. Jacobs testified they crossed the road for farming purposes and access to the homes on Parcel 1 and 4 since 1983. RP 61-62. Non-party witness Charlotte Tracy

testified Jacobs used the road for more than 50 years. RP138-139. Kristine Kohl testified she recalls crossing the road for farming and other activities for over 30 years. RP 158-159. Wade Ehlers, as agent for the Jacobs, used and crossed the road for farming activities. RP 188:2-9. Every indication was that the Jacobs believed the road to be their own, subject to Robert's and Rodriquez's ingress and egress rights. RP 227:6-8.

D. Response to Assignment of Error #5 – Jacobs acquired an easement by necessity.

In much the same way the Jacobs demonstrated its prescriptive easement rights across the panhandle, it also demonstrated its rights to an implied easement out of necessity. An easement of necessity requires the claimant demonstrate courts look to three (3) factors to determine whether an implied easement exists: “(1) former unity of title and subsequent separation; (2) prior apparent and continuous quasi-easement for the benefit of one part of the estate to the detriment of another; and (3) a certain degree of necessity for the continuation of the easement.” *Woodward v. Lopez*, 174 Wash.App. 460, 469, 300 P.3d 417, 421 (2013) (quoting *McPhadden v. Scott*, 95 Wash.App. 431, 437, 975 P.2d 1033 (1999)). “Unity of title and subsequent separation is an absolute requirement . . . but the presence or absence of the second and third factors is not conclusive.” *Woodward v. Lopez*, 174 Wash.App. 460, 469 (2013). Instead, the second and third factors “are aids to determining the presumed intent of the parties as

disclosed by the extent and character of the use, the nature of the property and the relation of the separated parts to each other.” *Woodward v. Lopez*, 174 Wash.App. 460, 469, 300 P.3d 417, 421 (2013) (quoting *McPhadden v. Scott*, 95 Wash.App. 431, 439, 975 P.2d 1033 (1999)).

There is no dispute that Plaintiffs have met the unity and separation of title requirement insofar as the property was subdivided by Jacobs in 1976. Ex. 103. Likewise, there was ample evidence that the use by Jacobs was “apparent and continuous” for a period of over 30 years. See discussion, *supra*, pg. 5-6. Finally, Jacob’s son testified that access for farming purposes from Game Farm Road was not reasonable based upon the size of the equipment required by the farming operations. RP 212:14-23. Whether it is an easement implied from prior use or a prescriptive easement, the reality is that the Jacobs used the panhandle of Parcels 2 and 3 for access to and from parcels 1 and 4, over an extended period of time, and in a manner which generated an easement right across the parcels.

E. Response to Assignment of Error #6 – Fences erected as spite fences.

Plaintiff also asserted a claim for a “spite fence” and requested an order abating the fences erected on parcels 2 and 3, that inhibited the access to Parcels 1 and 4. See, CP 280 (Amended Complaint, stating cause of action pursuant to RCW 7.40.030). The court made findings and conclusions consistent with the Jacobs’ claim in that regard. CP 672-673.

RCW 7.40.030 provides that where any owner or lessee of land has maliciously erected such a structure with such intent, a mandatory injunction will lie to compel its abatement and removal. RCW 7.40.030. Previous decisions by the Supreme Court of Washington have held: “we have no doubt that a fence is a structure, within the meaning of the statute.” *Karasek v. Peier*, 22 Wn. 419, 425, 60 P. 33 (1900). Courts have held that, to establish a violation of RCW 7.40.030, “the court must find (1) that the structure damages the adjoining landowner’s 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 injure and annoy the adjoining landowner; and (3) that the structure serves no really useful or reasonable purpose.” *Baillargeon v. Press*, 11 Wash.App. 59, 66, 521 P.2d 746 (1975).

All of these elements were demonstrated at trial. It is obvious that the fences precluded the Jacobs from farming parcels 1 and 4. Likewise, and in consideration of the fact the fences contained nothing within the fenced area (they were simply placed upon a single boundary line) and were of very simple design (i.e. barbed wire with t-posts) the only reasonable explanation for the fences were that they were intended to preclude Jacobs’ use and access for farming purposes. In short, the fences erected in the Fall of 2012 served no purpose, inhibited historical use and were clearly intended to spite Jacobs.

F. Response to Assignment of Error #7 – Plaintiffs’ motion to amend Complaint.

Roberts/Rodriquez contend the trial court erred in permitting Jacobs to amend its complaint on the eve of trial. Some factual history relative to the timing of that motion is relevant to the issue on appeal.

The lawsuit was filed July 30, 2013. CP 1. Current counsel for Jacobs appeared on September 14, 2016 and substituting for prior counsel who had retired. CP 115. Little discovery had occurred and depositions were scheduled for December 7, 2016. It was at the deposition of Defendant Roberts that the 2012 survey was provided to Jacobs. CP 199-200. Rodriquez/Roberts relied upon the survey as the basis for erecting the fences that necessitated the lawsuit.

Counsel for both parties conferred in December of 2016 and Counsel for Jacobs indicated it would be amending the complaint to add additional claims. *Id.* Counsel for Roberts/Rodriquez indicated she had anticipated the motion. *Id.* A motion was filed to amend the Complaint on December 29, 2016. That led to settlement negotiations and a continuance of the trial date then scheduled for January 9, 2017. Those negotiations failed and the trial was rescheduled for March 15, 2017. The motion to amend the complaint was heard pretrial, wherein counsel for Roberts/Rodriquez expressed prejudice (RP 35:10-11) that Jacobs would seek leave to amend, but also represented to the Court that she “figured [in

December of 2016] that he was probably going to make an adverse possession claim.” RP 29:9-22. It was also noted that Counsel for Roberts/Rodriquez had the survey in her possession for years, while the litigation was pending and prior to the depositions in December of 2016. RP 23:19-25. The court authorized the amendment citing lack of surprise and offering a continuance of the trial if the Defendants needed additional time to prepare. CP 38:16-19 (court offered a continuance; counsel declined the invitation after consulting with client). After being given the opportunity to request a continuance, the Defendants choose not to make such a motion and the trial then occurred.

Pursuant to CR 15, the Court shall freely grant leave to amend its pleadings when justice so requires. CR 15; see also LCR 15. Courts have interpreted CR 15 to require the court to facilitate the amendment of pleadings unless such amendment would prejudice the opposing party. See, *Ives v. Ramsden*, 142 Wash.App. 369, 387, 174 P.3d 1231, 1240 (2008). These rules “serve to facilitate proper decisions on the merits, to provide parties with adequate notice of the basis for claims and defenses asserted against them, and to allow amendment of the pleadings except where amendment would result in prejudice to the opposing party.” *Wilson v. Horsley*, 137 Wash.2d 500, 505, 974 P.2d 316, 319 (1999). CR 15 is to be liberally applied, addressed to the sound discretion of the Court, and

reviewed upon a manifest abuse of discretion standard. See, *Sanwick v. Puget Sound Title Ins. Co.* 70 Wash.2d 438, 444-45, 423 P.2d 624, (1967); see also, *Criscola v. Guglielmelli*, 50 Wash.2d 29, 31, 308 P.2d 239 (1957).

The trial Court's decision to authorize the amendment on the eve of trial effectuated no prejudice upon the parties, or to the extent it did, that prejudice was waived when the Court offered the opportunity for a motion to continue and the Defendants declined. Furthermore, the additional claim for adverse possession required essentially the same factual demonstration as the claim for prescriptive easement which had been pending since the lawsuit was initiated. The Defendants were simply not prejudiced and/or waived the issue by not requesting a continuance when that was offered.

G. Response to Assignment of Error #8 – Court denied Rodriquez's claim for easement by necessity.

From the conversation about amending the Plaintiff's complaint, sprouted a motion to amend the answer to add two additional counterclaims by Rodriquez against Jacobs, one for prescriptive easement and another for an implied easement. That motion to amend was also granted. See, CP 274.

The court ruled against Rodriquez on those claims, without any real explanation (see, CP 554 ("The Court finds no percussive [sic] evidence to support Defendant's counterclaims.")), probably because there was simply no evidence that Rodriquez had used any portion of the Jacobs' property at any time, or for any reason. Quite to the contrary, there was ample evidence

that Rodriquez had utilized the panhandle of Roberts' property for ingress and egress³ in much the same manner that Jacobs had utilized the panhandle for access to and from Parcels 1 and 4 for purposes of farming, access, etc.

H. Response to Assignment of Error #9 – Jacobs awarded attorney's fees.

The court's decision granted the Jacobs essentially all of its requested relief. See, CP 549-555. A motion for attorney's fees followed soon thereafter requesting attorney's fees and statutory costs. CP 556. The motion was based upon RCW 7.28.083 and CR 37⁴ as well as RCW 4.84.110. *Id.* The court granted the motion after reviewing the supporting documentation. CP 667. Roberts/Rodriquez claims it had no notice of the exposure to fees. *Brief of Appellant*, pg 35-36.

The basis for the award was RCW 7.28.083. CP at 667. That statute states:

The prevailing party in **an action** asserting title to real property by adverse possession may request the court to award costs and reasonable attorneys' fees. The court may award all or a portion of costs and reasonable attorneys' fees to the prevailing party **if, after considering all the facts, the court determines such an award is equitable and just.**

³ Although Rodriquez has not utilized the panhandle for the requisite time period, Rodriquez could avail itself of the tacking doctrine to demonstrate its prescriptive rights over the Roberts' panhandle in much the same way inverse tacking permits Jacobs to establish adverse use for the prescriptive time period. Cf., *Shelton v. Strickland*, 106 Wash.App. 45, 52, 21 P.3d 1179 (2001).

⁴ Plaintiff propounded requests for admissions to Defendants and most all were "denied". See, CP 577-580. Those denials essentially required proof of all facts relevant to the Plaintiffs' claims and expanded the scope of trial tremendously. Although not the basis for the award of fees, CR 37 could easily have been another basis as the denials proved outright improper.

RCW 7.28.083(3) (emphasis added). For Roberts/Rodriquez to assert it had no notice of intent to seek attorney's fees is tantamount to acknowledging counsel was unaware of the law, i.e. there is a specific statute authorizing the award of attorney's fees to the prevailing party in this circumstance.

Next, the statute authorizing fees does not limit the award to the claim for adverse possession. Indeed, the statute refers to "an action" asserting title to real property rather than a particular claim. *Id.* The trial court award was for all the fees incurred while represented by trial counsel⁵ and as it related to "the action". Thus, the award was a proper exercise of judicial discretion.

Furthermore, the award was deemed equitable and just by the trial court after considering all the facts. See, CP 667. A trial court's findings of fact are afforded deference. See discussion, *supra* pg. 4. Here, the trial court was in the best position to identify which party was behaving in an "equitable and just manner" and determined that to be the Jacobs. It made a specific finding to that effect. CP 667. The Court also made a specific determination that the Defendants acted out of spite in erecting the fence and presented no credible evidence to support its position. CP 672-673 (Findings of Fact #10, 11, 12 and 15.) The "equitable and just" reality is

⁵ Plaintiff only requested fees for its involvement after prior counsel retired.

that Roberts and Rodriquez were on the wrong side of the facts and law, perpetuated litigation that ended in a three-day trial wherein it was determined both Roberts and Rodriquez lacked credibility and behaved with spite. *Id.* It should not be unexpected that a court found a legal basis, after considering all the facts, that equity warranted an award of attorney's fees.

Roberts/Rodriquez also takes issue with the Court having failed to distinguish between claims when it awarded fees. Jacobs had essentially three claims: spite fence, prescriptive easement, and adverse possession. Both the claim for prescriptive easement and adverse possession, essentially require the same facts in order to prevail, i.e. open, notorious, continuous and against a claim of right. Likewise, the facts giving rise to the spite fence claim were almost incidental to the adverse possession and prescriptive easement claim. Segregating the fees based upon the various claims is not realistic and would require the court to speculate.

I. Response to Assignment of Error #10 – Trial court failed to award taxes and assessments.

Despite the position to the contrary, the trial court **did** award Rodriquez an offset for purposes of taxes paid. CP 667. The amount was \$1,291.51 and was calculated based on a percentage of the taxes paid relative to the amount of the land adversely possessed. Jacobs will adhere to the court's ruling that it is obligated to reimburse a portion of the taxes paid by Rodriquez relative to the property adversely possessed.

V. ATTORNEY'S FEES ON APPEAL

Pursuant to RAP 18.1 and RCW 7.28.083, Respondent requests it be awarded its attorney's fees and cost for defending this appeal. As indicated above, RCW 7.28.083 authorizes attorney's fees for maintaining an action for adverse possession and the trial court determined fees were equitable and just. Defending this appeal is rightfully considered a part of the "action". Considering the Appellant asserts 10 assignments of error, all of which are essentially allegations of unsupported facts that were actually well proven, additional attorney's fees are warranted.

VI. CONCLUSION

The trial court's findings were supported by substantial evidence and should be afforded appropriate deference. The Defendants acted with spite in erecting a fence that served no useful purpose and intentionally prevented the historical access the Plaintiff's utilized for over 30 years. The trial court's rulings should be upheld.

DATED this 2nd day of April, 2018.

TELQUIST McMILLEN CLARE, PLLC
Attorneys for Respondents



By: _____
ROBERT G. MCMILLEN, WSBA #29831

CERTIFICATE OF FILING AND SERVICE

The undersigned hereby declares, under penalty of perjury, under the laws of the State of Washington, that on April 2, 2018, I electronically filed the foregoing document with the Court of Appeals, Division III. On April 2, 2018, I also caused a true and correct copy of the foregoing document to be served on the following counsel, via Inter-City Legal Messenger and U.S. Mail to:

Alicia Berry
Attorney at Law
1141 N. Edison, Ste C
Kennewick, WA 99336

DATED this 2nd day of April, 2018, at Richland, Washington.

TELQUIST McMILLEN CLARE, PLLC



By: _____
Kristi Flyg, Legal Assistant

TELQUIST MCMILLEN CLARE, PLLC

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