

No. 373177-III

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

DAVID L SNYDER and MARY B. SNYDER,

Respondents,

vs.

LANCE CAMPBELL and BRIDGET CAMPBELL,

Appellants.

APPELLANTS' OPENING BRIEF

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I. ASSIGNMENTS OF ERROR

1. The Trial Court Erred by Granting Summary Judgment in Favor of Plaintiffs as to Defendants' Claim of Adverse Possession.

Issue: Whether the location of a fence, row of trees, enclosed area and other evidence of exclusive use and/or establishment of a boundary line by prior owners is sufficient to create a question of fact as to whether title was acquired by adverse possession or mutual recognition and acquiescence?

2. The Trial Court Erred by Awarding Attorneys Fees and Costs to Plaintiffs Pursuant to RCW 7.28.083(3).

Issue: Whether a court may award attorneys fees and costs pursuant to RCW 7.28.083(3) without making any finding based on the specific facts of the case that the award is both just and equitable?

3. The Trial Court Erred by Awarding Pre-Litigation Attorneys Fees and Cost to Plaintiffs.

Issue: Whether fees and costs incurred by a party in connection with pre-litigation efforts to resolve a dispute, including offers and counter-offers of settlement and drafting proposed settlement agreements, are recoverable under RCW 7.28.083(3) as costs incurred in the "action"?

II. STATEMENT OF THE CASE

Lance and Bridget Campbell ("Campbells") are the owners of real property in Spokane County, Washington, known as 5021 N. Altamont Street in Spokane. The Campbells purchased their home from the Federal National Mortgage Association in February 2015. CP 60-64. The front of the home faces Altamont Street to the east. David and Mary Snyder own and occupy the house at 5021 N. Altamont, directly adjacent to the south of the Campbells' house. CP 97. The previous owner of the Campbell's home, Wade McClure (formerly known as Wade Peterson), owned the home from March 29, 2006 to December 17, 2014 when it was acquired by Federal National Mortgage Association at a foreclosure sale. CP 308.

When the Campbells purchased their home, there was a chain link fence located several feet south of the south side of the house. CP 156. The fence ran east to west from the southwest corner of the house to approximately 10 feet from the alley behind the house. CP 156. There was also a wood fence that ran from the west end of the chain link fence north to a garage located in the northwest portion of the back yard. CP 157. The remainder of the back yard was enclosed by a picket fence and hog wire, creating a contained area. CP 157. The enclosed area appeared to have been used to contain pets or other domestic animals. CP 157.

At the time the Campbells purchased the house, there was also a row of juniper bushes 2 - 6 feet high that extended from the east end of the chain link fence toward the front of the house. CP 157. The row of bushes was more or less in line with the chain link fence. There was grass growing on the south side of the bushes, but between the bushes and the Campbells' house there was only dirt and weeds. CP 157.

In the front of the house, there was a large spruce tree and a row of rose bushes running west to east in line with the south side of the house. The rose bushes appeared to have been present for a number of years. CP 157.

After moving into the house, the Campbells began construction of a rock retaining wall in the front of the house. The retaining wall was located entirely north of a set of concrete steps 10 feet north of the spruce tree and rose bushes. CP 157. Although the Campbells had no intention of extending the retaining wall south of the steps, the Snyders approached them and told them not to put any retaining wall in that location, claiming that anything south of the spruce tree was the Snyder's property. CP 157.

In May 2015, Bridget Campbell discovered Mrs. Snyder digging up a bush that was growing next to the foundation of the Campbell's house. CP 158. Because she was concerned the digging might be causing damage to the foundation of the house, she asked Mrs. Snyder to stop.

Mrs. Snyder claimed that the bush was on her property and she would dig there if she wanted to. CP 158.

In June 2015, the Snyders moved the chain link fence in the back of their property north so that the east end of the fence was almost touching the southwest corner of the Campbells' house. CP 158. The Snyders also removed a portion of the wood fence that ran from the west of the chain link fence north to the garage. CP 158. At about the same time, the Snyders dug up the rose bushes in the front of the Campbells' house and erected a second chain link fence from the southeast corner of the Campbells' house east to the sidewalk on Altamont. CP 158. Those actions were taken by the Snyders without consulting the Campbells or asking for their approval or permission. CP 158.

After moving the old chain link fence and erecting the new fence, the Snyders began landscaping the area north of their house all the way up to the foundation of the Campbells' house. CP 158. The Snyders began using sprinklers to water the area adjacent to the Campbells' house causing water to spray onto the side of the house enter into the Campbells' basement. The Campbells have asked the Snyders not to water directly against the side of their house, but they have refused that request. CP 158.

In July 2015, a Survey of the Snyders' property was performed by RFK Land Surveying, Inc. CP 44-52. The survey located the north line of

the Snyders' property approximately in line with the foundation of the Campbells' house, so that the eaves of the house encroach over the line. CP 45, 52. The Survey also located the north line of the parcel adjoining the Snyders' to the south approximately in line with the foundation of the Snyders' house, such that the eaves of the Snyder's house also encroach onto their neighbors property to the south. CP 52.

After the survey was completed, the Campbells and Snyders attempted to resolve their differences over the location of the boundary line. In October 2017, the Campbells accepted a proposal by the Snyders with the stipulation that the Snyders agree not to maintain flower beds or gardens under the eaves of the Campbells' house and not spray water on the side of the house. CP 159. The Snyders then rescinded their proposed settlement. CP 159.

In November 2018, a little more than a year later, the Snyders filed the present action to quiet title to the disputed strip of land. CP 1-11. The Campbells responded by denying the Snyder's claims and asserting ownership of the disputed strip of land by adverse possession. CP 286-97. On July 22, 2019, the Snyders moved for summary judgment as to the Campbells' adverse possession claim. CP 21-23. The trial court granted partial summary judgment on October 4, 2019. CP 208-11.

The Snyders then moved for an award of attorneys fees and costs pursuant to RCW 7.28.083(3). CP 212-219. In support of the motion, the Snyders submitted the declarations of attorneys Paul Stewart and Tricia Usab. CP 231-44; 220-30. Ms. Usab's time report details work performed by herself and attorney Kathryn McKinley from March 21, 2016, through July 13, 2017. CP 224-28. The next entry does not occur until September 2018, more than a year later. CP 228. All of the time spent by Ms. Usab and Ms. McKinley appears to be solely in connection with representing the Snyders in negotiations with the Campbells and attempting to reach a mutually agreeable settlement. CP 224-28. Over the Campbells' objections, the trial court granted the Snyders' request for fees and costs for the total amount requested, except for the cost of obtaining the survey. CP 265-69.

III. STANDARD OF REVIEW

The standard of review of an order granting summary judgment is de novo. The appellate court performs the same inquiry as the trial court. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). In reviewing on order on summary judgment, the appellate court, like the trial court, construes all evidence and reasonable inferences in the light most favorable to the nonmoving party. *Keck v. Collins*, 181 Wn.App. 67,

325 P.3d 306 (2014). The moving party bears the initial burden of demonstrating the absence of a material fact. If the moving party makes that initial showing, the non-moving party must set forth specific facts demonstrating a genuine issue for trial. *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989), *overruled in part on other grounds* by 130 Wn.2d 160, 922 P.2d 59 (1996).

Affidavits in support of a motion for summary judgment must set forth specific evidence demonstrating the absence of a material fact. Conclusory statements without detailed specific facts will not suffice. *See, Guile v. Ballard Community Hospital*, 70 Wn.App. 18, 26-27, 851 P.2d 689 (1993). Circumstantial evidence and direct evidence carry equal weight. *See Smith v. Dep't of Corr.*, 189 Wn. App. 839, 847, 359 P.3d 867 (2015), *review denied*, 185 Wn.2d 1004 (2016).

IV. ARGUMENT

1. Plaintiffs Failed to Establish the Absence of a Material Question of Fact as to Whether Defendants had Acquired Title to Some or All of the Disputed Property by Adverse Possession and/or Mutual Recognition and Acquiescence.

The Washington Supreme Court has identified five distinct methods of determining the legal boundary line between properties when

there is a dispute. (1) adverse possession, (2) agreement of adjoining landowners, (3) estoppel, (4) location by common grantor, and (5) mutual recognition and acquiescence. *See, Lamm v. McTighe*, 72 Wn.2d 587, 591, 434 P.2d 565 (1967). To establish a boundary line by mutual recognition and acquiescence, the claiming party must show (1) a certain, well-defined and physically designated boundary line and (2) a good faith manifestation by adjoining landowners or their predecessors in interest of a mutual recognition and acceptance of the designated line as the true boundary line (3) for a period of at least 10 years. *Id.*, 72 Wn.2d at 592-93.

Legal ownership of property through adverse possession is established by showing possession that is (1) exclusive, (2) actual and uninterrupted, (3) open and notorious, and (4) hostile for a period of at least 10 years, the period of limitation on actions to recover real property. *Chaplin v. Sanders*, 100 Wn.2d 853, 857, 676 P.2d 431 (1984). What constitutes possession of property is determined by the nature, character and locality of the property and the uses to which is ordinarily applied. *Lingvall v. Bartmess*, 97 Wn. App. 245, 255, 982 P.2d 431 (1999), see also, *Danner v. Bartel*, 21 Wn. App. 213, 216, 584 P.2d 463 (1978), overruled on other grounds by *Chaplin v. Sanders*, 100 Wn.2d at 861, n. 2. Any use that is obvious to a prudent observer is sufficient to establish

adverse possession. See, *Campbell v. Reed*, 134 Wn.App. 349, 362-63, 139 P.3d 419 (2006).

Actual possession is interrupted only when there is cessation of the possession for some period of time. *Lingvall v. Bartmess*, 97 Wn. App. at 256. A mere protest of adverse use will not interrupt possession that is hostile at its inception. *Id.* Likewise, the granting of consent that is not sought by the adverse possessor will not destroy the nature of possession that is initially adverse and hostile to the rights of the true owner. *Id.*

Possession is “hostile” when it is contrary to the rights of the true owner. Hostility, for purposes of adverse possession, does not mean enmity or ill-will toward the true owner, but instead connotes a use of the land as one’s own. *Chaplin v. Sanders*, 100 Wn.2d at 857-58. The subject intent or motive of the adverse claimant is irrelevant. *Id.*, at 860-62.

Where there is privity between successive occupants holding continuously and adversely to the true title holder, the successive periods of occupation may be tacked to each other to establish the 10-year period. *Roy v. Cunningham*, 46 Wn. App. 409, 413, 731 P.2d 526 (1986). The ultimate test as to whether title has been acquired by adverse possession is whether there has been exercise of dominion over the land in a manner

consistent with the actions a true owner would take. *ITT Rayonier, Inc. v. Bell*, 112 Wn.2d at 759.

Actual occupation, cultivation, or residency is necessary to constitute possession. *Campbell v. Reed*, 134 Wn.2d at 362-63. If a line of use is "obvious upon the ground" to a prudent observer, adverse possession may exist up to that line and a reasonable projection of the line. *Id.*, citing *Frolund v. Frankland*, 71 Wn.2d 812, 820, 431 P.2d 188 (1967).

Here, there is conflicting evidence concerning who used and maintained the disputed strip of land prior to the Campbells purchasing their home and whether there was mutual recognition that the boundary line was 1 1/2 to 2 feet south of the line established by the survey done in 2015. In support of their motion, the Snyders submitted the declarations of Rudy Kitzan, a surveyor, David Snyder, and Wade McClure. The Kitzan declaration established the boundary line as described in the deeds as being located along the south foundation of the Campbell's house, so that the eaves overhung the boundary line. David Snyder stated in his declaration that he had inherited the house south of the Campbell's home from his mother's estate in 1991. CP 98. Snyder claimed that he and his family used and maintained the area between the two houses up to the south side of Campbell's home after 1996. CP 98-99. He also claimed that a fence put up by the Snyders in 1997 in the rear half of the property

was intentionally placed about 1 1/2 feet south of the actual boundary line because there was "a fragile plant" on the boundary line. CP 99.

According to Snyder, his wife, Mary Beth, continued to "weed-whack" the strip of land lying north of the fence up to the boundary line. CP 100.

Snyder did not explain how he or his wife could have known where the actual boundary line was in light of the fact that no survey was done until 2015.

In his declaration, Wade McClure stated that he owned the Campbell property from March 2006 to December 2014, and that during his ownership of the property his understanding of the boundary line between the two properties was "in accordance with the Survey" performed in 2015. CP 309. McClure also stated that during his ownership of the property, the Snyders had "used and maintained all of the land from and including, the south boundary line of the footprint of my house on the Campbell property." CP 309. McClure did not provide any factual information to explain what his understanding of the location of the boundary line was based upon, since he did not have the benefit of the survey during the time he owned the property. Nor did he describe any conduct on the part of the Snyders that would constituted use and maintenance of the disputed strip of land.

In opposition to the motion, Bridget Campbell submitted a declaration stating that when she and her husband purchased their home, there was a chain link fence in the back yard running from approximately the rear of the house to about ten feet from the alley. CP 156. That fence was located about 2 to 2 1/2 feet south of the Campbells' house. CP 156. There was hog wire between the east end of the fence and the corner of the Campbells' house preventing access to the Campbells' back yard from the Snyders' side. CP 157. There was also a wood fence along the alley that ran from the west end of the chain link fence to a detached garage, and hog wire running from the northeast corner of the garage to a picket fence attached to the north side of the house. The result was that the Campbells' back yard was entirely enclosed. CP 157. There was also a row of juniper bushes from two to six feet tall on the south side of the house in line with the chain link fence. Grass was growing on the south side of the juniper bushes, but on the north side there was only dirt and weeds. Campbell's description of those landmarks was consistent with photographs showing the condition of the property both before and after the Campbells purchased their home. CP 157.

The declarations submitted by the Snyders in support of their motion are insufficient to establish the absence of a material question of fact. Although David Snyder claims he and his wife used and occupied

the entire area between the Snyder and Campbell houses after moving into their house in 1996, there is substantial circumstantial evidence contained in his own declaration to the contrary. While Snyder claims the chain link fence was not intended as establishing or recognizing a boundary line and was placed some distance from the true boundary line because of the existence of a "fragile plant," a reasonable trier of fact, after hearing all the evidence, could conclude that the location of the fence was consistent with the use and occupation of the area between the houses prior to 1996.

Attached to Snyder's declaration is a photograph showing a view of the property from the back of the chain link fence toward Altamont Street. That photograph shows a wooden fence on the north side of the fence almost touching the fence. CP 134. The wooden fence clearly extends well south of the red post in the photograph indicating the boundary line as established by the survey. Thus, it appears that whoever built the wooden fence believed that the chain link fence was on the actual boundary line and that they had a right to extend the wood fence to meet the chain link fence. David Snyders claims that the wood fence was built by McClure in 2014, but does not explain why the Snyders would have allowed him to construct a fence on what they claim is and always was their property.

Another photograph attached to David Snyder's declaration shows a row of juniper bushes consistent with those described by Bridget Campbell. CP 132. That row of bushes appears to be placed approximately 1 1/2 to 2 feet south of the Campbells' house and more or less in line with the chain link fence. According to Snyder, the photograph was taken in July 2018. CP 100. The bushes are as much as six feet tall and appear to have been planted some years before the photograph was taken, although it is not known exactly when or by whom they were planted.

In his declaration, Wade McClure states that he "acknowledged and agreed that the eaves along the south edge of my house extended slightly over the south boundary line of the Campbell Property and onto the Snyder Property." CP 309. He does not explain how he knew where the actual property line was, since the survey was not done until 2015, after the Campbells purchased the home. McClure also states "[m]y understanding of the property line between the Campbell Property and the Snyder Property is in accordance with the Survey that I reviewed, which was performed by RFK Surveying Inc., dated July 8, 2015, and recorded in Spokane County, as Document No. 6419293, In Book 159 of Surveys at Page 57." CP 309. However, he provides no factual basis for his alleged understanding other than the survey itself.

McClure also states that during his ownership of the property the Snyders "used and maintained all the land from and including the south boundary line of the footprint of my house on the Campbell Property." CP 309. Again, McClure provides no factual details in support of that statement. He does not describe any activities on the part of the Snyders that would constitute use or maintenance of the disputed area. Indeed, McClure's declaration does not set forth any particular facts regarding the use or maintenance of the disputed area or recognition by the adjoining property owners of a boundary line. The McClure declaration is entirely conclusory and fails to establish any specific facts.

The facts set forth in Bridget Campbell's declaration are detailed and generally consistent with the facts set forth in David Snyder's declaration. However, her declaration contains additional facts supporting an inference that the chain link fence and row of junipers was mutually recognized as establishing the boundary line between the two properties. When the Campbells purchased their home, the back yard was completely enclosed by the chain link fence, the wood fence, the garage, a picket fence on the north side of the Campbell house, and hog wire filling in the gaps. CP 157. Thus, the Snyders would have been prevented from having access to the disputed 1 1/2 to 2 feet of land at least in the rear portion of the property, and the owner of the Campbells' house would have had

exclusive use for some period of time, potentially at least as far back as 1996 when the chain link fence was erected.

The condition of the property at the time the Campbells purchased their home leads to a reasonable inference that the previous owners, including Wade McClure, had treated the line established by the chain link fence and row of juniper bushes as the true boundary line between the two properties. Despite David Snyder's claims to the contrary, it is reasonable to infer that the Snyders would have placed such a fence on or very near what they believed to be the actual boundary line. The row of juniper bushes in line with the chain link fence also tends to support an inference that both the Snyders and the prior owners of the Campbells' home accepted that line as the true boundary line.

The fact that McClure built a wooden fence along the alley at the back of the property from the detached garage all the way to the west end of the chain link fence further supports that inference. Otherwise, the south 1 to 1 1/2 feet of the wood fence would have constituted a trespass on the Snyder's property. .

Taking all inferences from the evidence in the light most favorable to the Campbells as this Court must on summary judgment, material questions of fact remain as to whether McClure and his predecessors in interest had exclusive use of the entire area north of the chain link fence

for a period of at least ten years, and whether the Snyders and prior owners of the Campbells' house recognized the line established by chain link fence and the row of juniper bushes as the true boundary line. Because material questions of fact exist as to whether the Campbells obtained title to the disputed strip of land lying north of the chain link fence through adverse possession and/or mutual recognition and acquiescence, the trial court erred by granting partial summary judgment in favor of the Snyders.

2. The Trial Court Erred by Awarding Attorneys Fees and Cost to the Snyders Without Finding that the Award was Equitable and Just as Required by RCW 7.28.083(3).

Washington follows the American rule that no attorney fees or costs may be awarded in an action absent a contract, statute, or recognized equitable exception.” *City of Seattle v. McCready*, 131 Wn.2d 266, 274, 931 P.2d 156 (1997); *Rettkowski v. Department of Ecology*, 128 Wn.2d 508, 514, 910 P.2d 462 (1996); *State ex rel. Macri v. City of Bremerton*, 8 Wn.2d 93, 113–14, 111 P.2d 612 (1941). The four equitable exceptions to the rule are: (1) the common fund theory, (2) actions by a third party subjecting an individual to litigation, (3) misconduct or bad faith by a party, and (4) the dissolution of temporary restraining orders or

injunctions when wrongfully issued. *McCready*, 131 Wash.2d at 266, 931 P.2d 156.

RCW 7.28.083(3) provides:

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. (emphasis added)

The statute does not make an award of attorneys fees and costs to a prevailing party automatic. Rather, it provides that a prevailing party "may request" fees and costs be awarded, and the court may award all or a portion of the requested fees and costs if, and only if, after considering all the facts, the court determines that the award is equitable and just.

Here, the only available exception to the rule against awarding attorneys fees to a prevailing party is RCW 7.28.083(3). Thus, the trial court's award of fees and costs can be upheld only if the court complied with the requirements of the statute. The order awarding fees and costs includes the following findings of fact:

1. On October 4, 2019, the Court entered an Order granting summary judgment against the Defendant/Counter Claimants Campbell, and in favor Plaintiffs/Counter Defendants [sic], on their competing claims for quiet title and ejection.
2. Costs in this matter are owed to the Snyders in the amount of \$1,959.88.

3. Reasonable attorneys' fees total \$36,278.50.

CP 266.

The Order contains no finding that the award of attorneys fees and costs is equitable and just in light of the specific facts of this case. Nor does the Order cite to any facts in the record as providing a basis for such a finding.

In its oral ruling, the trial court stated the following:

As far as the attorney fees are concerned, the statute provides the prevailing party is entitled to attorney fees. Had this matter settled in 2018, there wouldn't have been an award of attorney fees because wouldn't be an action to award those fees.

...

It is just and equitable for them [Snyders] to receive the entirety of that time for the simple reason that they did prevail on this issue [adverse possession]. They've attempted to assert their lawful right to that property since the very beginning and it escalated to this point to find that they were legally entitled to that property, and then to make them pay pretty much half their attorney fees to have that right affirmed wouldn't be just.
(emphasis added)

RP Vol. 2, p. 11-12.

From the foregoing, it is clear the trial court determined that the Snyders were entitled to an award of attorneys fees and cost simply because they were the prevailing party. The trial court incorrectly stated that that a prevailing party is "entitled to attorney fees" under the statute. The court did not, as required by statute, consider all of the facts of the

case to determine whether an award of attorneys fees and costs was appropriate in this particular case. Thus, the trial court committed clear error by awarding attorneys fees and costs to the Snyders.

The facts of this case do not support a finding that an award of attorneys fees and costs is both just and equitable. Both parties engaged in extensive pre-litigation efforts to negotiate a resolution. There is no evidence that the Campbells acted in bad faith or that their claims of adverse possession were frivolous. The placement of the chain link fence, the row of junipers, and the fact that the back yard was completely enclosed would lead a reasonable purchaser of the Campbells' property to believe the fence was on the true boundary line. Moreover, acknowledging the placement of the line at the south foundation of the Campbells' house would create serious issues in terms of the Campbells' ability to access that side of their house for maintenance and repairs and also protect the house from activities by the Snyders and successors in interest, such as spraying water on the foundation of the house.

After extended negotiations with the Snyders, the Campbells agreed to accept their proposed settlement with the stipulation that the Snyders agree not to maintain flower beds or gardens under the eaves of the Campbells' house and not spray water on the side of the house. CP 159. The proposed settlement was then rescinded by the Snyders.

Neither the Snyders nor the Campbells are responsible for the problems created by the placement of the boundary line as determined by survey. As pointed out by the surveyor Rudy Kitzan, it appears that the developer of the lots did not pay particular attention to the placement of the houses when they were built. The Snyders' house encroaches on the neighbors to the south in the same way the Campbells' home encroaches on the Snyders' property. CP 45. Even if the Snyders ultimately prevail in this case, there is simply no basis for finding that justice and equity require the Campbells to pay the Snyders' attorneys fees and cost.

2. Even if Reasonable Fees and Costs Are Awardable Under RCW 7.28.083(3), the Trial Court Erred by Awarding Fees and Costs Incurred in Pre-litigation Negotiations and Attempts to Reach a Settlement.

RCW 7.28.083(3) allows for an award of attorneys fees and costs to the prevailing party in an action asserting title to real property by adverse possession." Fees incurred in negotiations prior to filing a lawsuit are not recoverable as fees incurred in an "action." *Dice v. City of Montesano*, 131 Wn.App. 675, 691-92, 128 P.3d 1253 (2006)(interpreting RCW 49.48.030, which requires an award of fees and costs in "any action" in which any person is successful in recovering judgment for wages or

salary). Fees and costs incurred in investigating the factual basis for a claim, researching and developing legal theories, and conducting other necessary pre-filing preparation are recoverable. *Id.*

Here, the trial court awarded all of the fees and costs requested by the Snyders without regard to whether they were incurred in connection with the filing and maintenance of the action or in connection with the extensive negotiations that took place prior to the filing of suit. The billings submitted by Tracia Usab in support of the Snyders' request for attorneys fees and costs include extensive billings from March 21, 2016 to July 13, 2017 that appear to relate exclusively to negotiations conducted with the Campbells and their attorney regarding use of the disputed strip of land, including a number of entries concerning the drafting of a proposed easement. CP 26-29. The next entry for Ms. Usab is not until September 12, 2018, more than a year later. It appears that sometime between July 2017 and September 2018 the decision was made to file suit. However, very little, if any, of the work done by Ms. Usab prior to September 2018 appears to be preparation for litigation. Those fees and costs are not recoverable under RCW 7.28.083(3) because they were not incurred in the "action."

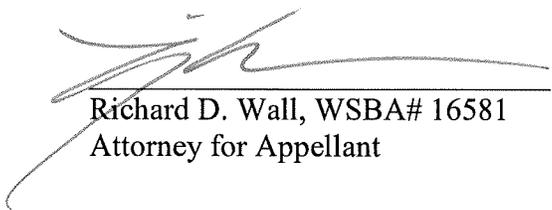
In its oral ruling, the trial court acknowledged that it was awarding fees not incurred in the "action," but reasoned that failing to award fees for

pre-filing negotiations would discourage litigants from attempting to settle disputes out of court. RP Vol. 2, p. 12. Regardless of the validity of that statement as a matter of policy, the statute only allows for an award of fees and costs incurred in the "action." The trial court clearly exceeded the authority granted by RCW 7.28.083(3) by awarding fees and costs incurred in pre-litigation negotiations.

CONCLUSION

For the foregoing reasons, this Court should reverse the trial court's order granting partial summary judgment, vacate the award of attorneys fees and costs, and remand this case for trial.

Respectfully submitted this 23rd day of April, 2020.



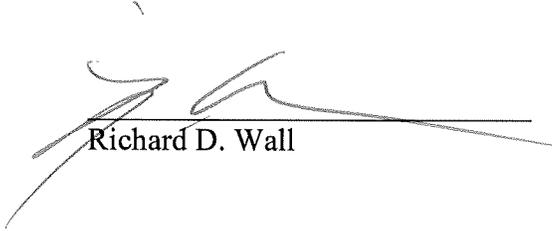
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Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 27th day of April 2020, a true and correct copy of the foregoing APPELLANT'S OPENING BRIEF was sent via email messenger to:

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