100468-1

SUPREME COURT
OF THE STATE OF WASHINGTON

Appellate Court No: **81937-2-I**
COURT OF APPEALS FOR THE STATE OF WASHINGTON, DIVISION ONE

JINRU BIAN, a married man

Petitioner,

v.

OLGA SMIRNOVA, a married woman

Respondent.

Appellant Bian PETITION FOR REVIEW

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I. IDENTIFY OF PETITIONER

Jinru Bian (Appellant) petitions the Supreme Court of Washington ("this Court") for review.

II. APPELLATE DECISIONS TO BE REVIEWED

The petitioner seeks review of the decision ("Opinion", Appendix C) by Court of Appeals, Division I ("the Court") for Bian v. Smirnova (#: 81937-2-I) filed on October 18, 2021, and the Order denying Motion for Reconsideration (Appendix D) filed on November, 10, 2021.

III. ISSUES PRESENTED FOR REVIEW [RAP13.4(b)]

A. The Court erred in Affirming the Summary Judgment because of Conflicts with Prior Opinions of the Supreme Court and Published Opinions of the Court of Appeals.

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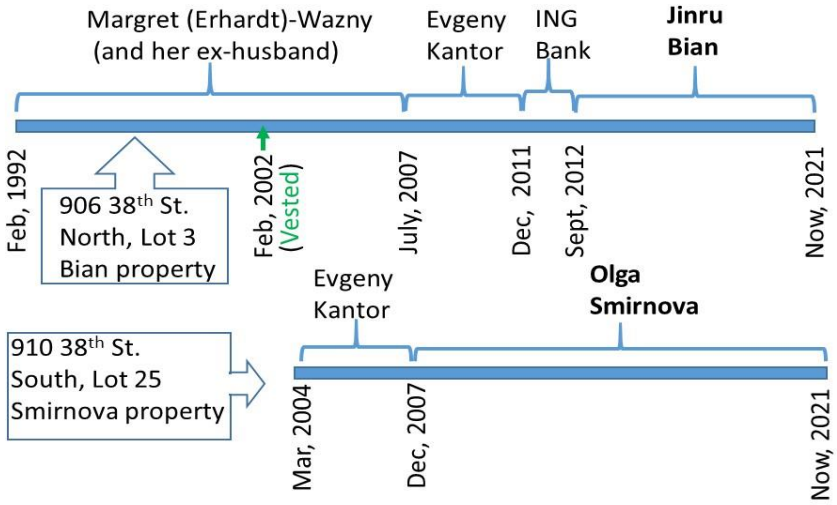
IV. STATEMENT OF THE CASE

A. THE DEED CHAINS OF THE TWO PROPERTIES.

(From Bian's Brief)



B. SUBSTANTIVE AND PROCEDURE FACTS

[The definitions of Fences by the Court are used, with addition of Fence I=II (1992-2017)]

Jinru Bian bought the property at 906 38th St, Bellingham in 2012. In 2016, Bian trimmed a tree on Bian's property (by the **agreed** boundary and a survey) to 3-feet [CP74], because the hedge was hazardous to driver's backview [CP28]. Thereafter, Smirnova, Bian's south neighbor, did the survey showing the **agreed** fence (Fence II) boundary was on south of survey line. Smirnova removed Fence II and built Fence III, north of Fence II, in 2017, extending Fence III into ramp way, limiting Bian using the ramp for which there is an easement.

After Smirnova stopped discussing the fence issue, Bian wrote letters to Smirnova, but got no response. Bian filed complaint in 2018 claiming adverse possession of the strip on that his predecessor, Margaret Erhardt, had owned the property (1992-2007) and adversely possessed the strip. Because 2018-case was closed unilaterally by Smirnova, Bian had to restart the case in 2020. Since there was no genuine issue of material fact known before 2020, including discovery in the 2018-case, Bian filed a motion for summary judgment in March 2020. In May

2020, Smirnova filed cross-motion for summary judgment and declared she demolished "Fence I" (Erhardt time) in 2007, built Fence II in 2009, and **knew** then Fence II was on south of Fence I. Although public record (zillow.com) shows the Bian property was listed for sale on 6/21/2009 and sold on 12/29/2011, **no** document shows Fence II was built in 2009 or in "**wrong**" **position**, including title-transfers and the discovery of the 2018-case.

Smirnova uses the "demolished-built" story to debate Bian's adverse-possession claim. Bian's declarations [CP27, 99, 151] and material evidences in the record show Fence II lasted from 1992 (defined as Fence I=II). There is no **material** evidence supporting Fence I existed, except Smirnova's declaration. Smirnova declared:

> "The contractor … could not install the New Fence (III) along the …line due to the **robust concrete footings** of the original posts (Fence I). …The contractor installed new posts … **four (4) inches inside** the Smirnova Property (…installed **directly** adjacent to the original posts)." (Add emphasis) [CP46]

There has been no dispute on the adverse possession Erhardt perfected in 2002 if Bian's facts are true [CP40]. Issues are: whether the "concrete footings" exist (indicating whether Fence I existed), whether merger doctrine could be used to divest the title acquired by adverse possession, and whether title transfers divested the vested title. The trial court denied Bian's summary judgment and granted Smirnova's summary judgment in August, 2020, without indicating ground(s), and denied Bian's Motion for Reconsideration, thereafter.

Bian appealed for the three issues as possible ground(s). The Court affirmed the granting of Smirnova's summary judgment. Bian moved for Reconsideration. The motion was denied on November 10, 2021.

Bian petitions this Court for review of the Opinion.

V. REASONS TO GRANT REVIEW. [RAP13.4(b)].

A. The Court Erred in Affirming the Summary Judgment because It Is in Conflict with the Opinions of the Supreme Court and Published Opinions of Court of Appeals.

Prior opinions (Emphasis added):

> Summary judgment is proper **only if** the moving party shows that there is **"no genuine issue as to any material fact** and that the moving party is entitled to a judgment as a matter of law." CR 56(c). Davis v. Cox, 183 Wn.2d 269, 351 P.3d 862, (2015).
>
> The court must review the facts in the light most favorable to the **nonmoving party**, and the motion should be granted **only if**, from all of the evidence, reasonable persons could reach but **one** conclusion. Sedwick v. Gwinn, 73 Wn. App. 879, 885, 873 P.2d 258 (1994)
>
> We will **not resolve factual issues**, but rather must determine if a genuine issue as to **any material fact** exists. Carlton v. Black (In re Estate of Black), 153 Wn.2d 152, 102 P.3d 796, 2004

1. **The Court Erred affirming the Summary Judgment when there are multiple genuine issues of material fact**, **in conflict with CR56 and the prior opinions.**

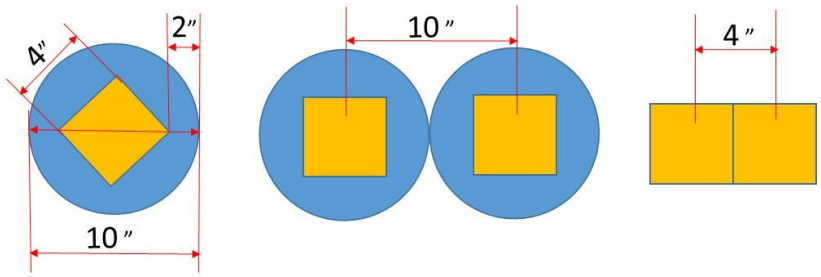
The genuine issues of material fact are exampled:

a) **Inherent genuine issue of material fact in Smirnova's declaration**

Smirnova claimed "robust concrete footings" from Fence I exist. Whether they exist is the key in this case as whether Fence I existed. The Court inferenced the "existence":

> "[T]he existing (robust concrete) footings is the only explanation Smirnova gave as to why she erected Fence III **four inches south** of the property line." (Add emphasis) (Opinion, p13)

The Court favored Smirnova's cause-effect logic. But, **this cannot be true**. The picture below illustrates 4x4 inches of posts with **concrete layers**. Fence III must have concrete



Note: From the Motion for Reconsideration. (Snohomish County Code: min. **12** inches in diameter for footing, see Appendix D)

footings to withstand strong wind. If the "concrete footings" exist, Fence III **must be 10-12 inches south** (see picture). Thus, "**(4)** inches inside" [CP46] precludes the existence of the "concrete footings" to which the new posts are "**directly** adjacent". The "(4)" (inches) is not 3, nor 5. It is impossible to install 11 (lineup) posts contacting the "concrete footings" each with diameter of **~12** inches, **but** "**four inches south".** The

Court inferenced is in error. (A reasonable reality is **footings of Fence II** squeezing the new posts north close to the survey line where no concrete footings, but **trees**, see below). The contradicted facts in Smirnova's declaration, an inherent genuine issue of material fact, forbids the summary judgment.

> Initially the burden is on the **party moving** for summary judgment **to prove by uncontroverted facts** that there is no genuine issue of material fact. If the moving party does not sustain that burden, summary judgment should **not be entered**, **irrespective of whether** the nonmoving party has submitted affidavits or other materials. (Emphasis added) Jacobsen v. State, 89 Wash. 2d 104, 569 P.2d 1152 (1977); Hope v. Larry's Mkts., 108 Wn. App. 185, 29 P.3d 1268, 2001.
>
> One who moves for summary judgment … must prove by **uncontroverted facts** that no genuine issue of material fact exists. This is true **whether the opponent** has the burden of proof on the issue at trial. (Emphasis added). Duckworth v. Bonney Lake, 91 Wn.2d 19, 586 P.2d 860, 1978

The Court ignored the rules.

b) **Genuine issue of material fact by material evidence and Bian's declaration on his experience**.

Whether the "concrete footings" exist is a **current fact.** If

they do exist, claim for adverse possession fails; if they do not, Fence II was Fence I=II. Do they exist? The record shows:

> Yes, by Smirnova declaration.
>
> No, by Bian declarations (see below)
> No, by Ex 1 from Smirnova.
> No, by Ex 2 from Bian.
> No, by the "(4) inches inside" from Smirnona
>
> No, when inferenced in favorable to the nonmoving party, **required by the prior opinions**.

The facts of Ex 1, Ex2, "four (4) inches inside", and Bian's declarations are the proofs of nonexistence of the "concrete footings" (Fence I). The Court ignored the facts, but **resolved the factual issue**, in **favor to** the **moving** party, which is in conflict with Carlton and:

> It by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. Herron v. King Broad. Co., 112 Wn.2d 762, 776 P.2d 98, 1989.

Smirnova declared: "I showed him the property line

marker, … [t]his was in addition to showing him the remnants of the cement footings from the Original Fence (Fence I) in the backyard" [CP131], as "visual representation of the property line" [CP81], Bian declared: the "showing" him "never took place" and "have never seen any" of the footings [CP100], including gardening in his backyard for 4 years. Bian requested many times for material evidence showing the existence of the "cement footings". But Smirnova never did in her following declarations. Taking photos needs minutes showing their existence, rather than declaring, briefing, inferencing by paper for years. Since above material facts show there is no "concrete footing", this genuine issue cannot be resolved only by declaring, briefing, and inferencing, unless Smirnova presents **material** evidence. [Even in trial, if (**only if**) **material** evidence of the "concrete footings" is shown, the issue is resolved and the case may be closed.][1]

1: To clarify this **simple, checkable,** true **factual** issue, Bian will give up his right to object if Smirnova provides **material** evidence (e.g., photos) **now,** showing the existence of the "cement footings" **on the north of Fence III**. Bian requests this Court authorize it.

Bian requests this Court rule who has the (further) burden of proof to resolve the factual issue of the existence-nonexistence of the objects in the context of this case, beyond "never seen" and the photos. Is it constitutional to take Bian's property only by declaring a story (against many material facts), without a single material support? But in summary judgment:

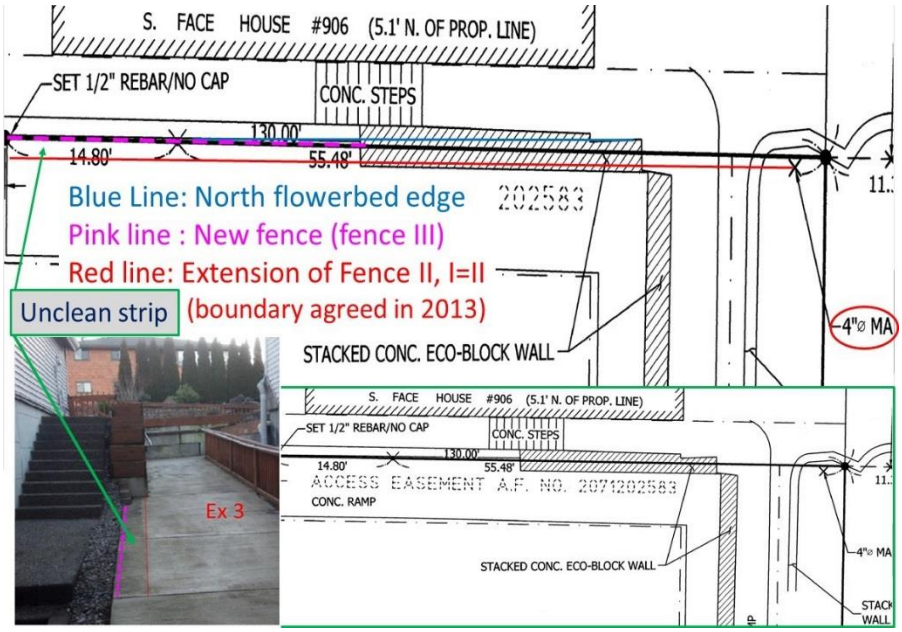
> The moving party has the burden of proving there is no genuine issue of material fact and all inferences are construed in the light most favorable to the nonmoving party. Carlton.
>
> One cannot show there is no genuine factual issue without presenting the court with the facts surrounding the critical issues. Hash v. Children's Orthopedic Hosp. & Medical Ctr., 49 Wn. App. 130, 741 P.2d 584, 1987

However, the Court ignored the requirement.

c) **Fence I=II was at the agreed boundary, evidenced by the uncleaned strip in Ex 3** (See below picture) **and historic document** [CP131].

The figure below shows that the (red) line linking the maple tree (4"ϕMA) and the south edge of flowerbed was the boundary agreed (at the extension of Fence I=II, or II) before 2016, evidenced by the uncleaned strip (Ex 3) that Smirnova left for

Bian to clean and the wood paint color difference [CP28]. Fence I=II was on south of Fence III (pink). Thus, Ex 3 confirm that the **only fence was Fence I=II**, (no fence at the extension of pink line). (This was why Bian trimmed only one tree in front in 2016, since it is on north of the maple tree.) Ex3 refutes that "I showed him … remnants of the cement footings" "as visual representation" (at the extension of pink-line).



Note: Color lines and words were added to the northeastern corner of the Survey [CP 74] (from Motion for Reconsideration)[2]

2: The Court commented: "addition of the fence in the ramp area does not shed any light on where Fence I was located", because the Court **assumed that Fence I existed** (at the extension of pink line).

Further, what Smirnova declared is conflict with the text-chat in 2017. In the chat, Bian wrote: "*Since the fence* (Fence II) *was built not by you, how do you know they did not think it was on the line*?" [CP131] During the chat, both honestly **agreed** that the fence (Fence II) was built by "they" who were before Erhardt. Sminorva did not deny "*the fence was built not by [her]*" then. This historic document from Smirnova directly contradicts her declaration that Fence II was built by her and "showed him" "cement footings", the genuine issue of material fact that the Court ignored.

The Opinion (P.11) agrees: "According to the survey, the maple tree sits south of the property line on the Smirnova Property." However, it continues "Smirnova's statement to Bian (agreed boundary at the maple tree), does not establish that Fence I encroached onto the Smirnova Property." Since the maple tree is at the (red) extension of Fence I=II (south of the survey line (pink)), the **encroachment was established**, but the Court erroneously **assumed that Fence I existed** which let the

Court make logical errors.

d) **Whether the boundary fence in the Erhardt's photo (Ex 5) was the same boundary fence in Ex 7 is a genuine issue of material fact.**

Smirnova claimed the boundary fence in Ex5 was Fence I and that in Ex 7 was Fence II, while Bian showed that in Ex 5 and 7 were the same fence, Fence I=II. The Court weighed and inferenced:

> Smirnova also submitted a photo provided by Erhardt that showed Fence I during the time Erhardt resided on the Bian Property. Smirnova established that because Fence II was not Fence I, Bian cannot prove Erhardt adversely possessed the strip of land based on the location of Fence II. (Opinion, p.8)

The **resovling factual issue** has serious errors. The photo **itself has no clue to identify** the **fence position**, and cannot "estabish[ed]" the boundary fence in Ex5 as Fence I without additional support. The Court **resolved** the issue by that the colors in two photos are different. However, the colors of **all three fences** in Ex 5 are the same, so are that in Ex 7. Since Smirnova claimed **only the boundary fence** was replaced, the

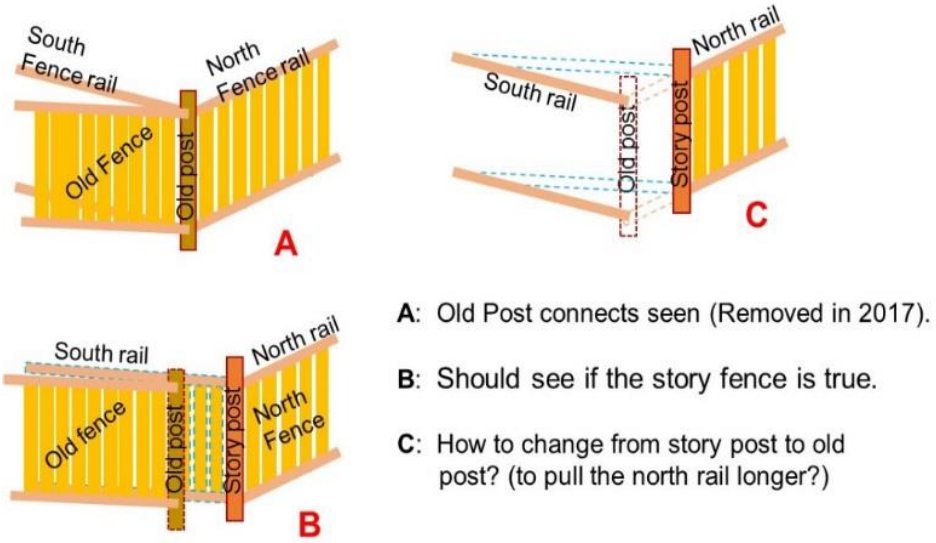
color construing fails. Second, the Court inferenced: "two fences can share the same style and not be the same fence", which does not exclude them from being the same. **Neither can be precluded** without additional materials. It is unclear **how** (logic) the Court established "Fence II was not Fence I". The **resolving factual issue** (besides in favor to the moving party) is in conflict with Carlton, Herron and:

> [I]t is well established that the function of the trial court in ruling upon a motion for summary judgment is not to resolve the basic factual issues, … Rather, the trial court's function is to determine whether a genuine issue as to any material fact exists. Mark v. Seattle Times, 96 Wn. 2d 473, 474 (1981).
>
> The appellate court must reverse summary judgment if the evidence could lead reasonable persons to reach more than one conclusion. Soproni v. Polygon Apt. Partners, 137 Wn.2d 319, 971 P.2d 500, (1999).

The Court ignored the rules in these opinions, resolving the factual issue, without showing its logic.

However, additional materials in the record support the two boundary fences are the same. First, if Fence I existed,

there must be two posts (from Fence I and II) at the 3-way junction (Ex 4, illustrated by the cartoon below). **The "story post" could not be removed, because the two west fences must be supported**. The fact of one-post at the junction precludes the existence of Fence I. The Court could not (did not) explain why there is only one post.



(From Bian's Brief, P.15, where "Old Fence" is Fence II, "Story post" is from Fence I, and **A**: Ex 4.)

Second, the lengths of the north and south fence panels from the old (junction) post are the same (~ 6-feet) and same as other panels. (Ex 4 and 7). If Fence I existed, the lengths must be **5** and 7 feet for the **south** and north panels from the junction

post, respectively, since moving the post, one foot south, must lead to 2-feet difference. This was why Bian declared:

> It is the same type of fence on all three sides as well as the same in Olga Smirnova's back yard. It was the original fencing from when the properties were developed… exactly the same as the rest of the fencing. [CP158]

Third, in Ex 4, the distance from the center of the baby trees/roots (big trees in Ex 5 were cut by Bian in 2013) to Fence II is ~ one-foot, using the picket (5.5") width as in-photo ruler. (The arrows in Ex 4 are ~2 feet, 4x5.5"+spaces). This is why Bian declared [CP154] installing Fence III made it "**necessary**… to remove vegetation (baby trees) on Bian side", because Bian knew the distance was ~ one-foot when he cut the two big trees along Fence II (hard to cut in the small space). The baby trees/roots, one-foot from Fence II, precludes Fence I at the **same position** of **Erhardt's trees** (the trees may explain why "(4) inches south"). The Court **weighed** the distance between the tree/roots and Fence II (Opinion, P.11):

> The photos do not establish that the vegetation, …, were the exact same width at the time the Erhardt photo was taken.

One cannot exclude the fact of the one-foot distance cited above. At least, this is a genuine issue to resolve by trial. The Court failed to understand that Bian had experience with Fence II, the trees from Erhardt (Ex 5) and the distance cited, and **further**,

> **Conflicting reasons or evidence rebutting their accuracy or believability are sufficient** to create competing inferences. Such inconsistencies **cannot be resolved** at the summary judgment stage. (Emphasis added) Renz v. Spokane Eye Clinic, 114 Wn. App. 611, 623 (2002)

The Court ignored the rule in the opinion.

e). **Section Summary**:

First, photos show no "concrete footing", Bian "never seen" any, and Smirnova claimed "(4) inches inside". All excludes the existence of the "concrete footings".

Second, uncleaned strip proves the boundary **agreed** at Fence II (or I=II), supported by the historic chat-document, why

Bian trimmed only one tree and Bian's declaration. These disapproves the existence of Fence I and its "concrete footings".

Third, Fence II was the fence in Erhardt time, supported by the distance of ~one-foot from the fence to the tree/roots, impossibility of moving the **junction post** one-foot south, and the same lengths of the fence panels in Ex 4.

All the three corroborate each other. The genuine issues showed are all based on material facts. But the Court believed a story **claimed** to be on "personal knowledge"; affirming the summary judgment is in conflict with prior opinions.

2. **The Court Erred in Construing Facts and Inferences in Favor of the <u>Moving</u> Party, in Conflict with Prior Opinions.**

Prior opinions:

> When determining whether an issue of material fact exists, the court must construe all facts and inferences in favor of the nonmoving party. <u>Strauss v. Premera BlueCross, 194 Wn.2d 296, 449 P.3d 640 (2019)</u>
>
> Any doubts as to the existence of a genuine issue of material fact is resolved against the

> moving party. In addition, we consider all the facts submitted and the reasonable inferences therefrom in the light most favorable to the nonmoving party Atherton Condo Ass'n v. Blume Dev. Co., 115 Wn. 2d 506, 516 (1990)

The Court construed all facts and inferenced in favor of the moving party anywhere there were two possibilities, with **obvious errors**, conflicting with the opinions. Examples:

a) In A.1.a), **"[F]our** inches south" precludes the existence of **~10"** concrete footings. However, the Court used "[F]our inches south" to support the existence of the "concrete footings", in favor of the **moving** party.

b) There are no "concrete footings" in Ex 1 and 2. However, the Court construed it as being "covered by the ground" (Opinion, p.13), in favor of the moving party. If covered, how Smirnova "showed him" as "visual representation"?

c) In A.1.d), the Court construed the two boundary fences in Ex 5 and 7 being different, erroneously by the color difference, and "two fences can share the same style and not be

the same fence" (just one of two possibilities) in favor of the moving party.

3. **The Court Erred to Resolve Factual Issues by Weighing and Balancing Evidence**, **Conflicting with Prior Opinions.**

Prior opinions (add emphasis)

> [I]t is **not** [judges] function, when ruling on a motion for summary judgment, **to resolve existing factual issues** on the merits. Rather, the court must determine whether any genuine issue of material fact exists which requires a trial on the merits. Jacobsen; Carlton
>
> Appellate courts are not suited for, and therefore not in the business of, **weighing and balancing competing evidence**. It is axiomatic that on a motion for summary judgment the trial court has **no authority to weigh evidence** or **testimonial credibility**, **nor may we do so on appeal**. Our job is to pass upon whether a burden of production has been met, not whether the evidence produced is **persuasive**. That is **the jury's role,** once a burden of production has been met. Renz.

The Court erred by departing from these rules, resolving factual issues, as if in trial. Examples:

a) In A.1.d), the Court concluded the boundary fence in Ex 5 is Fence I. Since the photo has no clue for the fence

position, there is no logic to reach the conclusion. The issue resolving is in conflict with the prior opinions.

b) The Court weighed Smirnova's declarations over Ex 1 and 2 by assuming that the (nonexistent) "concrete footings" in the photos must be "covered", conflicting with Smirnova's declaration of "showing him". The Court denying the prima facie of the material evidence for merit is in conflict with the prior opinions.

c) **Ash tree**. The ash tree in Ex 10 breaks Fence III, showing the impossibility to have Fence I at the same position. The Court assumed the ash tree, "which looks relatively young in 2016". The **survey shows 10"ϕ Ash tree**. A green ash tree with 10"ϕ is 27-year-old, not young as the Court resolved. (https://intownhawk.com/estimate-tree-age/).

d) The Court ignored why there is only one junction-post (in Ex 4, must be **two** if Fence I existed); the Google photo shows separated backyards (Ex 6) by heavy bushes in **April**

2009 (**two months before listing** the property for sale), while Smirnova claimed building Fence II in 2009 at a **wrong** position; etc., because those were inconsistent with what the Court wanted to resolve to.

e) The Court weighed the Smirnova declaration as (in) "FACTS" by its **claiming** "on personal knowledge" and cited:

> Cf. Mithoug v. Apollo Radio of Spokane, 128 Wn.2d 460, 463, 909 P.2d 291 (1996) (citing CR 56(e) and recognizing that trial courts should reject evidence when the court is presented with an affidavit not based on personal knowledge)

Cf.Mithoug requires to reject affidavits not on personal knowledge. But Cf.Mithoug does not require the Court must accept a story if it is **claimed** on personal knowledge [c**laiming** on personal knowledge is not sufficient (to prove] to be on personal knowledge] when it is against material facts. The Court assumed Smirnova has higher creditability than Bian. The Court failed to understand that Bian **had experiences** on Fence II, the distance between it and Erhardt's trees (roots), no any "concrete footings", the "heavy vegetation… impossible" to penetrate

through [CP92] (Ex 6), and, importantly **experience discussing with Smirnova** the boundary in 2013 (supported by Ex 3) and who built the fence (Fence II, supported by the historic document, CP131). The Court is in conflict with that it "has no authority to weigh evidence or testimonial credibility" (Renz) and "[I]t by no means authorizes trial on affidavits" in Summary Judgment (Herron).

B. Whether Merger Doctrine Can Be Applied to Divest the Title Vested by Adverse Possession is a matter of first impression in Washington and Should Be Determined by This Court.

The trial court did not address this and the appellate Court commented "Smirnova's argument that the doctrine of merger of title applied as an affirmative defense".

Smirnova urged the courts to divest the title vested by adverse possession by a similarity to easement extinguishing when two properties are owned by one owner. Bian presented that 1) easement is an agreement between owners while titles are identifications of land and one owner can have many titles; 2)

There is no law requiring all the easement expirations to be recorded, while **any** changes of a property title must be recorded; 3) (Automatically) merging the vested title may be against the intention of an owner (unless the owner **specifies** one or the other); 4) Merging a vested title by adverse possession conflicts with the case law for adverse possession established, and 5) how to reconcile with common grantor doctrine in Washington.

(Emphasis added)

> When real property has been held by adverse possession for ten years, such possession **ripens into an original title**. Title so acquired cannot be divested by acts other than those required where title was acquired by deed [e.g., a deed conveying a property interest.] El Cerrito. v. Ryndak, 60 Wn.2d 847, 376 P.2d 528 (1962).
>
> "Title vests **automatically** in the adverse possessor if all the elements are fulfilled throughout the statutory period…. a title obtained through adverse possession is **as strong as a title acquired by deed**: "it cannot be divested … by **any other act** short of what would be required in a case where … title was by deed". Gorman v. City of Woodinville, 175 Wn.2d 68, 283 P.3d 1082 (2012)

Once "**automatically**" ripening into "**an original title**" after ten-year adverse use, the fee simple title cannot be divested by **any** acts other than those required where title was acquired by deed. This excludes "the merger". It is important for legal instruction for the public in this field in Washington as a matter of first impression.

C. **Whether Title Transfers Can Divest the Vested Adverse Possession Title.**

This is one of the issues in this case and the Court had no comment on it.

D. **Substantial Public Interests**.

The decision from the summary of Opinion reads:

> "Because Bian failed to rebut Smirnova's evidence defeating his adverse possession claim, we affirm the trial court granting Smirnova's motion for summary judgment."

The "failed to rebut Smirnova's evidence" may be understood as "no rebuttal to the evidence" or "unsuccessfully disapprove the evidence". By above, the former is excluded. In the latter, by asking who is "right" (**in a trial**), weighing (balancing)

evidence to resolving the factual issue (with **obvious errors)** and construing facts to what the Court believed (favorable to the **moving** party) are unavoidable consequences, but **they all are forbidden by the prior opinions** for what summary judgment is designed with. The sole standard CR56 authorizes for reversing or affirming a summary judgment is whether there is a genuine issue of material fact. Failing to **successfully rebut the evidence** (verdict after trial) is different from failing to **show a genuine issue** by facts (for a trial). Consequently, the Opinion has **no comment on** (or ignores) **whether there is a genuine issue of material fact in the case,** the sole standard.

Since the Court erred by departing from the rules in the prior opinions, Bian feels he was forced to face a **unilateral** trial without chance to defense (explain) for all the "**erroneous findings**". The "trial on summary judgment" by the Court is in conflict with the prior opinions.

Affirming summary judgment when genuine issues of material fact exist in this case amounts to judicial overreach and

usurpation of citizen jury and bench judge roles, and thereby threatens a pillar centerpiece in American jurisprudence, against citizenry in violation of federal and state constitutions that ensure due process.

All the opinions cited are for justice and significant only when courts and everyone follow. The conflicts with prior opinions have significant impact upon the public interests for summary judgments: ignoring genuine issues of material fact, construing facts and evidences inferencing in favor to the moving party, and, as if in trial, resolving factual issues (to "remove" any factual issue). The Court may continue the same and influence others.

Following issues also have substantial public interests:

In Washington, how to resolve an existence-nonexistence issue of physical **checkable** objects; or who has the burden of proof to resolve the issue. If one **claims** there exist physical objects in their backyard, how the other to prove "nonexistence"

of the claimed objects, **besides "never-seen"** declaration and the **photos**?

` How to weigh preponderance of material evidence from declared story and how to treat controverted facts from moving party in summary judgment?

Whether merger doctrine can be applied to title vested by adverse possession is a matter of first impression in Washington and should be determined by this Court.

The Court claimed not to consider new argument (though there is **no** any, see p.15 in Motion for Reconsideration), which RAP 9.12 does not exclude. This Court should clarify it or add the exclusion in RAP 9.12 and CR56.

VI. CONCLUSIONS

For the foregoing, Jinru Bian respectfully requests this Court grant the petition for review and reverse the Opinion. RAP13.4(b)(1),(2),and (4).

Respectfully submitted, this 9th day of December, 2021.

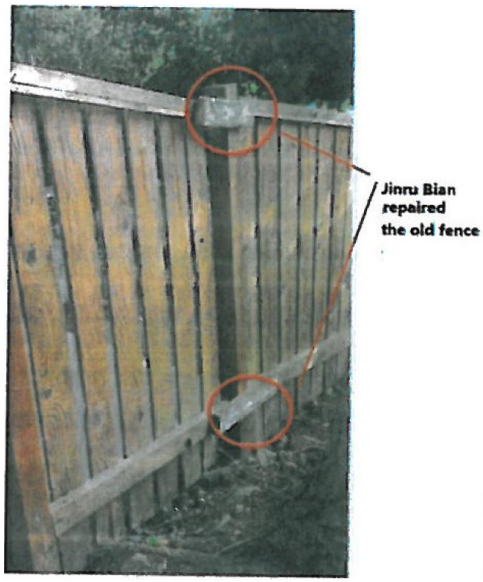
I, Jinru Bian, certify that the total number of the words above is 4953, excluding the Table of Contests (allowed 5000).

Jinru Bian, pro se Petitioner
818 Hilliary Lane
Aurora, OH 44202
Phone: 360-318-4470
Email: jbian98@gmail.com

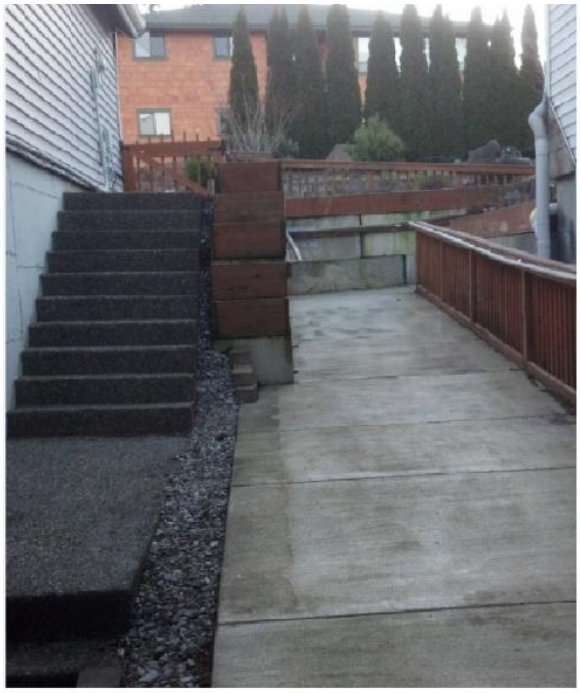
Appendix A: Exhibits

(Some are added yellow word / lines for easy to read)
(**The same set** in Brief of Appellant, for convenience)

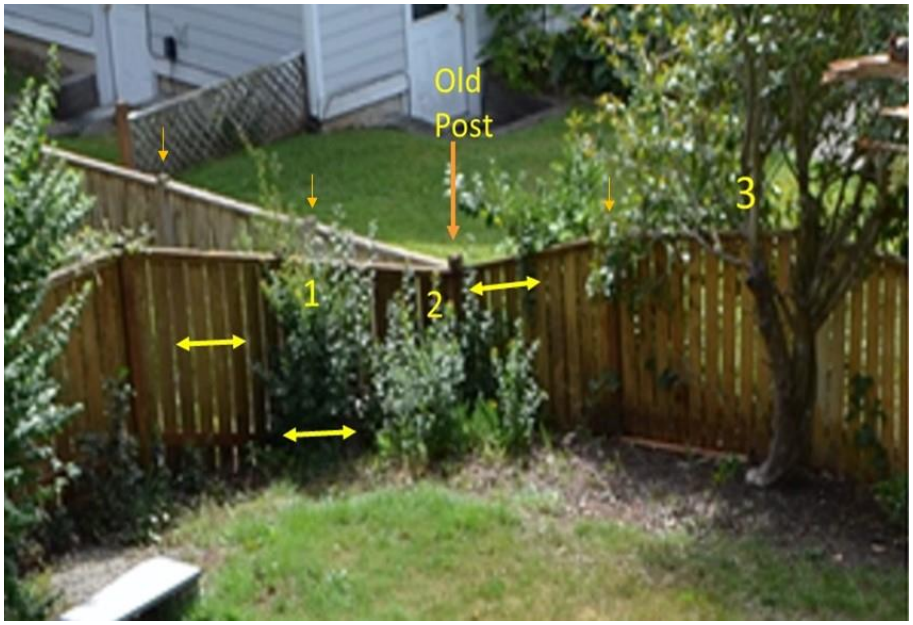
Ex 1: CP 129 (Add yellow arrows as a ruler)



Ex 2: CP 15



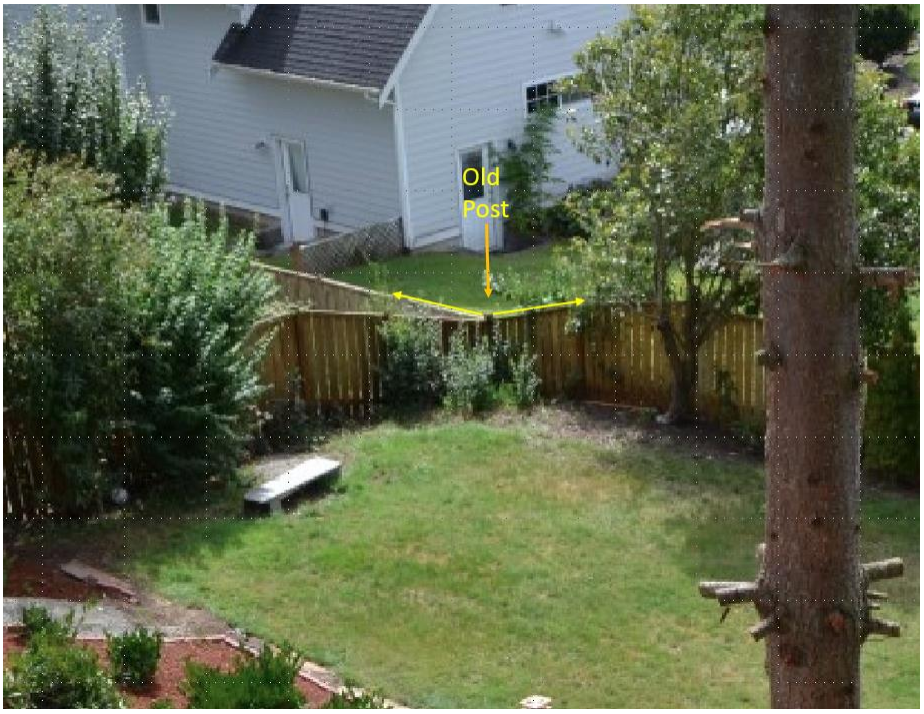
Ex 3: CP 173



Ex 4: taken from CP 172 (add yellow words and lines)

Ex 5: CP 180 (add yellow words and lines)

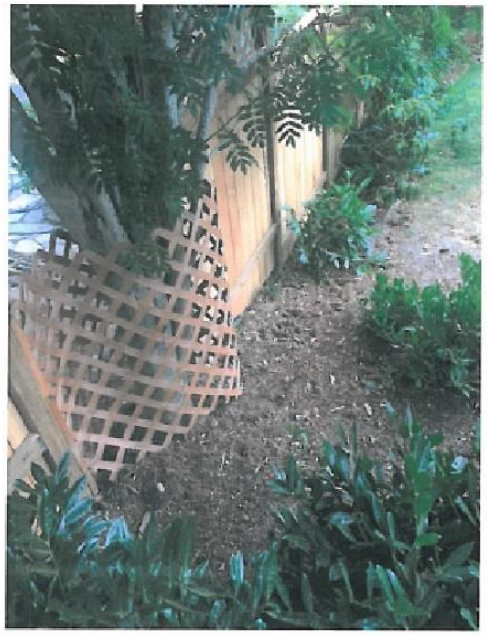
Ex 6: CP 86, CP 148 (add yellow words and lines)



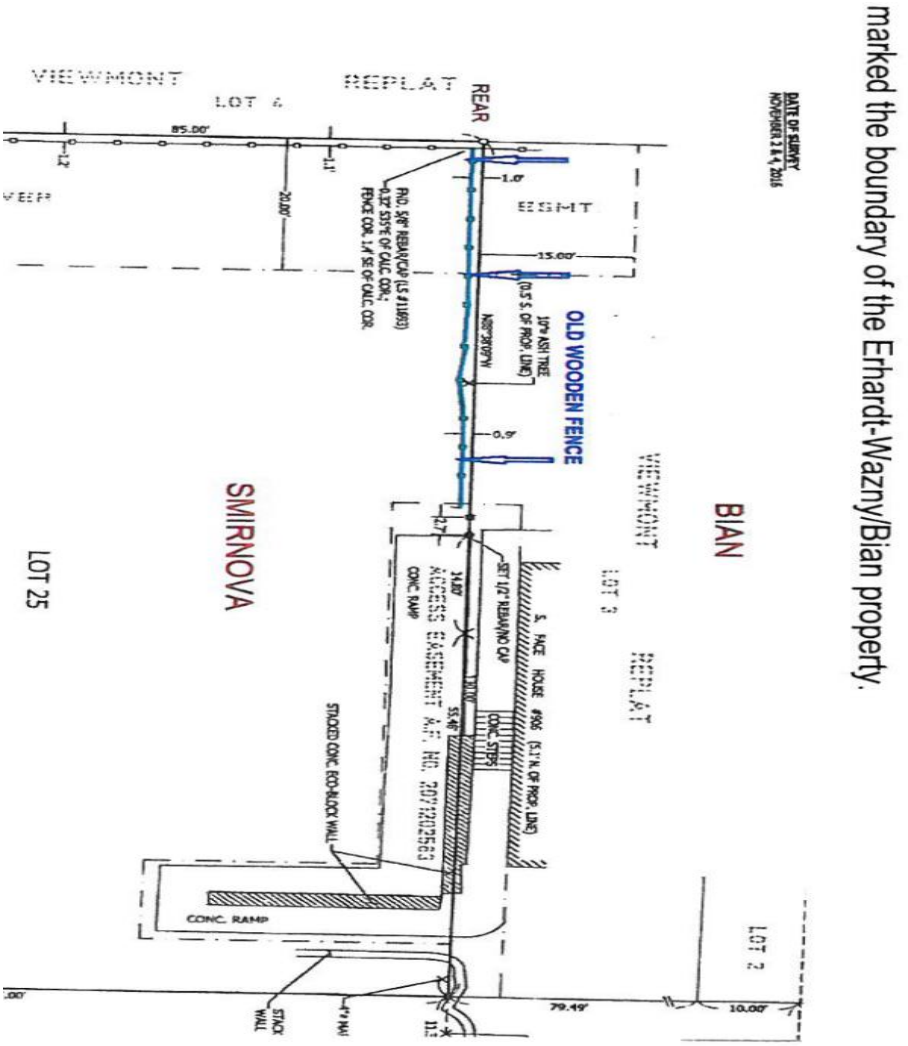
Ex 7: CP 172 (add yellow word and lines)

Ex 8: CP 15 (add red word and circle)

E**x 9**: CP 174 (add yellow word / line)



Ex 10: CP 157

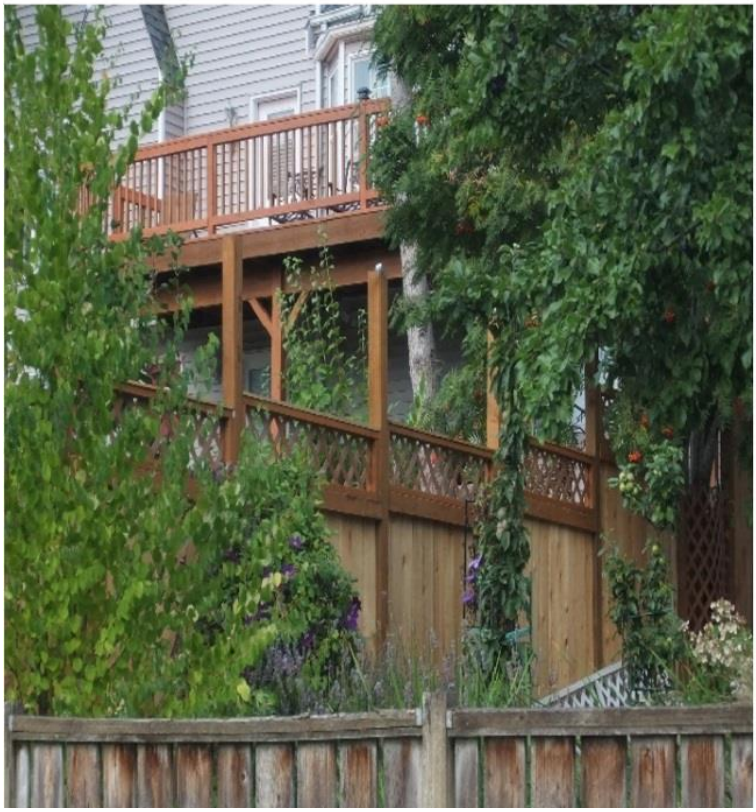


Ex 11: Related Part of Survey (CP 14)

3/15/2019 -	TTE	RESEARCH LAW REGARDING MERGER OF TITLE AND ADVERSE POSSESSION; ANALYZE CASES PROVIDED BY OPPOSING COUNSEL	2.10 280.00/hr	588.00 2.10
6/19/2019 -	TTE	DRAFT CORRESPONDENCE TO O. SMIRNOVA REGARDING STATUS UPDATE	0.20 280.00/hr	NO CHARGE 0.20
10/8/2019 -	TTE	REVIEW NOTICE OF CLERK'S DISMISSAL SET FOR NOVEMBER 3; CONFERENCE WITH SAW REGARDING SAME	0.20 280.00/hr	56.00 0.20
10/22/2019 -	TTE	REVIEW NOTE FOR TRIAL SETTING FILED BY COUNSEL FOR J. BIAN; CONFERENCE WITH SAW REGARDING SAME	0.40 280.00/hr	112.00 0.40
10/28/2019 -	TTE	TELEPHONE CONFERENCE WITH J. KOLER REGARDING SETTING OF TRIAL DATE; DISCUSS LAW IN SUPPORT OF POTENTIAL SUMMARY JUDGMENT MOTIONS; RESEARCH LAW REGARDING SAME	1.30 280.00/hr	364.00 1.30
10/31/2019 -	JAB	RESEARCH AND COMPILE DEED HISTORY AND RELATED DOCUMENTS ON PARCELS	0.70 150.00/hr	105.00 0.70
-	TTE	RESEARCH ADDITIONAL LAW REGARDING MERGER OF TITLE DOCTRINE; REVIEW CASES PROVIDED BY OPPOSING COUNSEL IN SUPPORT OF BIAN'S POSITION; REVIEW CHAIN OF TITLE FOR 906 AND 910 38TH STREET	2.10 280.00/hr	588.00 2.10
11/1/2019 -	TTE	ATTEND TRIAL SETTING CONFERENCE; RESEARCH LAW REGARDING COMPELLING ENTRY OF DISMISSAL	1.20 280.00/hr	336.00 1.20
-	JAB	RESEARCH S. JORGENSEN STATUS; E-MAIL TTE	0.10 150.00/hr	15.00 0.10
11/20/2019 -	TTE	REVIEW AND RESPOND TO CORRESPONDENCE FROM O. SMIRNOVA REGARDING UPDATE	0.20 280.00/hr	56.00 0.20

Ex 12: CP 264

Ex 13: CP 313 (left)



Ex 14: CP 313 (right)

Appendix B: FENCE POST, FOOTING SIZE AND DEPTH

(from Snohomish County)

Snohomish County Planning and Development Services
3000 Rockefeller Avenue Everett, WA 98201

https://www.snohomishcountywa.gov/DocumentCenter/View/18901/6---Fences-PDF?bidId=

https://www.snohomishcountywa.gov/DocumentCenter/View/18901/6---Fences-PDF?bidId=

TABLE 1
FENCE POST, FOOTING SIZE AND DEPTH
(All posts are spaced a maximum of 8'-0" o.c.)
Posts must be embedded to within six inches of the bottom of the footing.

1) If you have a fence height that is:	Then, 2) You need this many/size fence rails:	And, 3) The post must have a minimum nominal size of dimension of (w x d):	And, 4) The footings supporting the posts will need a minimum depth (feet) and diameter (inches) of :
Up to 7 feet high No permit required	(2) 2x6	4x4	4'-0" deep x 12" diameter Or 3'-9" deep x 16" diameter Or 3'-6" deep x 18" diameter
7 - 8 feet high Permit required	(4) 2x6	4x6 (the six-inch dimension must be perpendicular to the fence face)	4'-6" deep x 18" diameter

(APPENDIX C)

FILED
10/18/2021
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JINRU BIAN, a single man,

Appellant,

v.

OLGA SMIRNOVA and
JOHN DOE SMIRNOVA,
a married man and woman
and their marital community,

Respondent.

No. 81937-2-I

DIVISION ONE

UNPUBLISHED OPINION

COBURN, J. — Jinru Bian seeks reversal of an order granting summary judgment to his neighbor, Olga Smirnova, terminating his claim of adverse possession. He also seeks reversal of an order granting her attorney fees and costs. Because Bian failed to rebut Smirnova's evidence defeating his adverse possession claim, we affirm the trial court granting Smirnova's motion for summary judgment. We reverse the order granting attorney fees and costs because the record does not establish that the trial court determined if the award was equitable and just. We remand to the trial court for determination of attorney fees and costs consistent with this opinion.

FACTS

Margaret Erhardt purchased her Bellingham property in 1992. At the time, her backyard was enclosed by a wood fence. She believed this fence

represented the property line between her and her neighbor to the south. In 2004, Smirnova and her former husband, Evgeny Kantor, purchased the property to the south of Erhardt's property (Smirnova Property).[1]

In 2007, Kantor purchased the Erhardt property. The parties do not dispute that the fence Erhardt describes as existing when she purchased her property was the same fence that existed when Kantor purchased the Erhardt property (Fence I).

Smirnova operated a residential licensed care facility from the homes on each of the properties and, according to her later declaration, made two changes in 2007. First, Smirnova demolished Fence I to create one large backyard to benefit the residents of her care facility. The original fence posts "were cut but not removed and stayed in the ground due to the heavy labor needed to remove them." Second, she created an easement between the two properties and built a ramp and a bridge so that wheelchair-bound residents could freely move between the residences and access the outdoors.

Also according to her later declaration, Smirnova erected another wood fence (Fence II) in 2009 to secure an area for a new puppy. This fence, which she described as temporary, was made from reused materials from another project. Faced with financial and health issues, Smirnova and Kantor decided to surrender to the bank the property that formerly belonged to Erhardt. Jinru Bian

[1] The record indicates that in 2004, Kantor was the sole purchaser of the property which was later given to Smirnova by way of a quitclaim deed in 2007. Because this transaction is not at issue, for clarity, we refer to the property as the "Smirnova Property."

purchased this property from the bank in October 2012 (Bian Property).

In 2016, the relationship between Bian and Smirnova deteriorated.[2] Smirnova commissioned a survey of her property in December 2016. The survey showed the location of Fence II slightly south of the Smirnova Property's legal boundary with the Bian property. It is this strip of land, about 10 inches,[3] between the platted property line and Fence II that is the subject of this dispute. In 2017, Smirnova replaced Fence II with a new wood fence (Fence III). Fence III was installed closer to the property line but could not be installed along the exact property line given that the original fence posts had "robust concrete footings" that were too laborious to remove. The new fence was placed four inches from the platted property line inside the Smirnova Property.

Summary Judgment Motions

In February 2020, Bian sued Smirnova in King County Superior Court to quiet title, claiming adverse possession for the property between the platted property line and where Fence II had stood. He also claimed trespass, unjust enrichment, and injunctive relief. Apparently, Bian initially brought suit in 2018, but after discovery through November of 2019, the matter was dismissed for, according to Smirnova, lack of prosecution. We do not have any records associated with the 2018 matter.

Bian based his claim on the theory that Smirnova did not actually demolish

[2] The disputes, which are not issues in this appeal, involved cutting down an arborvitae and attempts to install a garden fence in the front of the properties.

[3] The 2016 survey indicates the distance between Fence II and the platted property line is 0.9 feet.

Fence I and replace it in 2009 with Fence II. Instead, Bian theorized that Smirnova's story was "fake" and that, in fact, Fence II was the same fence as Fence I. Thus, according to Bian's theory, the fence that Erhardt characterized as dividing the two properties during the time she owned the Bian Property was in place continuously from 1992, when Erhardt purchased the property, until 2017, when it was replaced with Fence III. Bian submitted a declaration from Erhardt explaining her use of the property and that she "always understood that the old wooden fence surrounding the back yard marked its boundaries," and she "did not know that the fence on the south side of our lot encompassed a sliver of land that is described in my neighbor's recorded deed." Bian also submitted a photograph he took of a corner of the backyard and fence when he first moved in before Fence II was replaced by Fence III. Smirnova submitted a photograph provided by Erhardt of the Bian Property's backyard during the time Erhardt owned it that depicted part of Fence I. Bian argued Erhardt's declaration and the photographs show that Fence I and Fence II are one and the same.

Bian moved for partial summary judgment on the adverse possession claim. Smirnova filed a cross-motion for summary judgment. The trial court denied Bian's motion for partial summary judgment and granted Smirnova's cross-motion for summary judgment. The trial court also denied Bian's motion for reconsideration.

Attorney Fees Below

In September 2020, Smirnova filed a motion for entry of judgment and award of attorney fees. Bian objected to the amount arguing that the fees related

to adverse possession needed to be segregated from the asserted claims for trespass, unjust enrichment, and Smirnova's claim that the merger doctrine applied. Bian also objected to fees associated with the dismissed 2018 action. Apparently, four hearings were held related to attorney fees.

At a hearing in November, the court granted Smirnova attorney fees and costs but directed the parties to work out the amount. We do not have the report of proceedings for the November hearing. Though the attorneys, after negotiations, appeared to have come to an agreement of $33,000 in fees and $187 in costs, Bian's counsel still needed to get approval from Bian. After not hearing back from counsel, Smirnova noted another hearing in February to enter judgment. Bian filed an objection and response and appeared pro se for the hearing. At the hearing, Bian, in addition to arguing the initial objections his attorney previously raised, stated that whatever the attorney fees the court decided to impose, they had to be "equitable and just." Smirnova argued that she negotiated in good faith and because she had to brief the motion for fees multiple times, she was requesting the original amount proposed.

The trial court granted Smirnova's request for $39,190.50 in attorney fees and $188.39 in costs. The trial court orally explained the amount requested was "reasonable" given the course of litigation. The written order explained Smirnova was "the prevailing party under RCW 7.28.083(3), and thereby entitled to an award of costs and reasonable attorney's fees."

Bian appeals the order granting Smirnova's cross-motion for summary judgment and the order denying the motion for reconsideration. Bian amended

the notice of appeal to include the order entering judgment and award of attorney fees and costs. Bian appears pro se on appeal.

DISCUSSION

Standard of Review

Summary judgment is properly granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Neighbors v. King County, 15 Wn. App. 2d 71, 80, 479 P.3d 724 (2020); CR 56(c). We review a summary judgment order de novo. Neighbors, 15 Wn. App. 2d at 80. "Summary judgment is subject to a burden shifting scheme. 'After the moving party submits adequate affidavits, the nonmoving party must set forth specific facts which sufficiently rebut the moving party's contentions and disclose the existence of a genuine issue as to a material fact.' " Michael v. Mosquera-Lacy, 165 Wn.2d 595, 601-02, 200 P.3d 695 (2009) (quoting Meyer v. Univ. of Wash., 105 Wn.2d 847, 852, 719 P.2d 98 (1986)).

Although we review facts and inferences in the light most favorable to the nonmoving party, "[o]nce there has been an initial showing of the absence of any genuine issue of material fact, the party opposing summary judgment must respond with more than conclusory allegations, speculative statements, or argumentative assertions of the existence of unresolved factual issues." Boyd v. Sunflower Props., LLC, 197 Wn. App. 137, 142-43, 389 P.3d 626 (2016).

Adverse Possession Claim

Bian argues that the trial court erred by granting summary judgment to Smirnova because he claims there is a genuine issue of material fact as to

whether the fence Smirnova dismantled in 2017 (Fence II) was the same fence that was in place in 1992 (Fence I). We disagree.

To prevail on an adverse possession claim, the claimant must show that possession of the property was exclusive, actual and uninterrupted, open and notorious, and hostile for an uninterrupted period of 10 years. Ofuasia v. Smurr, 198 Wn. App. 133, 143, 392 P.3d 1148 (2017). "When real property has been held by adverse possession for ten years, such possession ripens into an original title. Title so acquired by the adverse possessor cannot be divested by acts other than those required where title was acquired by deed." El Cerrito, Inc. v. Ryndak, 60 Wn.2d 847, 855, 376 P.2d 528 (1962).

Because Bian had not owned his property for the requisite 10 years, his adverse possession claim was entirely dependent on one fact: that the fence in existence when Bian purchased his property in 2012 was the same fence in place between 1992 and 2007 when Erhardt owned the property. Thus, Bian must prove that Erhardt adversely possessed the strip of land.

As proof for this claim, Bian submitted a declaration from Erhardt that stated, when she moved onto the property in 1992,

> there was an old wooden fence, about 5.5 feet in height, surrounding the back yard on three sides. . . . We always understood that the old wooden fence surrounding the back yard marked its boundaries. During the entire time we lived there, we used and maintained the entire area within the old wooden fence. . . . This area was used and maintained exclusively by me; no one else maintained or used the back yard.

Bian concedes that part of the fence must have been taken down when Smirnova built the ramp in 2007 but maintains that the rest of the fence that existed when

he bought the property in 2012 was the same fence that Erhardt relied upon to designate her back yard for more than 10 years. Because the 2016 survey shows that the fence Smirnova took down in 2017 was inside the Smirnova Property, Bian contends Erhardt adversely possessed the strip of land between that fence and the platted property line.

In response to Bian's motion for partial summary judgment and in support of her own summary judgment motion, Smirnova established that she has resided on the Smirnova Property since 2004 and ran a licensed care facility from her home and the Erhardt property when her former husband bought it in 2007 until it was surrendered to the bank in 2011. She declared that she removed Fence I in 2007 to create an open back yard and put up Fence II in 2009 because of a new dog. When she replaced Fence II with Fence III, the new fence could not be placed exactly on the actual platted property line because the original fence posts had "robust concrete footings" that were too laborious to remove. Thus, Fence III is four inches inside the Smirnova Property and closer to the property line than Fence II, but Fence I as she understood it, was on the property line. Smirnova also submitted a photo provided by Erhardt that showed Fence I during the time Erhardt resided on the Bian Property.

Smirnova established that because Fence II was not Fence I, Bian cannot prove Erhardt adversely possessed the strip of land based on the location of Fence II.

As the opposing party to Smirnova's cross-motion for summary judgment, he was required to respond with more than conclusory allegations and

speculative statements that Smirnova's explanation about the fences was "fabricated" and a "fake" story. He contends that Smirnova presents only "conclusory statements" and "self-serving" claims with "zero evidence." Bian fails to understand that Smirnova presents evidence based on personal knowledge because she lived on the Smirnova Property during the time in question. The evidence she presented in her declaration cannot be disregarded as simply conclusory statements because Bian chooses not to believe them. Cf. Mithoug v. Apollo Radio of Spokane, 128 Wn.2d 460, 463, 909 P.2d 291 (1996) (citing CR 56(e) and recognizing that trial courts should reject evidence when the court is presented with an affidavit not based on personal knowledge).

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of a pleading, but a response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

CR 56(e).

Bian submitted multiple photos, including three photos of the fence that existed at the time he bought the property.[4] One photo is described as a Google

[4] Bian also submitted two before and after photos of the ramp area showing where there was no fence before the survey and where Smirnova installed a fence after the survey. The addition of the fence in the ramp area does not shed any light on where Fence I was located.

We do not consider a photo Bian refers to in his brief that was submitted with his pro se response and objection to the entry of the order for judgment and award. "On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court." RAP 9.12. "The purpose of this limitation is to effectuate the rule that the appellate court engages in the same inquiry as the trial court." Mithoug, 128 Wn.2d at 462.

Earth photo reportedly taken on April 30, 2009. It is an aerial photo from a far distance that depicts what appears to be shrubbery and trees in between the back yards of the two properties. Another photo shows Fence III and how it meets up with lattice surrounding the trunk of an ash tree. Another photo shows from a distance the top portion of a maple tree on the other side of the ramp near the east end of the property line. Three other photos show the fence that existed in his back yard after he bought the property and before it was removed and replaced with Fence III. One photo is taken from very far away and another is a close photo of a part of the fence where Bian had repaired it. The third photo is taken of the northwest corner of Bian's backyard as it was when he bought the property.

A. Trees and Vegetation

Bian first contends that the locations of pine, ash, and maple trees prove it would have been "impossible" to have had Fence I located on the property line.

Bian first questions, without any support from an arborist, how Fence I could have existed given the size and location of the pine tree. As indicated by the photo of the pine, it is located on the Bian Property beyond the property line at the time of the survey in 2016. Logic follows that a younger pine would have been even further from the property line when Erhardt owned the property if the pine was present at that time.

Bian next argues, without any support, that it would have been "impossible" for Smirnova to plant the ash tree "beyond the 'original' fence"

because of its location. According to the survey, the ash tree was on the Smirnova Property six inches south of the property line but north of Fence II. Bian provided no evidence that the ash tree, which looks relatively young in 2016, existed 24 years earlier when Erhardt purchased the property in 1992, or nine years earlier when Erhardt sold her property to Smirnova's former husband. Bian also ignores Smirnova's explanation that there was no fence at the location between 2007 and 2009.

The maple tree was a demarcation of the property line according to Bian, who claims that Smirnova told him in 2013 the boundary of the property was the ramp to the maple tree. According to the survey, the maple tree sits south of the property line on the Smirnova Property. Smirnova's statement to Bian, does not establish that Fence I encroached onto the Smirnova Property.

Bian next relies on the aerial Google Earth photo of the properties, the photo supplied by Erhardt of the northeast corner of the Bian Property when she lived there, and Bian's photo of the same northeast corner after he bought the property. Bian contends the photos prove that Fence II that encroached on the Smirnova Property was the same fence that existed when Erhardt owned the Bian Property, because 1) the width of the garden bed is the same, and 2) the same three "trees" appear in the same location relative to the fence in these photos.

The difference in distance between the property line and Fence II is 10.8 inches according to the survey. The photos do not establish that the vegetation, including garden beds, were the exact same width at the time the Erhardt photo

was taken and the time the Bian photo was taken. Again, Bian has no personal knowledge as to what happened to the properties, including garden beds, during the time Smirnova operated a care facility on the Bian Property and when the bank owned the property.

Bian next contends that these photos disprove Smirnova's claim that she removed Fence I to create an open backyard between the two properties. Bian argues that it is "unreasonable" to believe that Smirnova removed Fence I to create one large backyard because of the difference in slope between the two backyards and the existence of trees and vegetation. Smirnova's care facility served the elderly and disabled, and Bian claims the hill created by the different grade of the houses would make it difficult for them to climb. This argument is not persuasive.

The photos of trees and vegetation that Bian relies on do not rebut evidence that Fence II was erected in 2009, three years before Bian purchased his property.

B. Fence Style

Bian next contends that the Erhardt photo and the Bian photo of the northeast corner of the Bian Property prove that Fence II and Fence I are one and the same based on the style and construction of the fence.

Bian first argues that the fence style is the same in the photos and that the age of the pickets and posts were old, whereas Smirnova had to have at least used new posts when Fence II was constructed even if she claimed she used material from another project for the fence. First, the fences in the photos appear

to be a different color. It is unknown what effect may be caused by power washing, staining, or painting the wood over the years. Second, two fences can share the same style and not be the same fence.[5]

Bian next argues that Smirnova "fabricated" the story about Fence I because he had never seen any old cement footings in the four years he resided on the property. If the footings existed, he argues they would have been noted on the survey and appeared in the photos. Bian ignores Smirnova's explanation that after the posts were cut, what remained "stayed *in the ground* due to the heavy labor needed to remove them." (Emphasis added.) In fact, leaving them covered by the ground is consistent with Smirnova wanting to create one open backyard between the two properties. Also, the existing footings is the only explanation Smirnova gave as to why she erected Fence III four inches south of the property line.

Although we review facts and inferences in the light most favorable to the nonmoving party, Bian failed to produce specific facts to rebut Smirnova's evidence that the fence that encroached on Smirnova's property was erected in 2009 and removed in 2017. The trial court properly granted Smirnova's motion for summary judgment.[6]

---

[5] We do not consider Bian's argument raised for the first time on appeal that it "is impossible to build a 'temporary fence' with its ending post joining the other two fences as perfect as the three original fences were built." Generally parties cannot raise new arguments on appeal that were not brought before the trial court. Matter of Estate of Reugh, 10 Wn. App. 2d 20, 51, 447 P.3d 544 (2019).

[6] Because Bian cannot establish Erhardt adversely possessed the strip of land on Smirnova's property, we need not address Smirnova's argument that the doctrine of merger of title applied as an affirmative defense.

Attorney Fees and Costs

Bian argues that the trial court erred in awarding attorney fees and costs to Smirnova in the amount of $39,378.89. In part, we agree.

"The general rule in Washington is that attorney fees will not be awarded for costs of litigation unless authorized by contract, statute, or recognized ground of equity." Durland v. San Juan County, 182 Wn.2d 55, 76, 340 P.3d 191 (2014). We review the authorization of attorney fees as a question of law reviewed de novo. Workman v. Klinkenberg, 6 Wn. App. 2d 291, 305, 430 P.3d 716 (2018). "When attorney fees are authorized, we will uphold an attorney fee award unless we find the trial court manifestly abused its discretion." Workman, 6 Wn. App. 2d at 305. A trial court abuses its discretion where its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. Id.

The trial court awarded Smirnova attorney fees and costs totaling $39,378.89 because she was the prevailing party under RCW 7.28.083(3).

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.

Trial courts should discount attorney fees for hours spent on "unsuccessful

---

Bian appealed the trial court's order denying his motion for reconsideration on the issue of summary judgment. However, Bian fails to adequately present the issue for our review. See Sprague v. Spokane Valley Fire Dep't, 189 Wn.2d 858, 876, 409 P.3d 160 (2018) (refusing to address petitioner's claims, where they did not brief the claims and cited no law establishing them).

claims, duplicated effort, or otherwise unproductive time." Berryman v. Metcalf, 177 Wn. App. 644, 662, 312 P.3d 745 (2013) (quoting Bowers v. Transamerica Title Ins. Co., 100 Wn.2d 581, 597, 675 P.2d 193 (1983)).

Bian argues that Smirnova should not receive attorney fees for two reasons. First, the fees were duplicative in that they included entries related to the 2018 complaint that was dismissed and the 2020 complaint. Second, Smirnova prevailed on a claim under the doctrine of merger of titles, and therefore she did not have to defend against the four "elements of adverse possession." Lastly, Bian correctly argues that the trial court failed to determine if the award is equitable and just.

Based on the record before us, it appears the trial court, at a hearing on November 13, addressed the arguments presented by Bian's counsel as to the basis of attorney fees that he again argued pro se at the hearing on February 26. Though the record indicates there were four hearings related to fees, we only have the verbatim report of proceedings for the last hearing.[7] In response to Bian's objection, the trial court explained:

> I note that [Smirnova's counsel] has put together a very thorough history of his efforts, which I directed him to engage in, to work with [Bian's counsel] to come to an agreed order so that, you know, the order could be entered and a Motion For Reconsideration could be brought. And it looks to me like there was a lot of delay between November 13th and here we are today on the 26th of February.
>
> So, under the circumstances, I'm not here to reconsider the decision I made on November 13th. The question is are

[7] Procedural rules apply to both litigants who choose to proceed pro se and those who seek assistance of counsel. In re Marriage of Olson, 69 Wn. App. 621, 626, 850 P.2d 527 (1993) (citing In re Marriage of Wherley, 34 Wn. App. 344, 349, 661, P.2d 155 (1983)).

> [Smirnova's] attorneys' fees reasonable? And I have gone through his filings. He represented Ms. Smirnova to defend in an action that you initiated and I ruled in her favor. I know you don't agree with that, that's why your case is on appeal right now, but when that happens he had a right to come in and ask for attorneys' fees.
>
> So, here is what I'm going to tell you, I've read through all of his filings, including all of the factual background for his efforts to try to come to an agreed order that could be entered so that a motion for reconsideration could be brought by you if that's what you choose to do. I think his request for attorneys' fees, given the course of this litigation, are reasonable. I think he has made a showing of that and for that reason I'm going to enter the order that he is presenting, that's going to be entered today, and what I would encourage you to do is if you decide to do so bring a Motion to Reconsider. But you have got to follow the court rule in doing that. I can't explain how you have to bring your case, unless [your counsel] is going to assist you in the future.
>
> All right. That will be my decision in this case.

The court's written order stated Smirnova was entitled to "reasonable" attorney fees as the prevailing party under RCW 7.28.083(3). Bian did not file a motion for reconsideration as to the trial court's award of attorney fees.

Because we review de novo whether the authorization of attorney fees is proper as a question of law, the record is sufficient as to that issue. Smirnova prevailed in her motion for summary judgment against Bian's claim for adverse possession. The trial court properly granted the award under RCW 7.28.083(3).

However, trial courts must "independently decide" what constitutes reasonable attorney fees and not simply defer to the billing records of the prevailing party's attorney. Mayer v. City of Seattle, 102 Wn. App. 66, 79, 10 P.3d 408 (2000). "Trial courts must also create an adequate record for review of fee award decisions. Failure to create an adequate record will result in a remand of the award to the trial court to develop such a record." Mayer, 102 Wn. App. at 79 (internal citations omitted).

The record suggests that counsel for both parties reached a proposed agreement that Bian did not approve of. The record also indicates that Smirnova requested the original proposed amount plus some additional hours for the last hearing. Thus, the record is unclear whether the amount awarded was based on the fact Bian would not sign off on the proposed agreed amount, which is his right, or if the requested higher original proposed amount was awarded because it was equitable and just.

Because the record fails to establish that the trial court determined the award was equitable and just, as required by RCW 7.28.083(3), we reverse the award of attorney fees and remand to the trial court to independently determine if the amount Smirnova requested was equitable and just.

Both parties ask for attorney fees on appeal. Bian asks for attorney fees under RAP 14.2, 14.3, 18.1 and RCW 7.28.083. Smirnova asks for fees under RCW 7.28.083(3). Because both parties prevailed in part, we decline to award attorney fees on appeal.

CONCLUSION

We affirm in part and reverse in part. We remand to the trial court for determination of attorney fees consistent with this opinion.

Coburn, J.

WE CONCUR:

Chun, J.

Verellen, J.

(APPENDIX D)

FILED
11/10/2021
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

JINRU BIAN, a single man,

Appellant,

v.

OLGA SMIRNOVA and
JOHN DOE SMIRNOVA,
a married man and woman
and their marital community,

Respondent.

No. 81937-2-I

ORDER DENYING
MOTION FOR
RECONSIDERATION

The appellant, Jinru Bian, having filed a motion for reconsideration herein, and a majority of the panel having determined the motion should be denied; now, therefore, it is hereby

ORDERED the motion for reconsideration be, and the same is, hereby denied.

FOR THE COURT:

Coburn, J.

(APPENDIX E)

No: 81937-2-I

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

DIVISION ONE

JINRU BIAN, a married man

Appellant,

v.

OLGA SMIRNOVA, a married woman,

Respondent.

MOTION FOR RECONSIDERATION

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I. IDENTIFY OF MOVING PARTY

Appellant, Jinru Bian, in the case of Bian v Smirnova, with case: 81937-2-I.

II. STATEMENT OF RELIEF SOUGHT

Appellant, Jinru Bian respectfully requests this Appellate Court to reconsider the decision made by this Court on October 18, 2021, affirming the trial court granting Smirnova's motion for summary judgment for the case of Bian v. Smirnova (#: 81937-2-I). (RAP12.4, CR56)

III. REFERENCE TO THE DECISION TO RECONSIDER

The decision from the summary of the Opinion reads:

> "Because Bian failed to rebut Smirnova's evidence defeating his adverse possession claim, we affirm the trial court granting Smirnova's motion for summary judgment."

IV. LAW and FACTS RELEVANT TO THE MOTION

A. Application Law.

> The judgment sought shall be rendered forthwith if the pleadings,…, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

CR56 (c)

> [I]t is not [judges] function, when ruling on a motion for summary judgment, to resolve existing factual issues on the merits. Rather, the court must determine whether any genuine issue of material fact exists which requires a trial on the merits. Jacobsen v. State, 89 Wash. 2d 104, 569 P.2d 1152 (1977).
>
> It by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. (Omit citations) Herron v. King Broad. Co., 112 Wn.2d 762, 776 P.2d 98, 1989

In ruling a motion for summary judgment the law does not require a judge to resolve issues (correctly) but to examine if there is any genuine issue of material fact.

> Summary judgment is appropriate **when there is no genuine issue of material fact** and the moving party is entitled to judgment; the motion will be granted, after considering all the evidence, affidavit, facts in the light most favorable to the non-moving party, only if reasonable persons could reach but **one** conclusion. (Add emphasis) Wilson v. Steinbach, 98 Wash.2d 434, 437, 656 P.2d 1030 (1982).

1. The record and Briefs show that there are genuine issues of material fact. Thus, the court affirming the granting is inappropriate.

2. In the opinion, the Court paid no or less attention to whether there is a genuine issue of material fact, but ruled as in trial in analyzing material evidences, weighing relative values of affidavits, and denying the material evidence of the adverse party.

3. For the review, the Court did not inference in the light most favorable to the adverse party, conflicting with the prior opinions.

> A summary judgment motion on appeal is also reviewed with "the evidence and all reasonable inferences from the evidence in the light most favorable to the nonmoving party. Keck v. Collins, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015).
>
> The moving party has the burden of proving there is no genuine issue of material fact and all inferences are construed in the light most favorable to the nonmoving party Carlton v. Black (In re Estate of Black), 153 Wn.2d 152, 102 P.3d 796, 2004

4. "Because Bian failed to rebut Smirnova's evidence defeating his adverse possession claim,

> we affirm the trial court granting Smirnova's motion for summary judgment."

This is inappropriate, because this appeal is at summary judgment stage, not for a case after its trial. The Court may affirm the case only if Bian failed to "set forth specific facts showing that there is a genuine issue for trial". CR56 (e). CR56 authorizes to affirm or reverse it **only by** whether there is a genuine issue of material fact, not by "rebut…evidence defeating". Failed to "show…issue" is different from "failed to rebut…evidence". The former asks whether there is a true issue to resolve by a trial, while the latter asks who is right (wrong). Before a trial, it is improper to conclude that "Bian failed to rebut Smirnova's evidence defeating his adverse possession claim" at its summary judgment.

> Summary judgment is proper **only if** the moving party shows that there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). (Emphasis added) Davis v. Cox, 183 Wn.2d 269, 351 P.3d 862, (2015).

B. Definitions of the Fences

One of the main issues, the one this Court examined, in the

appeal is whether the Fence I and Fence II are the same and one.

The Appellate Court defined the Fences as:

Fence I: Original Fence, Story Fence, at the survey line. 1992-2007.

Fence II: Intermediate Fence, Temporary Fence, at ~1 foot south from the survey line. 2009-2017.

Fence III: New Fence, at ~ the survey line. 2017-now.

Above definition pre-assumes Fence I and Fence II are different, and to be proved the same. Bian adds another fence, defined as:

Fence I=II: Margaret Fence, at **~1 foot south** from the survey line. **1992-2017**. (It is difficult to talk clearly, without this definition.)

By the opinions above and CR56(c), the role of this Court is to "determine whether any genuine issue of material fact exists" (Jacobsen) about the Fences to resolve, not to find whether Fence I and Fence II are the same, which is trial or jury's job.

Also, in the Briefs, the word "evidence" was used for material evidence (e.g. photos), different from declared evidence.

C. Specific Facts Showing Genuine Issues of Material Fact

Followings are rephrased some of the factual presentations

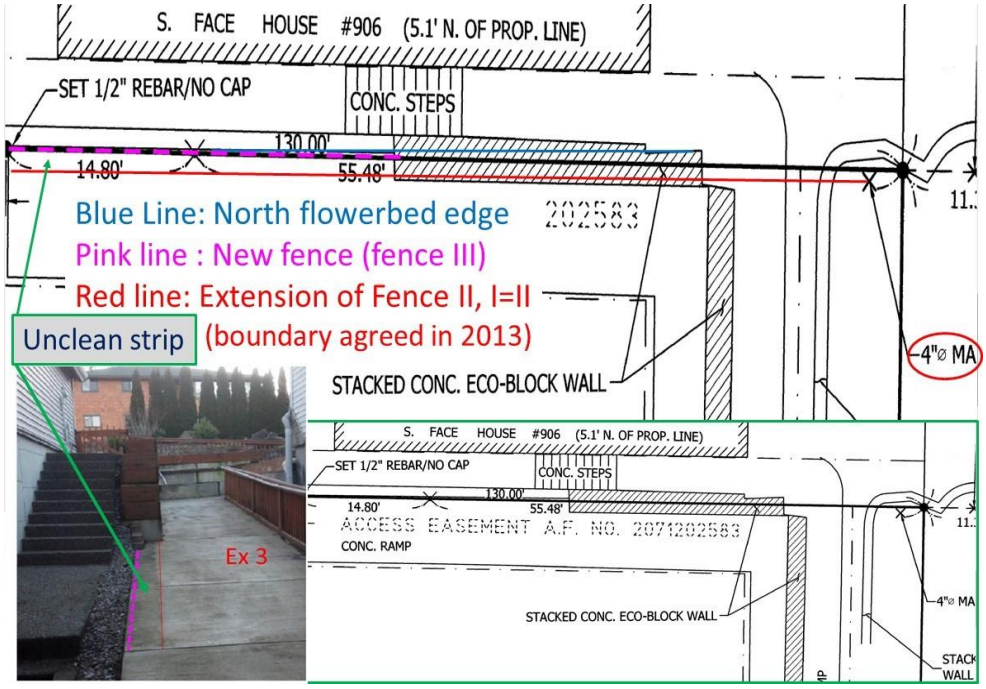
in Bian's Briefs, and answers to the questions in the Opinion.

1. Agreed boundary in 2013 showing genuine issue 1.

Footnote 4 in the Opinion, P 9, reads: [1]

> Bian also submitted two before and after photos of the ramp area showing where there was no fence before the survey and where Smirnova installed a fence after the survey. The addition of the fence in the ramp area does not shed any light on where Fence I was located.

Bian explained the photos in his Brief [B'OB, P11, 2)]. If it was not clear to this Court, the below picture would be helpful.



Note: The color lines and words were added to the northeastern corner of the Survey [CP 74]

The picture shows that the (red) line linking the maple tree and the south edge of flowerbed was the agreed boundary in 2013 (at the extension of Fence II or I=II); this is evidenced by the uncleaned strip that Smirnova left for Bian to clean and the wood paint color difference [CP 28, ¶ 6] in Ex 3. Fence I=II is on the south of Fence III (pink). Thus, Ex 3 and the survey confirm that only fence was Fence I=II up to 2017 at the extension (red line) of the maple tree and flowerbed edge. This fact was declared on March 17, 2020 [CP 28] before Smirnova's motion for summary judgement and supported by the above material evidence. Smirnova did not deny Bian's declaration of maple tree as agreed boundary, and never explained the unclean strip with other excuse. Thus, this material fact confirms that in 2013, both agreed the boundary was the red line (extension of Fence I=II). The declaration that she showed Bian the footings (at the extension of pink line) conflicts with this fact in Ex 3. This is a genuine issue

---

[1] Both Ex 3 & Ex 9 (the one with Fence III) were submitted to the trial court with Bian's Declaration of June 12, 2020 (CP 173, 174)

of material fact that she did not clarify in the first stage of her motion: 1) whether both sides had agreed the (red) line being boundary (**maple tree** and **flowerbed edge**), and 2) why there had been the uncleaned strip and pain color difference (material evidence). This issue has not been clarified up to her Open Brief.

> Initially the burden is on the party moving for summary judgment to prove by uncontroverted facts that there is no genuine issue of material fact. Jacobsen
>
> In a summary judgment motion, the burden is on the moving party to demonstrate that there is no genuine issue as to a material fact…. The moving party is held to a strict standard. Any doubts as to the existence of a genuine issue of material fact is resolved against the moving party. In addition, we consider all the facts submitted and the reasonable inferences therefrom in the light most favorable to the nonmoving party. Atherton Condominium Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co., 115 Wn.2d 506, 799 P.2d 250, 1990.

This picture also answers the question in the Opinion, P 11:

> "According to the survey, the maple tree sits south of the property line on the Smirnova Property. Smirnova's statement to Bian, does not establish that Fence I encroached onto the Smirnova Property."

Since the maple tree was at the 2013-agreed boundary, the position of the extension (red line) of Fence I=II (south of the survey line pink), the encroachment was established. This sets forth the specific fact with factual support to the genuine issue, not a conclusory statement. She has the burden to clarify this true issue.

2. **Nonexistence of concrete footings** (genuine issue 2)

Whether the concrete footings exist is the key to this case. If no footings exist, Fence I is a fake story. If they do exist, the claim for adverse possession fails. Ex 1 and 2 show, in the north of the posts of Fence II, where there are none of the concrete footings, as "visual" "line marker". Simirnova claimed she "showed" the "line marker" to Bian, which means they were (are) visible. After Bian declared the fact that he did not see any of "footings and posts" [CP37, ¶ line 6] for years [on June 8, 2020, CP 100, ¶ 3], it was her burden to show their existence by material evidence. "One who moves for summary judgment has the burden of proving that there is no genuine issue of material fact." Balise v. Underwood, 62 Wn.2d 195, 199, 381 P.2d 966 (1963). But she failed to provide

any material evidence, although asked many times. “One cannot show there is no genuine factual issue without presenting the court with the facts surrounding the critical issues.” Hash v. Children's Orthopedic Hosp. & Medical Ctr., 49 Wn. App. 130, 741 P.2d 584, 1987. The critical issue here is why the “showed” “visual” “line marker” could not be seen. Taking a photo to add in her following declarations (June 12, 2020 and June 18, 2020) was not a hard work, but she did nothing in resolving the genuine issue, up to her Brief. The appellate court interprets that as they are “covered by the ground” which “is consistent with Smirnova wanting to create one open Backyard”. If so, Smirnova could not “show[ed] them to Bian” as “visual representation”. It is not the Court function to reconcile this true issue or to evaluate the material evidence.

> Appellate courts are not suited for, and therefore not in the business of, weighing and balancing competing evidence. It is axiomatic that on a motion for summary judgment the trial court has **no authority to weigh** evidence or testimonial credibility, nor may we do so on appeal. Our job is to pass upon whether a burden of production has been met, not whether the evidence produced is persuasive. That is the jury's role,

> once a burden of production has been met. (omit citation). (add emphasis) Renz v. Spokane Eye Clinic, 114 Wn. App. 611, 623 (2002)
>
> At the summary judgment stage, the trial judge's function is not himself to **weigh the evidence and determine the truth of the matter**, but to determine whether there is a genuine issue for trial. (Emphasis added) Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

On the other hand, the non-existence of the footings in Ex 1 and 2 is also **consistent** with all the facts and inferences in Bian's Brief. The prima facie of the photos is "nonexistence" and no material evidence is against it. Thus, it is improper for this Court to construe it as "covered", because 1) it is against the "visual" claim by Smirnova, 2) the Court tried "to resolve existing factual issues on the merits" (Jacobsen), and 3) the construing is not "in the light most favorable to the nonmoving party". "When determining whether an issue of material fact exists, the court must construe all facts and inferences in favor of the nonmoving party." Ranger Ins. Co. v. Pierce County, 164 Wn.2d 545, 192 P.3d 886, (2008), Keck, and Carlton

Since the material evidences already show the nonexistence, their existence can, at most, be an **assumption** before another material evidence to balance.

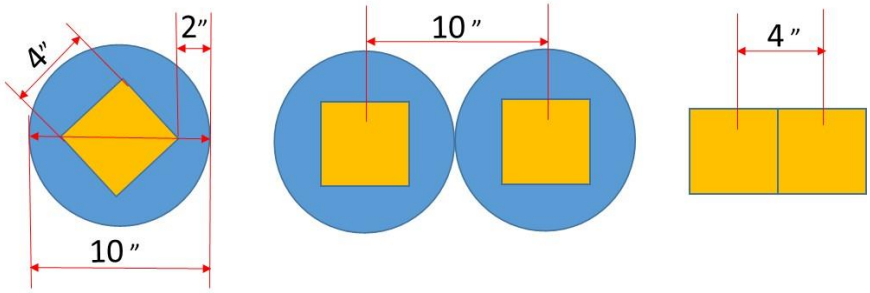
> Summary judgment does not concern degrees of likelihood or probability. Summary judgment requires a legal certainty: the material facts must be undisputed, and one side wins as a matter of law. Davis v. Cox,

For this genuine issue of material fact, a trial may come out two different results. None has the "**authority to weigh evidence**" and ability to conclude one or another before a trial. "The appellate court must reverse summary judgment if the evidence could lead reasonable persons to reach **more than one** conclusion." (Add emphasis) Soproni v. Polygon Apt. Partners, 137 Wn.2d 319, 971 P.2d 500, 1999.

3. **Inherent genuine issue by the moving party** (Issue 3)

Fence III is "four inches south of the property line" because of (Fence I) "robust concrete footings that were too laborious to remove". **This cannot be true**. The fence post is 4x4 inches. The concrete layer of the footings must have a thickness of 2-4 inches;

the footings will be 10-12 inches in diameter (Snohomish County Code: min. **12 inches** in diameter. See appendix B). Fence III must also have concrete footings (or it will fall with strong wind); thus, distance between Fence I and III is 10-12 inches by the two bulky footings, if the "concrete footings" do exist. Only if both



Note: assume 2" at the minimum thickness of concrete layer (smaller than the 12" Φ min in Appendix B)

Fences have **no footings**, the "four inches inside" is possible. "Four inches south of the property line" or existence of "robust concrete footings", the two are mutually contradicted. The "four inches south" precludes the existence of "concrete footings", a genuine issue of material fact by the moving party claim.

The **controverted claim created the genuine issue of material fact** (a trace of fabrication) to be resolved by a trial and thus, prohibits the summary judgment.

> Initially the burden is on the party moving for summary judgment **to prove by uncontroverted facts** that there is no genuine issue of material fact. If the moving party does not sustain that burden, summary judgment should not be entered, **irrespective of whether** the nonmoving party has submitted affidavits or other materials. (Emphasis added, omit citations) Jacobsen v. State, 89 Wash. 2d 104, 569 P.2d 1152 (1977); Hope v. Larry's Mkts., 108 Wn. App. 185, 29 P.3d 1268, 2001.
>
> One who moves for summary judgment … must prove by **uncontroverted facts** that no genuine issue of material fact exists. This is true **whether the opponent** has the burden of proof on the issue at trial. (Omit citation, add emphasis). Duckworth v. Bonney Lake, 91 Wn.2d 19, 586 P.2d 860, 1978

The real story, by common sense, may be that Fence III was squeezed out by the footings of Fence II to a position close to the survey line where no footings to squeeze.

4. The fences in Ex 4 are exactly the same from their original development. (genuine issue 4)

The footnote 5 in the Opinion P 13 reads:

> "We do not consider Bian's argument raised for the first time on appeal that it "is impossible to build a 'temporary fence' with its ending post joining the other two fences as perfect as the three original fences were built."

The RAP rule does not exclude new argument.

> On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court. RAP 9.12

Nevertheless, the citation from Bian' Brief is **not** a new argument but a rephrase of that from Bian's declaration [CP 158, ¶ 26]:

> "I had cleaned it. It is the same type of fence on all three sides as well as the same in Olga Smirnova's back yard. It was the **original fencing from when the properties were developed… exactly the same as the rest of the fencing**." [Add emphasis]

It is well known that it is easy to duplicate new things, but difficult to duplicate or repair very old things (e.g., old clothes, old builder walls or Fences, antique furniture) with a **result to be exactly the same**, **or without seeing the repairs**, even for professional **deliberately** wanting to be the same. During his repairing and cleaning, Bian examined every single pickets of all

the fences in his backyard and thus, knew all the fences were **exactly the same**. Bian used the words **"exactly the same"** in the sense of oldness, size, nailing style, sidedness (picket south faces the sun, different from north side), difference between top and bottom of the pickets. The declaration of "**original from when the properties were developed**" excluded a situation that one removed the old fence and re-built with **the same materials** the next month, since it is easy to see and trace the re-building. This is also evidenced by Ex 4 and 7, from which a reasonable person will conclude that **the three fences are the same**. Can a reasonable person conclude that the fences Ex 4 are different by looking the photo? No. At least, none can be certainly sure they are not the same by the photo. That is enough to the genuine issue that must be resolved in trial, though Smirnova declared they were different. The law does not require this Court to find out whose view is right (or wrong); that is jury's role. CR56, Renz, Herron.

> When reviewing a case on appeal from a summary judgment order, we must be mindful that **we are not charged with making factual**

> **findings**, and we must be particularly careful to give deference to the position of the nonmoving party to avoid usurping the role of the fact finder. Drinkwitz v. Alliant Techsystems, Inc., 140 Wn.2d 291, 996 P.2d 582, (2000). (Add emphasis)
>
> At the summary judgment stage, the trial judge's function is **not himself to weigh the evidence and determine the truth of the matter**, but to determine whether there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). (Add emphasis)

5. **Nonexistence of the Post from Fence I**. (issue 5)

A post from Fence I at the T-way corner could not be removed, unless all the three fences in Ex 4 were removed; it must be at the corner (Ex 4) if Fence I would have existed. It was impossible to engineer it by moving the post one feet south, illustrated in Bian Brief [P 15]. By Ex 4, Fence II must be the "original from … developed", because it perfectly joined the old post and other two fences (Bian's personal experience), and could not be re-built sometime later. This excludes the existence of Fence I. At least it is a genuine issue of material fact to be resolved. "We will not resolve factual issues, but rather must determine if a genuine issue

as to any material fact exists". Carlton v. Black (In re Estate of Black), 153 Wn.2d 152, 102 P.3d 796, 2004.

6. The distance of the Trees to Fence II is ~1 foot excluding Fence I at the same position (genuine issue 6)

By Bian's **personal experiences** with Fence II (cleaning and repairing, etc.), he knew the distance between Fence II to the two big trees, 1, 2 in Ex 4 and 5 was ~1 foot because it was difficult in cutting them due to the small space to Fence II. This is why Bian declared [CP 154, ¶ 1] installing Fence III made it "**necessary**… to remove vegetation (baby trees) on Bian side". One can see how close the baby trees to the Fence II is [Ex 4, Bian Brief, p.13]. Although the garden-bed may vary, but the positions of the trees did not. Bian cut the two trees close to Fence II for sunlight, but left the tree to the west fence. The baby tree/roots (center) are ~1 foot from the old fence (use fence picket width as in-photo ruler), the distance that a reasonable person will agree. (Also see above **4**). Can one exclude the fact of ~ one foot distance with a good reasoning? No. Then, at least, this is a true issue to resolve. If one

is unsure for the distance by the photo, it is a genuine issue to be resolved, since no **material** evidence existed excludes the fact that the distance was ~1-foot. The court reasoned that the distance could not clearly established. But, this is sufficient to create a genuine issue to be resolved by trial.

> **Conflicting reasons or evidence rebutting their accuracy or believability are sufficient** to create competing inferences. Such inconsistencies **cannot be resolved** at the summary judgment stage. (Add emphasis, omit citations) Renz.

7. **The Photo from Erhardt. (**genuine issue 7**)**

"Smirnova submitted a photo provided by Erhardt that showed Fence I during the time Erhardt resided on the Bian Property." The photo itself has no any clue to identify the fence position and whether Fence I and II were the same or different, without additional material evidence, accept showing the three big trees in the southwestern corner. Thus, it, combined with Ex 7, creates a genuine issue of material fact to resolve in trial.

First, the colors of all the fences in Ex 5 are the same, so are that in Ex 7, though the colors in Ex 5 and 7 are different. Two possibilities: Smirnova replaced all the fences in both backyards, or photography conditions (daytime) made the different. Second, "two fences share the same style and not be the same fence", which is possible, but has lower probability than the two fences are the same, because of restrictions to make them the same. There are **two** possible conclusions for this matter. Neither can be precluded without other material support.

> [I]t is well established that the function of the trial court in ruling upon a motion for summary judgment is not to resolve the basic factual issues, … Rather, the trial court's function is to determine whether a genuine issue as to any material fact exists. Mark v. Seattle Times, 96 Wn. 2d 473, 474 (Wash. 1981). Summary judgment requires a legal certainty: the material facts must be undisputed, and one side wins as a matter of law. Davis v. Cox

The law does not require a court to resolve issues (correctly), but does require to inference in favor of nonmoving part to avoid uncorrectable mistake, while an inferencing mistake has chances

to correct in its trial. "The motion should be granted **only if**, from all the evidence, reasonable persons could reach but **one** conclusion**"** (Add emphasis). CR 56(c); Wilson v. Steinbach, 98 Wash.2d 434, 437, 656 P.2d 1030 (1982).

8. Inconsistence from the Moving Party Devalues the Creditability of her Declarations.

This Court pre-assumes that the Smirnova declaration was on "personal knowledge". Claiming a story on "personal knowledge" does not preclude it is fabricated (not on personal knowledge). It is unclear how the court believes her declaration was on "personal knowledge", not on fabrication without material support but against so many facts. The cited law rejects a declaration that is not on personal knowledge. But no law requires that a court must accept a story if it is **claimed** to be on personal knowledge. It is not because "Bian chooses not to believe them", but because her story is against so many specific facts and material evidences, and that Bian's **personal experience** with her was totally different

from what she declared. Any declaration **claimed** to be on personal experience must not be against material facts.

If the theory that, if it is **claimed** to be on personal knowledge, one must believe it, is expanded to some "non-civil" cases where he has "sole experience" of a story, it does not mean his declaration is true, and a trial is necessary if his story is against material evidence.

8.1. Smirnova claimed she "showed the footings to Bian", but never provided any material evidence showing their existence when there was enough time to do and she was asked.

8.2 She claimed that she told Bian the "intermediate fence" story in 2013. However, when Bian text-chatted with her in 2017 "*Since the fence* (fence II) *was built not by you, how do you know they did not think it was on the line*?" [CP 131]. Both honestly (some friendly, at least from Bian), in the chat, agreed that the Fence II was built by "they" who were before Erhardt. She did not correct or deny "the fence was built not by [her]". This material evidence destroys her credibility in her declaration.

8.3 She claimed the "four inches inside" that contradicts to the existence of "robust concrete footings".

8.4. She claimed she showed Bian the Fence I position at the pink line (in the picture in prior section), but how to explain the "unclean strip" in the ramp way (Ex 3).

8.5 If the Fence I were real, normal person would not spend money on performing a new survey, since there are "land makers".

8.6. Early claim: "**Title to the two properties united** in Ms. Smirnova and her ex-husband" [CP 39, ¶ 2]. Later claim: "Our decision to keep the **properties legally separate"** [CP 130, ¶ 7].

These show low credit to the claimed "personal experience".

9. Vegetation and Trees. (additional issues of material fact)

9.1 Bian declared [CP 154, ¶ 15; CP 86, line 15]:

> **A thick wall of mature vegetation** would have prevented unified use of Lot 3 and Lot 25. Upon the alleged removal of the original wooden fence, the backyard areas of the properties would still have been quite separate by virtue of the significantly different grades and a thick vegetative wall between the properties. [T]hat heavy vegetation separates

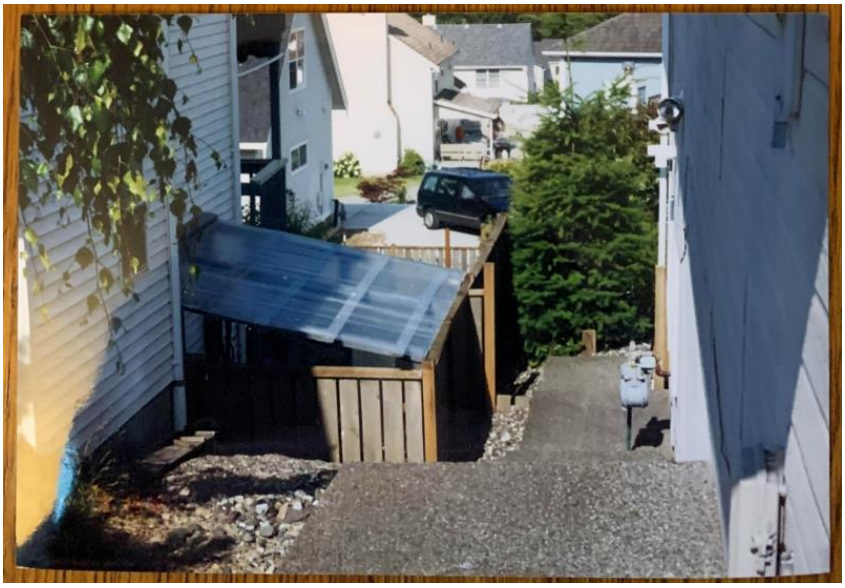
> the two rear yards. It would have been impossible to have been using both backyards as one property."

This is **his personally experiences** with the **thick wall of mature vegetation,** at the time he moved into Lot 25, which none could go through and would have prevented unified the two lots. His declaration would be good to show the genuine issue of material fact, as a specific fact, even without Ex 6 (Google-Map).

9.2 **Ash tree**. The ash tree breaks Fence III, which shows it impossible for Fence I to exist. Although the court assumes the ash tree, "which looks relatively young in 2016". But the survey record in 2016 shows it is **10"** in diameter, which was 27 years old for a green ash. (https://intownhawk.com/estimate-tree-age/)

9.3 **Pine Tree**. The Court assumes "younger pine would have been even further from the property line." But the center of the pin tree never moved. The crown of the younger pine was more difficult to fit into 1-foot space than its old trunk in Ex 1, as shown by the 1999 photo showing how big the crown of the young pine was on the north to the old fence (comparing with the

The 4-feet width of the walkway concrete block in the photo).



(Only illustrating the **size crown of the young pine**, not as new evidence).

9.4. Ex 5 and 8 show the cliff-hill in the backyard from the Smirnova to Bian is about 5-10 feet difference. Thus, with and without a fence make no difference for most people, especially for elder persons, which is supported by the Ex 6 showing "no walk- sign through the two yards in April 2009 (contrasting to the walk-sign in middle down) in the bottom lawn" [Bian Brief, P16], and the heavy shrubbery and the trees in Ex 6. "[O]n a motion for summary judgment the trial court has

no authority to weigh evidence or testimonial credibility, nor may we do so on appeal." (Add emphasis) Renz.

10. Summary of the genuine issues of material fact presented in this motion:

1) Fence I=II was at the agreed boundary in 2013 that is different from what Smirnova declared in 2020, supported by material facts Ex 3, 9 and the Bian declaration in March 17, 2020 [CP 28]. (At least it is a genuine issue from first stage), not clarified.

2) Nonexistence of "concrete footings", supported by Ex 1, 2 and the nonmoving party declaration on June 8, 2020 [CP 100, ¶ 3]. This is genuine issue in second stage, not clarified.

3) "Four inches south of the property line" excludes the existence of "concrete footings". This is an **inherent genuine issue of material fact, existed at first stage, by the moving party.**

4) Fence II was from original development with all the fences (not built in 2009), supported by Ex 4 and 7 (material and its engineering). This is a genuine issue in second stage, not clarified.

5) Nonexistence of the **post** from Fence I in the T-way corner where it must exist (Ex 4) by its engneering. The genuine issue was from second stage (declared on June 12, 2020), is not clarified.

6) The distance of 1-foot between the baby trees/roots from the trees in Erhardt time and Fence II excluding existence of Fence I. This is a genuine issue, showed by Ex 4 in second stage, not clarified. (“evidence rebutting their accuracy or believability are sufficient” for a genuine issue. Renz.

7) Whether the fence in the photo from Erhardt (Ex 5) is the same as the fence in Ex7, or different from it is a third stage issue of material fact that is not clarified, although Smirnova tried to clarify it, becasue there is no additional material evidence to support her attemption.

8) The material facts from pine, ash and maple trees as well as the shrubbery and the trees, and the grade difference of 5-10 feet cliff-slope are additional issues excluding the existence of Fence I, in second stage.

The moving party never clarify or try to clarify these issues of material fact, although this court tried to inference it in the light most favorable to the moving party.

First stage: Moving party submits the motion for summary judgment;

Second Stage: Nonmoving party presents genuine issues to object the motion.

Third Stage: The moving party clarifies there is no genuine issus.

11. No objection to new material evidence showing existence of the "concrete footings".

The existence or nonexistence of the footings is the key in this case and a current fact, not limited by historic story. Without any material evidence, the Court chose to believe Sminorva's claim that is against the material evidences in the record. If setting in a trial it is much easier (minutes) and more accuracy to check it than to declare, to brief and to argue by paper.

The Court should not affirm the granting summary judgement when above genuine issues of material fact existed, especially the self-contradiction claim in section 3, the inherent genuine issue within her story, which must be resolved before a judgment. However, to help her make a better story, Bian is willing to give up his right to object if Smirnova provide new material evidence (e.g., photos) showing the existence of the footings on the north of the Fence III, and if this Court authorizes it. Bian also authorizes Smirnova to enter into Bian's property for taking photos (after talking with the tenant for a right time).

One may not claim a person being a drug dealer without showing drugs, one may not judge a person being a murder without showing a dead body, and one may not claim and judge that there are the footings without any material evidence and with the logic defect, but against the existed material evidences. Bian respects the law and the courts, believes they are for justice in the States. Thus, Bian does not object her providing new material evidence to prove it.

12. Rules for attorney's fees and costs

Bian appreciates this court for reversing the attorney's fees and costs. However, this Court does not indicate whether the superior court has the authorities to award fees and costs from a closed case from another superior court in the same level **without reading the record**. Bian does not know if there is a rule to allow it and understands this may be the duty and the authorities from the Supreme Court of Washington.

V. CONCLUSIONS

The sole ground that CR56 authorizes to affirm or reverse a granting of summary judgment is whether there is a genuine issue of material fact; no other ground is authorized.

The genuine issues showed in the prior sections are all based on material evidences and facts. The typical genuine issue in the case is whether "concrete footings" exist. This is the key and center of the case, a simple current material fact, and can be easily checked at **anytime**. Exist or not? The record shows:

Yes, by declaration of Smirnova.

No, by declaration of Bian.
No, by Ex 1 from the moving party.
No, by Ex 2 from the nonmoving party.
No, by the "four inches inside" claim from Sminorna.

Yes, if inferenced in the light most favorable to Smirnova,
But it is in conflict with Keck, Carlton, Wilson

No, when inferenced in the light most favorable to Bian.
This follows Keck, Carlton, Wilson

This Court may not ignore the genuine issue of material fact, the material evidences showing the nonexistence of "concrete footings" (it was first produced by "four inches inside"

declaration by the moving party), as well as the personal experience of the nonmoving party, may not inference in the light most favorable to the moving party with assumption without a material support, and may not assert that this is not a genuine issue of material fact.

> The standard of review for summary judgment motions has long been well established: When there are **multiple possible interpretations of disputed materials facts** then summary judgment **must be denied** and the case must proceed to a trier of fact. Further, all facts and inferences must be construed in favor of the nonmoving party. (Add emphasis) Wilson v. Steinbach
>
> Summary judgment requires a legal certainty: the material facts must be undisputed, and one side wins as a matter of law. Davis v. Cox

For the foregoing reasons, the appellant, Jinru Bian, respectfully requests the Honorable Court reconsider the affirming the trial court granting Smirnova's motion for summary judgment.

Respectfully submitted, this 4th day of November, 2021.

I, Jinru Bian, certify that the total number of the words in this motion is 5869 (allowed 6000), excluding the Table of Contents and Appendixes.

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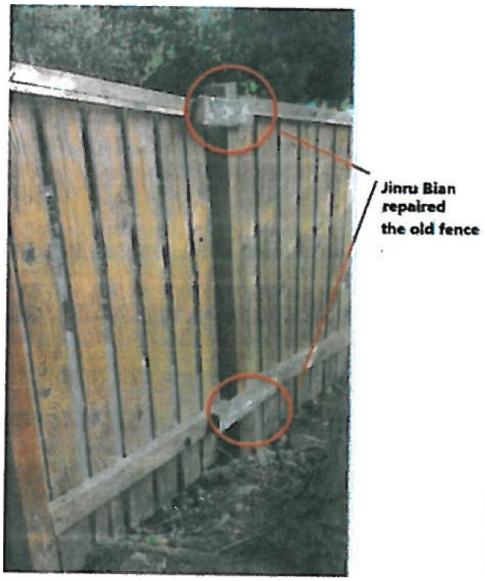
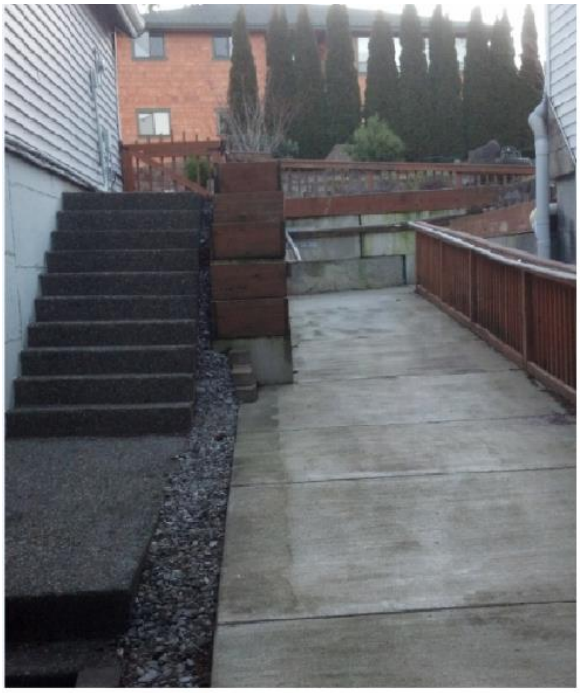
Appendix A: Exhibits

(Some are added yellow word / lines for easy to read)
(**The same set** in Brief of Appellant, for convenience)

Ex 1: CP 129 (Add yellow arrows as a ruler)



Ex 2: CP 15

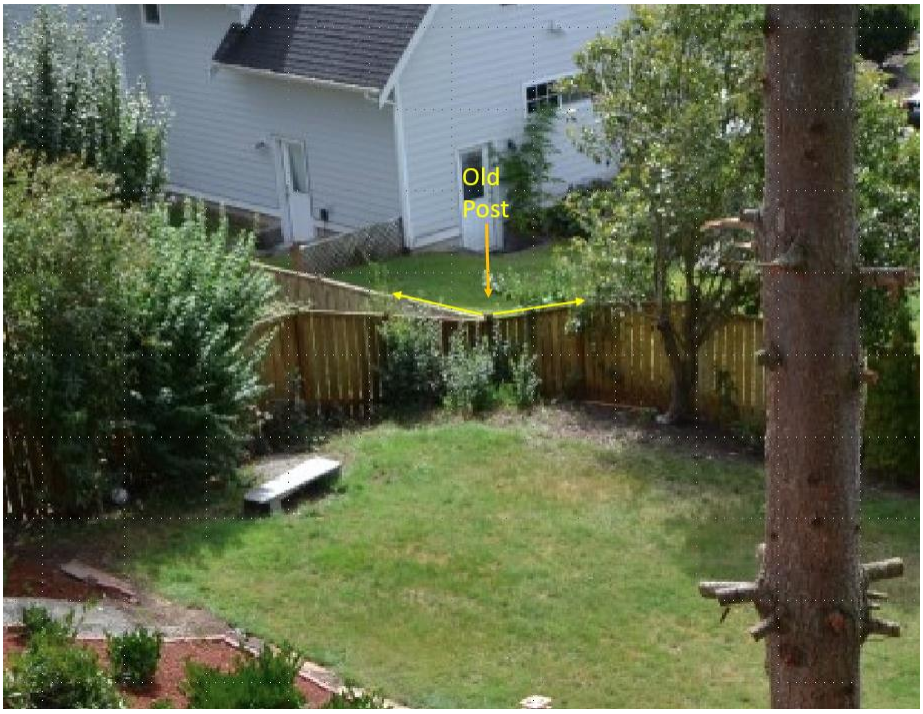


Ex 3: CP 173

Ex 4: taken from CP 172 (add yellow words and lines)

Ex 5: CP 180 (add yellow words and lines)

Ex 6: CP 86, CP 148 (add yellow words and lines)



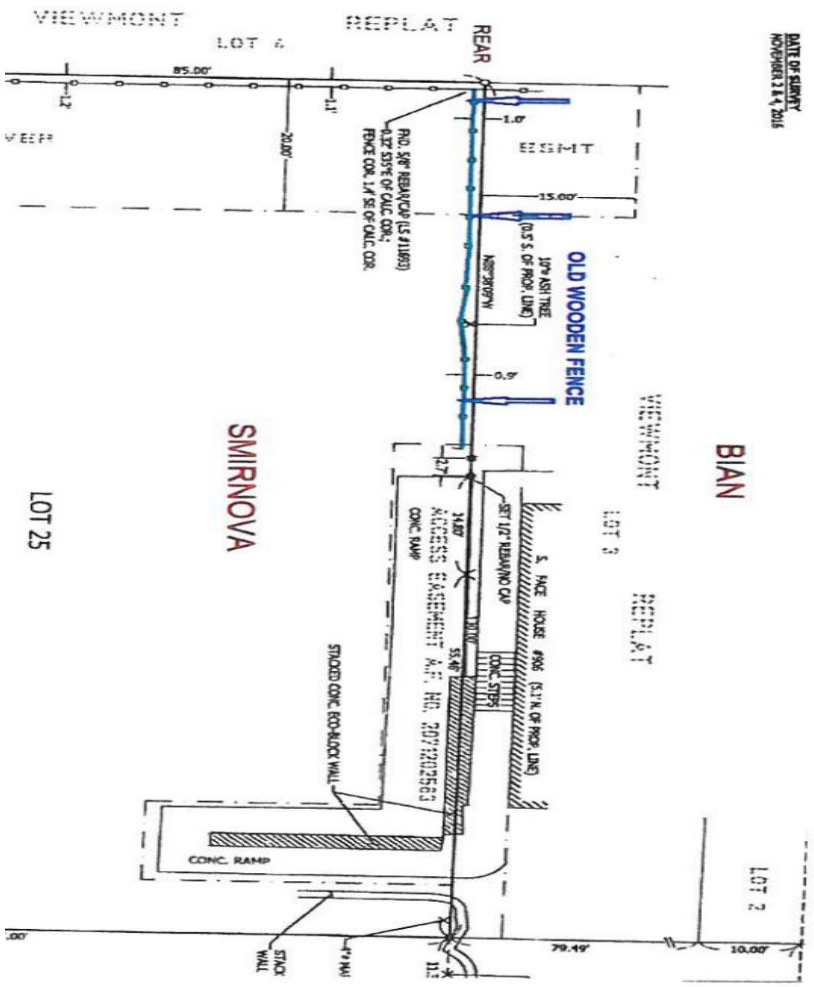
Ex 7: CP 172 (add yellow word and lines)

Ex 8: CP 15 (add red word and circle)

E**x 9**: CP 174 (add yellow word / line)

Ex 10: CP 157

marked the boundary of the Erhardt-Wazny/Bian property.

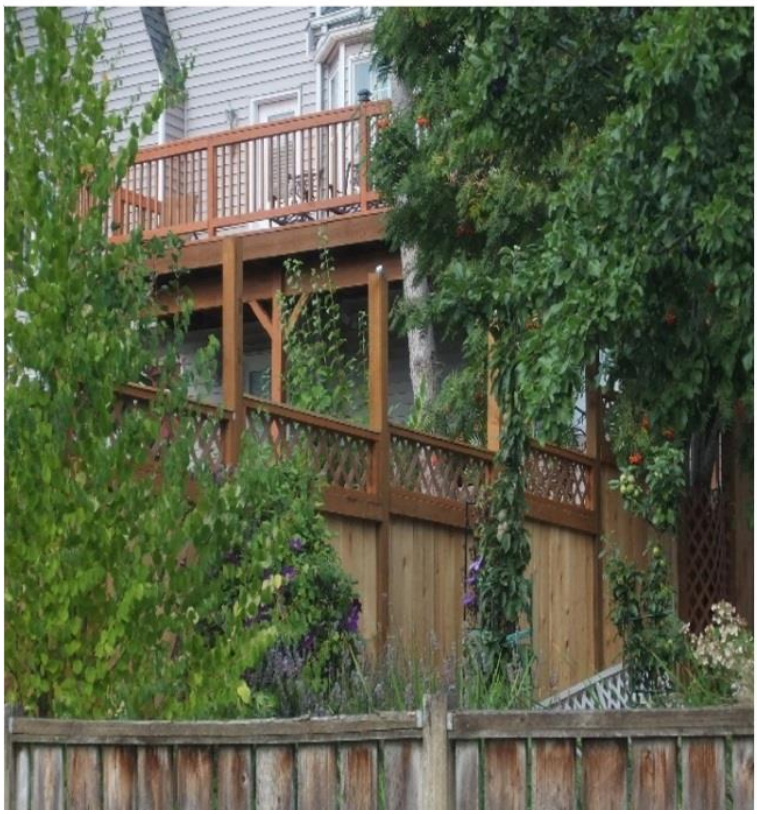


Ex 11: Related Part of Survey (CP 14)

3/15/2019 -	TTE	RESEARCH LAW REGARDING MERGER OF TITLE AND ADVERSE POSSESSION; ANALYZE CASES PROVIDED BY OPPOSING COUNSEL	2.10 280.00/hr	588.00 2.10
6/19/2019 -	TTE	DRAFT CORRESPONDENCE TO O. SMIRNOVA REGARDING STATUS UPDATE	0.20 280.00/hr	NO CHARGE 0.20
10/8/2019 -	TTE	REVIEW NOTICE OF CLERK'S DISMISSAL SET FOR NOVEMBER 3; CONFERENCE WITH SAW REGARDING SAME	0.20 280.00/hr	56.00 0.20
10/22/2019 -	TTE	REVIEW NOTE FOR TRIAL SETTING FILED BY COUNSEL FOR J. BIAN; CONFERENCE WITH SAW REGARDING SAME	0.40 280.00/hr	112.00 0.40
10/28/2019 -	TTE	TELEPHONE CONFERENCE WITH J. KOLER REGARDING SETTING OF TRIAL DATE; DISCUSS LAW IN SUPPORT OF POTENTIAL SUMMARY JUDGMENT MOTIONS; RESEARCH LAW REGARDING SAME	1.30 280.00/hr	364.00 1.30
10/31/2019 -	JAB	RESEARCH AND COMPILE DEED HISTORY AND RELATED DOCUMENTS ON PARCELS	0.70 150.00/hr	105.00 0.70
-	TTE	RESEARCH ADDITIONAL LAW REGARDING MERGER OF TITLE DOCTRINE; REVIEW CASES PROVIDED BY OPPOSING COUNSEL IN SUPPORT OF BIAN'S POSITION; REVIEW CHAIN OF TITLE FOR 906 AND 910 38TH STREET	2.10 280.00/hr	588.00 2.10
11/1/2019 -	TTE	ATTEND TRIAL SETTING CONFERENCE; RESEARCH LAW REGARDING COMPELLING ENTRY OF DISMISSAL	1.20 280.00/hr	336.00 1.20
-	JAB	RESEARCH S. JORGENSEN STATUS; E-MAIL TTE	0.10 150.00/hr	15.00 0.10
11/20/2019 -	TTE	REVIEW AND RESPOND TO CORRESPONDENCE FROM O. SMIRNOVA REGARDING UPDATE	0.20 280.00/hr	56.00 0.20

Ex 12: CP 264

Ex 13: CP 313 (left)



Ex 14: CP 313 (right)

Appendix B: FENCE POST, FOOTING SIZE AND DEPTH

(from Snohomish County)

Snohomish County Planning and Development Services
3000 Rockefeller Avenue Everett, WA 98201

https://www.snohomishcountywa.gov/DocumentCenter/View/18901/6---Fences-PDF?bidId=

https://www.snohomishcountywa.gov/DocumentCenter/View/18901/6---Fences-PDF?bidId=

TABLE 1
FENCE POST, FOOTING SIZE AND DEPTH
(All posts are spaced a maximum of 8'-0" o.c.)
Posts must be embedded to within six inches of the bottom of the footing.

1) If you have a fence height that is:	Then, 2) You need this many/size fence rails:	And, 3) The post must have a minimum nominal size of dimension of (w x d):	And, 4) The footings supporting the posts will need a minimum depth (feet) and diameter (inches) of :
Up to 7 feet high No permit required	(2) 2x6	4x4	4'-0" deep x 12" diameter Or 3'-9" deep x 16" diameter Or 3'-6" deep x 18" diameter
7 - 8 feet high Permit required	(4) 2x6	4x6 (the six-inch dimension must be perpendicular to the fence face)	4'-6" deep x 18" diameter

CERTIFICATE OF SERVICE

I, JINRU BIAN certify under penalty of perjury under the laws of the State of Washington that on the 4th day of November 2021, I caused to be served a true and correct copy of the preceding document, Motion for Reconsideration, on the parties listed below at their email addresses of record via Email:

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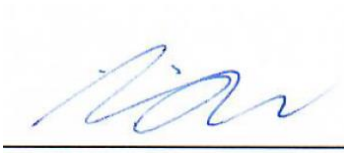

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CERTIFICATE OF SERVICE

I, JINRU BIAN, certify that under penalty of perjury under the laws of the State of Washington that on the 9th day of December 2021, I caused to be served a true and correct copy of the preceding document, Petition for Review, on the parties listed below at their email addresses of record via Email:

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JINRU BIAN

December 09, 2021 - 4:04 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	81937-2
Appellate Court Case Title:	Jinru Bian, Appellant v. Olga Smirnova, Respondent
Superior Court Case Number:	20-2-00253-1

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- jbian98@gmail.com;jinrub@yahoo.com
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- swoolson@chmelik.com
- tegland@chmelik.com

Comments:

Petition for review from the Supreme Court of Washington

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Note: The Filing Id is 20211209155302D1536602

JINRU BIAN

November 04, 2021 - 11:53 AM

Transmittal Information

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Appellate Court Case Number:	81937-2
Appellate Court Case Title:	Jinru Bian, Appellant v. Olga Smirnova, Respondent
Superior Court Case Number:	20-2-00253-1

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JINRU BIAN

December 09, 2021 - 4:04 PM

Transmittal Information

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Appellate Court Case Number:	81937-2
Appellate Court Case Title:	Jinru Bian, Appellant v. Olga Smirnova, Respondent
Superior Court Case Number:	20-2-00253-1

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