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**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

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Appellate Court No: **848011-I**
COURT OF APPEALS FOR THE STATE OF
WASHINGTON, DIVISION ONE

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**JINRU BIAN,**

Petitioner,

v.

**OLGA SMIRNOVA,**

Respondent.

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# Corrected
# PETITION FOR DISCRETIONARY REVIEW

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I. The Court of Appeals erred in setting a rule for discounting hours based on whether the hours spent on "counterclaim vs. affirmative defense", **not on** "wasted (unproductive, unsuccessful and unnecessary) vs. useful"; the latter is required standard by the published opinions.

************

J. The Court affirming may set a new standard for equitable and just ONLY by "dispute size" and "litigation length", **WITHOUT examining, mentioning or concluding** if there is any "**wasted**" hours in the award, which is in conflict with the published opinions.

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## I. IDENTIFY OF PETITIONING PARTY

The Petitioner, Jinru Bian (Appellant), petitions the Supreme Court of Washington for review.

## II. APPELLATE DECISIONS TO BE REVIEWED

The petitioner seeks review of the decision ("Opinion", Appendix A), by the Court of Appeals, Division I ("the Court") for the case of Bian v. Smirnova (#: 848011-I), "affirm the trial court's award of attorney fees as equitable and just", filed on November 6, 2023, and the Order denying Motion for Reconsideration (Appendix B), filed on November 30, 2023, under RAP 13.4 (b)(1)(2) and (4).

## III. ISSUES PRESENTED FOR REVIEW

This petition requests to review what constitutes a reasonable attorney fees for equitable and just. There are three sections (blocks of hours) of attorney fees that the Opinion affirmed and that Bian petitions this Court review.

### Section (Block) I

A. Did the Court err in affirming the awarding attorney fees on hours spent on the unproductive effort and unsuccessful claim, because of prior

reversal by the Court of Appeals, (also **without any analysis or comment on it)**, which is in conflict with that "[t]he court must then discount hours spent on 'unsuccessful claims, duplicated effort, or otherwise unproductive time'"? Berryman v. Metcalf, 177 Wn. App. 644, 660, 662, 312 P.3d 745 (2013) (quoting Bowers v. Transamerica Title Ins. Co., 100 Wn.2d 581, 597, 675 P.2d 193 (1983))? Under RAP 13.4(b)(1) and (2), review is proper.

B. The fact "**without any analysis or comment on it" (**above) is in conflict with the opinion: "A trial court must support its fee award by entering findings of fact and conclusions of law. The court's findings must do more than give lip service to the word 'reasonable'. The findings must show how the court resolved disputed issues of fact and the conclusions must explain the court's analysis"? Cedar Grove Composting, Inc. v. City of Marysville, 188 Wn. App. 695, 354 P.3d 249, (2015). Under RAP 13.4(b)(2), review is proper.

**Section (Block) II**

C. Did the Court err in afirming the awarding attorney fees on hours on another independent and closed case (where no prevail party and had **different factual base** from that in this case for Smirnova to prevail)?

There is **no rule, statute or published opinion cited allowing** or guiding an award by one court to another independent and closed case where no party prevailed. Actually, CR 41b(2)(A), by which the independent case was dismissed, indicates: the dismiss is "without prejudice and

without cost to any party". Under RAP 13.4(b)(4), review is proper.

D. Did the Court err in affirming the awarding attorney fees on hours on another independent case **without going through its base facts** (different from the base in this case) in the closed case, which is in conflict with RCW 7.28.083(3) that requires "**considering all the facts"** before awarding attorney fees? Under RAP 13.4(b)(4), review is proper.

E. Did the Court err in affirming the awarding attorney fees with no finding nor conclusion of law, in the judgments or in the Opinion, on the "**new facts well beyond**" (Smirniov's words) the record in this case, which is in conflict with the authority that "[a] trial court must support its fee award by entering findings of fact and conclusions of law"? Cedar Grove Composting, Inc. Under RAP 13.4(b)(2), review is justified.

**Block (Section) III**

F. Did the Court err in affirming the awarding attorney fees on hours on "mergers" which were based on **existence of adverse possession title**, a fact that is against the factual base that there was **no adverse possession title** (a finding by the Court) and thus the awarding is in conflict with the authority that "[t]he hours reasonably expended **must** be spent on claims having a '**common core of facts** and related legal theories'"? Chuong Van Pham v. City of Seattle, Seattle City Light, 159 Wash.2d 527, 538, 151

P.3d 976 (2007). Under RAP 13.4(b)(1), review is proper.

G. Did the Court err in affirming the awarding attorney fees on the hours spent on "mergers" that were new theories in WA State and **not authorized** for attorney fees, which is in conflict with the authority that "the attorney fees **must** be segregated between those efforts for which fees can be awarded and those for **which fees are not authorized**"? Hume v. Am. Disposal Co., 124 Wn.2d 656, 880 P.2d 988, (1994). Under RAP 13.4(b)(1), review is proper.

H. Did the Court err in affirming the awarding attorney fees on hours on "mergers" on which the hours were "**unproductive", "unnecessary"** and **"unsuccessful"** and, thus, the awarding is in conflict with Chuong Van Pham? Under RAP 13.4(b)(1), review is proper.

I. Did the Court err in using a "new rule" for Discountable Hours based on whether the hours spent on "counterclaim vs. affirmative defense", **not on** "wasted (unproductive, unsuccessful and unnecessary) or useful"? The former is in conflict with the latter that is required by Berryman and Chuong Van Pham? Under RAP 13.4(b)(1)(2) and (4), review is proper.

J. Did the Court err in affirming the awarding attorney fees for equitable and just **only** by the dispute size and the litigation length **without examining or concluding whether there is any "wasted" hour**, which is in conflict with above authorities and that "[u]nder the lodestar method

of determining reasonable fees, the court **must first 'exclude** from the requested hours any wasteful or duplicative hours and any hours pertaining to unsuccessful theories or claims'"? Target Nat'l Bank v. Higgins, 180 Wn. App. 165, 321 P.3d 1215, (2014) (quoting Mahler v. Szucs, 135 Wn.2d 398, 434, 957 P.2d 632 (1998))? Under RAP 13.4(b)(1)(2) and (4), review is proper.

## IV. STATEMENT OF THE CASE

Jinru Bian (Appellant / Plaintiff) bought the property at 906 38th St, Bellingham, WA, in 2012 [CP 27]. Olga Smirnova, Bian's south neighbor, did a survey in 2017, finding the boundary by an old fence was on the south of the survey boundary [CP 28, ¶ 6]. Smirnova then removed the fence and built a new fence on the north of the old fence [CP 29, ¶ 12-14].

Because of no response to Bian's inquiring, in August 2018, Bian filed a complaint (# 18-2-01455-37, "the 18-case") claiming adverse possession of the strip based on the fact that his predecessor, Margret Erhardt, had owned the Bian property from 1992 to 2007 and adversely possessed the strip. The 18-case was closed [CP 264, line 17] in 2020 by Smirnova's action

of "COMPELLING ENTRY OF DISMISSAL" (see in Smirnova's attorney bill [CP 250, 11/1/2019]), while both sides discussing a trial date for summary judgment [CP 250].

After the closure of the 18-case, not a willingness of Bian (but he had to passively accept it), Bian filed another complaint (# 20-2-00253-37, this case) in February 2020. Because there had been **no genuine issue of the material facts known in the yearly discovery of the 18-case**, Bian filed a motion for summary judgment in March 2020. In May 2020, Smirnova filed a cross-motion for summary judgement and a declaration [CP 30, 42] creating a **new** story that the old fence removed in 2017 was a temporary fence built in 2009 and Smirnova demolished the "original fence" of Erhardt time in 2007. Thus, by this **new** story of "original fence", there was **no adverse possession.**

In the same filing, Smirnova also claimed that there **was the adverse possession** but the adverse possession title perfected to Erhardt / Bian property in 2002 was "merged" back

[CP 83, line 15] when Mr. Kantor owned both properties in **2007** for six months. The merger claim was adopted from merging an easement when one owner owns two properties. Another new theory [CP121, ¶ 1] by Smirnova was that although the strip **was vested** to the Bian property by adverse possession in **2002**, since it was not referred at the title conveyances, the vested strip was divested (another merger). The trial Court granted Smirnova's motion and denied Bian's motion and motion for reconsideration afterwards in September, **2020**. Bian appealed the denying then.

Afterwards, Smirnova filed motion for awarding attorney's fees and cost [CP 246]. The first proposed order and judgment in **2020** was $34,226.28 [CP 260], which included time preparing the motion, affidavit bill, proposed order and judgment. Later, there were disputes on what constitutes reasonable attorney fees. A (second proposed) judgment of $39,378.89 for the awarding was entered in March 2021 [CP 387]. The increment of **$5152.61** from the first presentation was spent on disputing the bill. Bian

appealed this order awarding attorney fees. The Court granted a consolidation of the two appeals for the two orders.

In October, 2021, the Court of Appeals issued an opinion [CP 392] (No. 81937-2-I, "the Opinion-1") that affirmed the granting Smirnova's motion for summary judgment and reversed the second order (for attorney's fee award).

Bian petitioned the Supreme Court to review the affirming the order granting Smirnova's summary judgment. Smirnova petitioned for review of the reversal of the order for attorney fee award. Both petitions were denied and a sanction of $10,700.00 was imposed on Bian because Bian moved Smirnova to provide material evidence to show there were concrete footings of the old fence posts that Smirnova had claimed their existence but Bian has never seen any (and did not believe the new story was true for the summary judgment).

After the mandate from reviewing Courts, on November 2022, the trial Court entered a judgment [CP 476]. (2022-Judgment), setting Bian as Debtor for $50,078.89 including the

same in the reversed order, but **no addressing any of the items** that Bian concerned in his response. Bian filed appeal for the 2022-Judgment because of the no addressing any of the items (hours) that should be discounted by the published opinion:

> "A trial court must support its fee award by entering findings of fact and conclusions of law. The court's findings must do more than give lip service to the word 'reasonable'. The findings must show how the court resolved disputed issues of fact and the conclusions must explain the court's analysis." Cedar Grove Composting, Inc. "The court should discount hours spent on unsuccessful claims, duplicated or wasted effort, or otherwise unproductive time." Chuong Van Pham

The trial Court entered another judgment on April 2023 (2023-Judgment), after a hearing for a postjudgment motion filed by Bian. The 2023-Judgment did not improve Bian's position but added a new part from interests for the reversed (2021) judgment and for 2022-Judgment. Bian filed Amendment to Notice of Appeal for 2023-Judgment for the new part, following the instructive letter from the Court.

## V. REASONS FOR GRANTING REVIEW

### A. The affirming the awarding attorney fees for

**hours on unsuccessful claim that was reversed by the Court because the awarding order had reversible errors presented by Smirnova, which is unproductive efforts, without excluding or denying the hours being unsuccessful or wasted, is in conflict with the published opinions**

> The Opinion cited: "[t]he court must then discount hours spent on 'unsuccessful claims, duplicated effort, or otherwise unproductive time.' Berryman v. Metcalf, 177 Wn. App. 644, 660, 662, 312 P.3d 745 (2013). (quoting Bowers v. Transamerica Title Ins. Co., 100 Wn.2d 581, 597, 675 P.2d 193 (1983))."

The Opinion-1 in 2021 reversed the order granting Smirnova attorney's fees. The reversal was because the order had reversible errors presented by Smirnova and the reversal makes the hours spent on the fee claim (2020-2021) was unsuccessful and the efforts on disputed fee claim (after completion of defense of land title) **unproductive or wasted**.

1) On remand, the new (2022 and 2023) judgments erroneously included the hours on the unsuccessful claim on attorney fees dispute that was unproductive efforts. The inclusion and the affirming the inclusion **are conflict with** the opinions of Berryman and Chuong Van Pham. Under RAP

13.4(b)(1) and (2), review is proper

2) Further, the trial Court had **no addressing on the concern** Bian presented for this block, which is a reversible error and a manifestly abuse its discretion in new judgments because "[a] trial court's failure to address such concerns is reversible error." Berryman. The Opinion having no analysis nor comment on the concern and on the non-addressing of this block of hours is also conflict with the opinion of Berryman, and actually vacates the matter of the right of Bian to civil appeal on this issue because the Opinion is empty on this appealed issue. RAP 6.1 Appeal as a Matter of Right. RAP 13.4(b)(2).

Bian does not understand that the Opinion cited the Berryman Court's opinion, while ignoring it on the specific issue even though the opinion uses the firming word "**must**", and that the Opinion or the judgments did not exclude these hours spent on "unsuccessful claims, or unproductive efforts", as presented, which are required to discount by the authorities. The key in this section is that it cannot be equitable and just for Bian to pay

for the reversible errors committed by Smirnova.

3) The "new rule" set in this section is that awarding attorney fees on unsuccessful and unproductive hours may not need a finding and conclusion of law, but by not addressing the concern for it in judgments but with a conclusory statement, which is **in conflict with** above authorities and that: "A trial court **must support** its fee award by entering findings of fact and conclusions of law. The court's findings must do more than give lip service to the word 'reasonable'. The findings must show how the court resolved disputed issues of fact and the conclusions must explain the court's analysis." Cedar Grove Composting, Inc. Under RAP 13.4(b)(2), review is proper.

**B. The affirming the awarding attorney fees on hours on an independent and closed case without "CONSIDERING ALL THE FACTS" [required by RCW 7.28.083(3)] in the case that had no story of "original fence" (by its yearly discovery), the base for Smirnova to prevail in this case, which is in conflict with the cited opinions and the statute.**

Under RCW 7.28.083(3):

"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."

The closed 18-case (Whatcom County # 18-2-01455-37) was an **independent** case (from this case). One of reasons for the independency was because the 18-case had **no** story of "original fence" which was the SOLE base for Smirnova to prevail in this case. Hours were spent in the 18-case on "**new facts well beyond**" [Smirnova's words, CP 461, line 19] the record of this case, which excluded the existence of "original fence". Thus, by its **yearly written discovery**, up to its set trial date, Smirnova could not prevail in the 18-case [Bian's Brief, P.23]. The hours spent were unproductive or wasted because of the "**error**" that Smirnova **hid the critical factual story (assume it was true**) in the **yearly discovery**, or the story of "original fence" was created in this case. Thus, the trial Court abused its discretion manifestly awarding fees for the 18-case with no ground and no reason, because "[the] discretionary decision rests on 'untenable grounds' or is based on 'untenable

reasons' if the trial court relies on **unsupported facts**". Mayer v. Sto Indus., Inc., 156 Wn.2d 677, 132 P.3d 115, (2006).

1) There is **no statute**, **nor authority** (cited) allowing one court to award attorney fees to another independent case, where **no party prevailed**, while the trial Court did. "An abuse of discretion occurs when a decision is 'manifestly unreasonable, or … if the trial court relies on **unsupported facts** or applies the **wrong** legal standard". Id. If it would allow the award by one court to another, procedure questions are whether the current court should (must) review the factual base in the independent case (or not), and whether the award should be based on current base or on the (different) base in the independent case. However, a published opinion held that establishing a base for attorney fees in one case did not necessarily establish the same base in another case even for **the same issue** (and its volunteer dismissal). Park Place Motors, Ltd. v. Elite Cornerstone Constr., LLC, 18 Wn. App. 2d 748, 493 P.3d 136 (2021). Similarly, Smirnova did not prevail in

the 18-case for attorney fee award because the 18-case was an independent case with **different base** from this case (and different court and case #). "Without a judgment, there is no prevailing party. [Defendant] was not entitled to attorney fees upon dismissal at the district court". AllianceOne Receivables Mgmt., Inc. v. Lewis, 180 Wn.2d 389, 325 P.3d 904, (2014). Under RAP 13.4(b)(1) and (2), review is proper.

2) RCW 7.28.083(3) requires "**considering all the facts**" before an award to be equitable and just. Because the judgments cited no document from the 18-case, the trial Court considered no fact in the 18-case, especially the "**new facts well beyond**" the record in this case, and the Opinion had no comment on the "**new facts**" and the **non-considering of the fact** that a yearly discovery resulted in no story of "original fence" which was the **sole** base for Smirnova to prevail in this case, the awarding attorney fees for 18-case and its affirming are a **modification of and in conflict with** RCW 7.28.083(3). Under RAP 13.4(b)(4), review is proper.

3) The fact that no finding and no conclusion of law, either in the judgments or in the Opinion, for the "**new facts well beyond**" the record in this case while awarding fees for them is in conflict with the opinion that "[a] trial court **must support** its fee award by entering findings of fact and conclusions of law." Cedar Grove Composting, Inc. Under RAP 13.4(b)(2), review is justified.

4) There has been **no** explanation and **no** addressing, in the judgments and the Opinion as **why the yearly written discovery efforts** resulted in **no** story of "original fence" in the 18-case, while it was created later in this case as the **sole** base for Smirnova to prevail. The fruits of the efforts that were wasted and unproductive were clearly because Smirnova **hid the critical fact** (assume the story was true).

5) The closure was by the efforts of "**compelling entry of dismissal**" of Smirnova (see Smirnova's attorney bill [CP 250, 11/1/2019]), while Smirnova did not request a right, if any, at its closure. Actually, CR 41b(2)(A), under which the

18-case was closed and which was cited by Bian to show that the 18-case could continue if Smirnova did not act "compelling entry of dismissal" since Bian already set a trial date for it, defines: the closure was "**without prejudice and without cost to any party**". The dismissal without prejudice shows that the 18-case was closed with no prevail part, as also defined by the court of Wachovia SBA Lending, Inc. v. Kraft, 165 Wn.2d 481, 200 P.3d 683, (2009). Thus, award fees for the case with no prevail party is in conflict with CR 41b(2)(A) and RCW 7.28.083(3). Under RAP 13.4(b)(1) and (4), review is justified.

Further, there is no base of equitable and just for Bian to pay for the **factual base** that was against the base in this case and the "**error**" that Smirniova committed "concealment" of the key fact. "A discretionary decision rests on 'untenable grounds' or is based on 'untenable reasons' if the trial court relies on unsupported facts". Mayer v. Sto Indus., Inc.

### C. The affirming the awarding attorney fees for hours on mergers that claimed to alter vested title with no COMMON CORE FACT with this

**case, were unsuccessful, unproductive, or unnecessary, and unauthorized for attorney fees. The affirming may set a new standard for discountable hours, different from that in published opinions**.

To merger a title one must admit there existed the title before merger it. Thus, the pre-admission of the adverse possession title is the condition for merging the existed title, not a defense against it, because merging or altering the existed title and defense against the title were based on opposite factual bases. For merging the title, the trial Court had **no finding and conclusion** on if the merger is counterclaim, or affirmative defense, though the Opinion believes the merger was an affirmative defense by the statement from Smirnova's Brief, as sole reason for awarding attorney fees.

1) Because no statute authorizes merger doctrine attorney fees and the mergers in this case [CP 451, line **20**] (the mergers were new theories, never used in merging title in WA) "the attorney fees **must** be segregated between those efforts for

which fees can be awarded and those for which fees are **not authorized**". Hume. Thus, affirming the attorney fees for the hours on mergers is conflict with Hume. Under RAP 13.4(b)(1), review is proper.

2) Undoubtedly, the hours on mergers in this case was unproductive or unsuccessful or unnecessary (together as: "wasted"), because without spending those hours on the mergers, there would be no difference, by Smirova's story of "original fence". Thus, affirming the "wasted" hours in this section is in **conflict** with Chuong Van Pham because "these hours were unnecessarily expended, unproductive, or not sufficiently related to the successful claim". RAP 13.4(b)(1).

3) The published opinion requires "[t]he court must then discount hours spent on 'unsuccessful claims, duplicated effort, or otherwise unproductive time.'" Berryman. These discountable hours were not classified as "affirmative defense" vs. "counterclaim", but classified as "wasted" vs. "useful" in

the opinions cited. Clearly, by the published opinions, if hours are spent on counterclaim but useful, it should not be discounted when there is a statute authorizing it, but if hours are spent on a defense (or affirmative defense) but wasted, they must be discounted. Thus, it is improper only to argue whether the mergers are counterclaim or affirmative defense, while ignoring whether it is "wasted" or useful as defined in the authorities, and presented to the trial Court and in Bian's Brief. No published WA opinion allows including discountable hours that are used as "defense" or "affirmative defense" **but that are "wasted"** (as "unsuccessful claims, duplicated effort, or otherwise unproductive time"). Thus, the modification of the definition for discountable hours for fee award is in conflict with the opinions. The Opinion affirming the wasted and discountable hours in this section actually sets a new rule (standard) to consider only "defense or counterclaim", not consider whether they are "wasted or useful" because the Opinion cited the Berryman court's opinion but without a word

on whether there existed no (or any) hours as the "wasted".

Under RAP 13.4(b)(4), review is proper.

### D. The Opinion may set a new standard for awarding attorney fees only by dispute size and litigation length without examining or concluding whether there is any "wasted" hour, which is in conflict with the published opinions

The published opinions in Washington State determine whether an awarding is equitable and just for attorney fees by whether the award includes any (discountable) hours on "unsuccessful claims, duplicated effort, or otherwise unproductive time" (because the authorities require that that "MUST" be discounted). There is no opinion or statute (including RCW 7.28.083(3)) taking dispute size and litigation length as ONLY criteria for amount of attorney fee award, without examining if there is any wasted hours. Thus, the Opinion may set another new rule that a trial court can take "disputes size and litigation length" as ONLY criterion for equitable and just in awarding attorney fees, not to consider, as did not in the Opinion, whether there were (or were not) any

discountable hours as defined in the published opinions, because the Opinion accepted the conclusory statement that the award was equitable and just from the trial Court by the reasons that "the boundary dispute 'was over a very small footprint of land,' yet the lawsuit gave rise to several years of litigation and many court hearings." Thus, accepting and affirming the trial Court's standard for equitable and just without examining, asserting, and concluding whether there were (or not) any "wasted" hours may set a new standard for awarding attorney fees only by the dispute size and the litigation time, which is in conflict with the cited opinions and that "[u]nder the lodestar method of determining reasonable fees, the court **must first** 'exclude from the requested hours any wasteful or duplicative hours and any hours pertaining to unsuccessful theories or claims'" Target Nat'l Bank. Under RAP 13.4(b)(2) and (4), review is proper.

## VI. CONCLUSIONS

For the forgoing reasons, Bian respectfully requests this Court grant the petition to review this case where the Opinion has conflicts with the published opinions and the statutes, for true equitable and just in attorney fee awards. RAP 13.4(b)(1)(2) and (4).

Respectfully submitted, this 29th day of December, 2023.

I, Jinru Bian, certify that the total number of the words in this petition is 4098 (allowed 5000).

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Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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| JINRU BIAN, a single man,<br><br>Appellant,<br><br>v.<br><br>OLGA SMIRNOVA and JOHN DOE SMIRNOVA, a married man and woman and their marital community,<br><br>Respondents. | No. 84801-1-I<br><br>DIVISION ONE<br><br>UNPUBLISHED OPINION |

BOWMAN, J. — Olga Smirnova successfully defended against Jinru Bian's adverse possession claim, and the trial court issued an order awarding her reasonable attorney fees and costs. We affirmed the trial court's dismissal of the adverse possession claim but reversed and remanded its award of attorney fees. On remand, the trial court again awarded Smirnova her attorney fees and costs and ordered interest to accrue from the original judgment date. Bian appeals the trial court's new order. We affirm the attorney fee award but remand for the trial court to amend the new money judgment to accrue interest from only the date of its execution.

## FACTS

Bian and Smirnova are neighbors, residing in Bellingham. On September 18, 2018, Bian sued Smirnova in Whatcom County Superior Court, alleging adverse possession to a piece of Smirnova's abutting property. The parties engaged in discovery for the next two years, but in January 2020, the court dismissed the case for lack of prosecution.

On February 6, 2020, Bian refiled the same complaint. The parties cross moved for summary judgment, and in August 2020, the trial court granted Smirnova's motion to dismiss Bian's adverse possession claim. In October 2020, Bian appealed the summary judgment ruling. Then, on February 26, 2021, the trial court entered an order awarding Smirnova attorney fees and costs. And on March 19, 2021, the court entered a judgment for $39,378.89 in favor of Smirnova. That same day, Bian amended his notice of appeal to include the award of attorney fees.

On October 18, 2021, we affirmed the dismissal of Bian's adverse possession claim but reversed the award of attorney fees and remanded for the trial court to determine whether the amount Smirnova requested was "equitable and just" under RCW 7.28.083(3). Bian v. Smirnova, No. 81937-2-I, slip op. at 17 (Wash. Ct. App. Oct. 18, 2021) (unpublished), https://www.courts.wa.gov/opinions/pdf/819372.pdf. Bian then petitioned for review in the Supreme Court. The court denied review and awarded Smirnova reasonable attorney fees and costs "incurred in filing an answer to the petition for review as well as answers to the motions filed in the Supreme Court." Bian v. Smirnova, 199 Wn.2d 1008, 506 P.3d 642 (2022). On May 17, 2022, the Supreme Court entered a judgment awarding Smirnova $10,700 in attorney fees.

On remand to the superior court, Smirnova presented a proposed order and judgment awarding her $50,078.89 in attorney fees, costs, and interest.[1] On October 28, 2022, the trial court entered an "Order Granting Defendants' Motion

[1] The amount included the May 2022 Supreme Court judgment.

for Entry of Judgment and for Award of Attorneys' Fees and Costs." The language of the order was nearly identical to the original February 26, 2021 order but added the subsequent history of the case and the language that "the Court has determined that such an award is equitable and just as required under RCW 7.28.083(3), and in accordance with the Opinion of the Court of Appeals."

On November 4, 2022, Bian moved for reconsideration and set a hearing date of December 2, 2022 without oral argument. But on November 17, the trial court entered an amended judgment for Smirnova for $50,078.89. Bian timely appealed that judgment on December 9, mentioning his pending motion for reconsideration. Then, on December 15, 2022, the trial court granted Bian's motion for reconsideration, ordering "a hearing on the record for all issues related to the reasonableness of the Court's award of any attorney fees and costs, including whether such fees and costs are just and equitable."[2]

On March 29, 2023, the trial court held that hearing. At the end of the hearing, the court granted Smirnova her reasonable attorney fees and costs as the prevailing party under RCW 7.28.083(3). It concluded the award was equitable and just and incorporated its "oral rulings as captured in the court transcript" as binding on the final judgment. The court set a hearing for April for entry of the judgment.

On April 14, 2023, the trial court entered a "Second Amended Judgment" for Smirnova for $34,674.84, which included interest accrued from the date of the

[2] On February 24, 2023, a commissioner of this court granted Bian's request for the superior court to hear his postjudgment motion for reconsideration.

original March 19, 2021 judgment.[3] Bian appeals.

## ANALYSIS

Bian argues that the record does not support the trial court's determination that the amount of its fee award is equitable and just. We disagree.

"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). Whether a trial court is authorized to award attorney fees is a question of law we review de novo. Workman v. Klinkenberg, 6 Wn. App. 2d 291, 305, 430 P.3d 716 (2018). When authorized, we will uphold an attorney fee award unless the trial court manifestly abused its discretion. Id. A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. Id.

Under RCW 7.28.083(3),

> [t]he 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.

A determination of reasonable attorney fees begins with calculating the "lodestar," which is "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." Berryman v. Metcalf, 177 Wn. App. 644,

[3] The court amended the November 17, 2022 judgment awarding Smirnova a total attorney fee award of $50,078.89 to credit Bian for $25,000.00 he paid in December 2022. The April 14, 2023 award of $34,674.84 included the remaining balance owed for attorney fees ($25,078.89), costs ($188.39), and interest ($9,407.56).

660, 312 P.3d 745 (2013). The court must then discount hours spent on " 'unsuccessful claims, duplicated effort, or otherwise unproductive time.' " Id. at 662 (quoting Bowers v. Transamerica Title Ins. Co., 100 Wn.2d 581, 597, 675 P.2d 193 (1983)).

Trial courts must articulate the grounds for a fee award, making a record sufficient to permit meaningful review. White v. Clark County, 188 Wn. App. 622, 639, 354 P.3d 38 (2015). This generally means supplying findings of fact and conclusions of law sufficient to permit a reviewing court to determine why the trial court awarded the amount in question. Id. A trial court's oral ruling becomes binding when, as here, it formally incorporates its oral ruling into the findings, conclusions, and judgment. In re Det. of B.M., 7 Wn. App. 2d 70, 84, 432 P.3d 459 (2019).

Here, the trial court determined that it was equitable and just to award Smirnova all her reasonable attorney fees and costs. In its oral ruling on March 29, 2023, the court found that Bian's boundary dispute "was over a very small footprint of land," yet the lawsuit gave rise to several years of litigation and many court hearings. The court also found it concerning that Bian filed the lawsuit in 2018, allowed the lawsuit to fail for want of prosecution, and then "almost immediately" refiled the same lawsuit. The court characterized Bian's conduct as bordering on "vexatious litigation." The record supports the trial court's determination that it was equitable and just to award Smirnova all her reasonable attorney fees.

The court then calculated Smirnova's reasonable attorney fees using the lodestar method. It reviewed more than 25 pages of billing records documenting

the hours Smirnova's attorney spent defending the lawsuit from 2018 until its conclusion. The court concluded that counsel's hourly rates were reasonable because they were "substantially less than . . . would be charged [for] an attorney practicing in King County." It also determined that the attorney hours were reasonable considering the four years of litigation, noting that the total cost of representation was "not as substantial" as similar cases before the court. The court did not abuse its discretion in calculating Smirnova's reasonable attorney fees and costs.

Bian argues the award is not equitable and just because it includes attorney fees incurred defending the 2018 lawsuit. According to Bian, those fees should not be included because the case was "closed" and not sufficiently related to Smirnova's successful disposition in 2023 to warrant an award of fees. But the record shows that Smirnova incurred significant attorney fees defending against Bian's allegations in the 2018 lawsuit. The parties engaged in discovery and litigated the claims for two years before the court dismissed it for Bian's inaction. And the fruits of those efforts were clearly relevant to defending against Bian's identical refiled allegations.

Bian also argues the award is not equitable and just because it includes attorney fees incurred developing Smirnova's "counterclaim" of merger, which he describes as "unsuccessful." But Smirnova did not bring a counterclaim of merger. Instead, she pleaded merger of title as an affirmative defense to Bian's allegation of adverse possession. And Bian cites no authority that a party cannot recover attorney fees for time spent developing an affirmative defense to a plaintiff's allegations. When a party cites no authorities in support of a

proposition, we need not search out authorities, but may assume that the party, after diligent search, found none. Fox v. Skagit County, 193 Wn. App. 254, 277-78, 372 P.3d 784 (2016) (citing DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)).

Finally, Bian argues that the trial court erred by awarding interest on the attorney fee award dating back to the original March 2021 judgment. We agree.

Interest on a judgment is governed by statute. Fulle v. Boulevard Excavating, Inc., 25 Wn. App. 520, 522, 610 P.2d 387 (1980) (citing RCW 4.56.110). Under RCW 4.56.110(3)(a), when

> a court is directed on review to enter judgment on a verdict or in any case where a judgment entered on a verdict is wholly or partly affirmed on review, interest on the judgment or on that portion of the judgment affirmed shall date back to and shall accrue from the date the verdict was rendered.

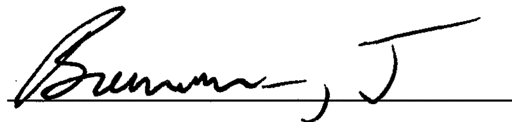
However, "[a]wards reversed on review do not bear interest." Fisher Props., Inc. v. Arden-Mayfair, Inc., 115 Wn.2d 364, 373, 798 P.2d 799 (1990). So, when an appellate court decision " 'merely modifies the trial court award and the only action necessary in the trial court is compliance with the mandate,' " interest will accrue from the date of the original judgment. Id. (quoting Fulle, 25 Wn. App. at 522). But interest runs from only the new judgment date when the appellate court " 'has reversed the trial court judgment and directed that a new money judgment be entered.' " Id. (quoting Fulle, 25 Wn. App. at 522).

Here, we "reverse[ed] the award of attorney fees [to Smirnova] and remand[ed] to the trial court to independently determine if the amount Smirnova requested was equitable and just." Bian, No. 81937-2-I, slip op. at 17. In doing so, we did not modify the fee award and remand for the trial court to simply follow

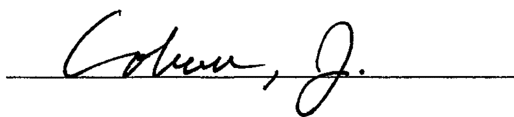
our mandate. Instead, we authorized the trial court to exercise its discretion and determine what amount of Smirnova's fee request was equitable and just. As a result, interest should accrue from the date of the new money judgment.

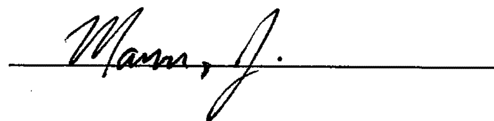
Smirnova asks for attorney fees on appeal under RCW 7.28.083(3) as the "prevailing party in an action asserting title to real property by adverse possession." When a statute authorizes fees in the trial court, those fees are also available on appeal. SEIU Healthcare Nw. Training P'ship v. Evergreen Freedom Found., 5 Wn. App. 2d 496, 515, 427 P.3d 688 (2018). Because both parties prevailed on appeal in part, we decline to award Smirnova attorney fees.

We affirm the trial court's award of attorney fees as equitable and just but remand for the court to modify the April 14, 2023 money judgment to accrue interest from the date of its execution.



WE CONCUR:





FILED
11/30/2023
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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| JINRU BIAN, a single man,<br><br>Appellant,<br><br>v.<br><br>OLGA SMIRNOVA and JOHN DOE SMIRNOVA, a married man and woman and their marital community,<br><br>Respondents. | No. 84801-1-I<br><br>DIVISION ONE<br><br>ORDER DENYING MOTION FOR RECONSIDERATION |

Appellant Jinru Bian filed a motion for reconsideration of the opinion filed on November 6, 2023. A majority of the panel has determined that the motion should be denied. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:

Judge

APPENDIX C: 1

FILED
Court of Appeals
Division I
State of Washington
11/27/2023 3:00 PM

**No: 848011**

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON

DIVISION ONE

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**JINRU BIAN**

Appellant / Plaintiff

v.

**OLGA SMIRNOVA**

Respondent / Defendant

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**Motion for Reconsideration**

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## I. IDENTIFY OF MOVING PARTY

Appellant, Jinru Bian, in the case of Bian v Smirnova, with case number: 848011.

## II. STATEMENT OF RELIEF SOUGHT

Appellant, Jinru Bian respectfully requests this Court to reconsider the decisions filed by this Court on November 6, 2023, affirming the trial Court's awarding attorney fees for the title case (number: 848011-I, the Opinion). RAP 12.4(b).

## III. REFERENCE TO THE DECISION TO RECONSIDER

The Opinion concludes: "[w]e affirm the trial court's award of attorney fees as equitable and just…". Since Bian appeals three blocks of the awarding attorney fees, the references to the decisions will be briefed separately below:

A. The hours spent on the claim of attorney's fees, after completion of defense of adverse possession title, and after first presentation of the attorney's fees, was unsuccessful because the claim was reversed by this Court, and the effort of which is manifestly unproductive.

For this appealing, the Opinion has **no analysis** on it, probably because there is **no finding** on this block of hours from the trial Court denying that the hours on this claim are unsuccessful (and unproductive efforts)


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and nor conclusion of law as why these unsuccessful and unproductive efforts were included.

B. The hours spent on the independent case (WC # 18-2-01455-37, “the 18-case”), which was closed with efforts of Smirnova’s “compelling entry of dismissal” action [CP 446, line 23] and discovered an opposite factual base to the base to prevail in this case.

The Opinion states: “the parties engaged in discovery and litigated the claims for two years before the court dismissed it for Bian’s inaction. And the fruits of those efforts were clearly relevant to defending against Bian’s identical refiled allegations”. But the Opinion has no comment on why for so long discovery there was no story of “original fence” that is the sole base for Smirnova to prevail in this case.

C. The hours on “Merger Title” And “Transfer-Divestment” Are Unsuccessful, Or Unproductive Or Wasted Effort, with opposite base to the base Smirnova prevails in this case.

The Opinion states:

“But Smirnova did not bring a counterclaim of merger. Instead, she pleaded merger of title as an affirmative defense to Bian’s allegation of adverse possession. And Bian cites no authority that a party cannot recover attorney fees for time spent developing an affirmative defense to a plaintiff’s allegations….” But the Opinion has no comment denying the efforts on the merger is unproductive, unnecessary, wasted, as presented to the trial Court and in Bian’s Brief.

## IV. LAW AND FACTS RELEVANT TO THE MOTION FOR RECONSIDERATION.

A. "**The court should discount hours spent on unsuccessful claims, duplicated or wasted effort, or otherwise unproductive time**." Chuong Van Pham v. Seattle City Light, 159 Wash.2d 527, 538, 151 P.3d 976 (2007)

The fact in this section was described in Bian's Brief as:

"Error 7. This Court reversed the (old) order granting Smirnova attorney's fees. The reversal makes the prior efforts on disputed attorney fee claim (after completion of defense land title) unproductive (wasted). The Judgments erroneously include the unproductive efforts, which is also not authorized by the statute, and cannot be equitable and just." [Bian's Brief, P 4]

Following is from Bian Brief, P. 42:

1. Presentation of attorney fee claim should not be more than once for reasonableness.

2. RCW 7.28.083(3) does not authorize an attorney fee award for disputing the fee bill, [CP 452, line 19; CP 468, B.] **after the first presentation** of the fee bill affidavit.

3. The reversible error in prior awarding fee decision made the hours on the fee dispute wasted and unproductive. [CP 469, ¶ 1; 494, ¶3; CP 453, line 17; VP1, P.24, line 10], indicating the Smirnova's disputing presentation in error.

4. **No proving** the reasonableness or **address** of the fees in this section is in the judgments or in the record.

5. Proving the reasonableness of the fees is the burden of Smirnova. The burden means obligation, responsibility and duty. No attorney charges a time for a client disputing a bill **especially when the client is right**. Including the hours for disputing bill is unreasonable. [CP453, line 12; CP469, ¶ 1] ”

This Court reversed the (old) order granting Smirnova attorney’s fees. The reversal was because the order had reversible error presented by Smirnova and made the prior efforts on disputed attorney fee claim (after completion of defense land title) unproductive (wasted) and the fee claim was unsuccessful.

There has been **no finding, nor conclusion of law in the Judgments** as well as **no analysis** in the Opinion as why the award should include this unsuccessful claim of the fee dispute, which was manifestly unproductive effort, as Bian presented. The no addressing in the Judgments on the concern itself is a reversible error and a manifestly abuse its discretion (and duty) in this case because “[a] trial court's failure to address such

concerns is reversible error." Berryman v. Metcalf, 177 Wn. App. 644, 662, 312 P.3d 745 (2013).

> "A trial court **must support** its fee award by entering findings of fact and conclusions of law. The court's findings **must do more than give lip service to the word 'reasonable'**. The findings must **show how the court resolved disputed issues of fact and the conclusions must explain the court's analysis**." Cedar Grove Composting, Inc. v. City of Marysville, 188 Wn. App. 695, 354 P.3d 249, (2015) (quoting Berryman) (bold added)

However, there has been no finding and conclusion of law in the Judgments and the Opinion for whether the hours spent on additional attorney-fee disputing, after first presentation of fee affidavit, was unsuccessful and unproductive and why the unproductive hours were included. This is conflict with above opinion as standard process and requirement for fee award and was an abuse its discretion in the award. Mayer v. Sto Indus., Inc., 156 Wn.2d 677, 132 P.3d 115, 2006. If Bian's Brief would appeal only this unsuccessful and unproductive effort, the analysis section in the Opinion would be absence because the trial Court had no findings and no conclusion on the concern (no

record at all). Apparently, including the hours on this unsuccessful and unproductive effort in the award is in conflict with the opinion of Chuong Van Pham, and conflict with the citation in the Opinion "[t]he court must then discount hours spent on" 'unsuccessful claims, duplicated effort, or otherwise unproductive time.' " Berryman v. Metcalf, 177 Wn. App. 644, 662 (quoting Bowers v. Transamerica Title Ins. Co., 100 Wn.2d 581, 597, 675 P.2d 193 (1983))" Bian does not understand that the Opinion cited the Berryman Court's opinion, while ignoring it on the specific issue even though the opinions use the firming word "must".

It must be admitted that it is **inequitable** for Bian to pay more than once for the fee presentations (duplicated affidavits and efforts) without reasonable explanation and it is entirely **unjust** for Bian to pay for Smirnova's reversible (reversed) Error. This is an abuse of its discretion because "[t]he court's decision is "manifestly unreasonable". Mayer v. Sto Indus., Inc.

The "new rule" set in this section is that awarding attorney fees for unsuccessful and unproductive hours may not need any finding and conclusion of law, but by not addressing the concern for it in the judgments, which is in conflict with the cited authorities, Berryman v. Metcalf and Chuong Van Pham v. Seattle City Light.

**B.** Under RCW 7.28.083(3):

> "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."

It is clear that the statute requires considering **all the fact** before an award to be equitable and just. In awarding attorney fees to the independent and closed 18-case, following facts the Opinion and the trial Court did not consider or overlooked:

1) The closed 18-case was an **independent** case. One of reasons for the independency is because the 18-case had **different factual base** that there was no story of "original fence, which was the **sole** base for Smirnova to prevail in this

case, by its yearly written discovery up to setting its trial date. (It also had a different court, case number, judge and period).

2) There were decisive photo evidences against the story of "original fence" (the only base for Smirnova to prevail in the 20-case), as presented to the trial Court.

3) A yearly discovery found that there was no story of "original fence, which means **no base** for Smirnova to prevail if the 18-case would continue.

4) There has been no explanation or addressing why the yearly written discovery efforts discovered no story of "original fence" which was later created in this case as a base to prevail.

5) The fruits of the efforts that were wasted were clearly because Smirnova **hid the critical fact** (assume it was true).

For 1), there is no rule, statute, or authority authorizing one court to make a decision on other independent cases, especially **without considering or going through its basic facts**, even though the relevant statute requires considering all

the facts. Ignoring the basic requirement of the statute is manifestly abused its discretion in the awarding.

For 2) and 3), it is clear that Smirnova could not prevail in the 18-case and cannot prevail by its factual base. Thus, **awarding attorney fees for a party who could not prevail cannot be just and equitable**. How the Court consider the fact: awarding attorney fees to a non-prevail party, demonstrated by its decisive facts in the case?

By 4), if during the discovery, Smirnova would "release" the story of "original fence", there would be no litigation since. How the Courts to consider the non-explanation of the critical fact (difference) and why the factual bases were different?

From 5), since fruit of wasted efforts was clearly because Smirnova **hid the critical fact** (assume it is true), it cannot be inequitable and unjust for Bian to bear the burden by the "error" that Smirnova hid the critical fact during the yearly discovery, or the story of "original fence" created later was a false story to prevail in the litigation. This is "manifestly unreasonable or

exercised on untenable ground." Mayer v. Sto Indus., Inc. How the Courts consider the "fatal and critical" error Smirnova continued to setting its trial date in 18-case in the fee award?

The award should consider these different factual bases with **findings and conclusion as why the bases were different**, as required by the statute. **No considering** the fact that Smirnova could not prevail in the 18-case, according to its yearly discovered facts, is in **conflict with RCW 7.28.083(3)** and manifestly abuse its discretion in its award. Bian does not understand how this Opinion consider the award conflict with the statute requirement.

Meantime, the "'almost immediately' refil[ing] the same lawsuit" further demonstrated that the 18-case was closed by the "compelling entry of dismissal" action of Defendant [Exhibit A, CP 446, line 23; CP 492], not a willingness of Bian and not a so-called "bordering on 'vexatious litigation'". Thus, this finding for the 18-case closure by the trial Court was in

short of restrict logic and on ‘untenable grounds’ or was based on ‘untenable reasons’. Id.

Further, this Opinion actually set a new rule that one trial court can determine disputes in another independent and closed case **without going through the facts in that case**, even the applicable statute requires “**considering all the facts**”.

**C.** Regarding merger of the adverse possession title, the trial Court had **no finding and no conclusion** on whether the merger is counterclaim, claim, new theory, or affirmative defense, while this Opinion believes the merger was an affirmative defense against adverse possession title, by citing the statement from Smirniva filings, in place of the trial Court.

1) In order for the merger to be meaningful, it must be based on **existence of adverse possession** (one must admit there is an adverse possession title before merger it). Logically, admitting its existence is not a defense against it, but a claim to

re-unit or alter **the exited title**. Thus, there is no logic to define merging or altering the existed title as "affirmative defense".

> 2) "Thus, courts should treat claims as separate lawsuits when they are both **factually** and **legally unrelated**" in attorney fee award. Bright v. Frank Russell Invs., 191 Wn. App. 73, 361 P.3d 245, 2015. (quoting Hensley v. Eckerhart, 461 U.S. 424 (1983)) (bold added)

As long as the merger in this case are **factually** and **legally unrelated**" as presented in this case, the attorney fee should be treated as separate lawsuits. The separate lawsuits in this case are based on opposite factual facts and unrelated law theories, which also presented in to the trial Court and Bian's Brief. Based on above opinion one should not conclude "Bian cites no authority that a party cannot recover attorney fees for time spent developing an affirmative defense to a plaintiff's allegations" because as long as in a defense, if the claims for a "defense" are **factually** and **legally unrelated theories** (and useless), it should be treated separately in attorney fee award since it is not a defense but altering the **existed** title.

3) There is no authority or statute that authorizes merging an adverse possession title in Washington. Instead, in this State, any property title change must be in writing, except adverse possession which however is required ten years of exclusively, continuously and adversely possession. Thus, merging an adverse possession title, "a proposed new law", was in violation of Washington property law, actually wasted unproductive and unnecessary. Even the merger would be successful; there is no authority authorizes attorney fees for it. "the attorney fees **must** be segregated between those efforts for which fees can be awarded and those for **which fees are not authorized**". Hume v. Am. Disposal Co., 124 Wn.2d 656, 880 P.2d 988, (1994). Awarding attorney fees for the merger is "manifestly unreasonable" since there is no legal ground for it.

4) Undoubtedly, the fact is that the merger in this case was unproductive or wasted, or unsuccessful (simply as: "wasted") [CP452, ¶ 2; CP 498, ¶ 1]. In other words, without

spending time on the merger, there would be no difference, by Smirova's story of "original fence".

5) The published opinion requires "[t]he court must then discount hours spent on 'unsuccessful claims, duplicated effort, or otherwise unproductive time.'" Berryman v. Metcalf. These discountable hours were NOT classified as "affirmative defense", or "counterclaim", but classified as "wasted" or useful in the opinion or other opinions. In other words, by the opinions, if hours are spent on counterclaim but useful, it should not be discounted when there is a statue authorize it, and if hours are spent on an affirmative defense (or defense) but wasted, they must be discounted. Thus, it is improper to argue whether the merger is a counterclaim or affirmative defense, while ignoring whether it is useful or "wasted" as defined by the authorities as presented to the trial Court and in Bian's Brief. No published WA opinion allows including discountable hours that are labeled as "defense" or "affirmative defense" **but that are wasted**: "unsuccessful

claims, duplicated effort, or otherwise unproductive time".
The legal standard should not be two sets of different conflicting concepts to be trusted by the public.

This is a legal issue to clarify: discounting hours should be based on defense/counterclaim, or on "wasted"/useful, when the two sets of standards are in conflict. This Opinion set the new rule only to consider the former, not the later, conflicting with the authorities cited.

D. The published opinions in Washington State determines whether it is equitable and just for an award of attorney fees by whether the award includes any hours on "unsuccessful claims, duplicated effort, or otherwise unproductive time" (because the authorities require that "MUST" be discounted). There is no published opinion or statute (including RCW 7.28.083(3)) taking "dispute size" and "litigation length" as ONLY criteria for amount of attorney fee award without asking if there is any hours wasted. Thus, this

Opinion may set another new rule that a trial court can take "disputes size" and litigation length as ONLY criteria for equitable and just in awarding attorney fees without checking (or not by) whether there is any discountable hours as defined in the published opinions), because this Opinion accepted the conclusory statement that the award was equitable and just from the trial Court, by the reasons that "the boundary dispute 'was over a very small footprint of land,' yet the lawsuit gave rise to several years of litigation and many court hearings. However, one must admit that there is no statute nor published opinion in this State determining attorney fees as equitable and just ONLY by the dispute size and the litigation length, because dispute size and litigation length for attorney fee award cannot be standardized and generalized, because reasonableness depends upon the "particular circumstances of each individual case." Schmidt v. Cornerstone Inv., Inc., 115 Wn.2d 148, 169, 795 P.2d 1143 (1990). Awarding attorney fees based on dispute size and litigation length ONLY (not on if there is any wasted

hours) is manifestly abuse its discretion because there is no legal ground or authority supporting.

Bian does not clear if the trial Court used lodestar method in determine the fee award, because "[u]nder the lodestar method of determining reasonable fees, the court **must first** 'exclude from the requested hours any wasteful or duplicative hours and any hours pertaining to unsuccessful theories or claims'" Target Nat'l Bank v. Higgins, 180 Wn. App. 165, 321 P.3d 1215, (2014) (quoting Mahler v. Szucs, 135 Wn.2d 398, 434, 957 P.2d 632 (1998)) because there is no examine whether there are those "wasted" hours.

## V. CONCLUSION and REQUEST:

For the forgoing reasons, Bian respectfully requests this honorable Court reconsider the decisions by **discounting one or more of the blocks of hours**:

A. The block of hours for the extra increment of $5152.61 spent on the unsuccessful claim on disputing attorney

fees after completion of title defense, which was wasted or unproductive because of its reversible (reversed) error, which has not addressed by the trial Court and this Court.

B. The block of hours ($7924.30) on the independent 18-case that had the different factual base (from that in this case for prevail) which the Courts did not consider or address, while the considering all the facts is required by RCW 7.28.083(3);

C. Segregate and discount the hours on mergers because they were unsuccessful, unproductive or wasted hours, no matter whether they were as "affirmative defense", "counterclaim" or new theories.

Alternatively, Bian respectfully requests this honorable Court reverse the Judgments for further proceeding discounting the items that are discountable, according to the authorities and rules cited in Bian's Brief.

Respectfully submitted this 27th day of November 2023.

I, Jinru Bian, certify that the total number of the words in this motion is 3130.

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

**JINRU BIAN**

**November 27, 2023 - 3:00 PM**

**Transmittal Information**

| | |
|---|---|
| **Filed with Court:** | Court of Appeals Division I |
| **Appellate Court Case Number:** | 84801-1 |
| **Appellate Court Case Title:** | Jinru Bian, Appellant v. Olga Smirnova and John Doe Smirnova, Respondents |
| **Superior Court Case Number:** | 20-2-00253-1 |

**The following documents have been uploaded:**

- 848011_Affidavit_Declaration_20231127145645D1220996_9598.pdf
  This File Contains:
  Affidavit/Declaration - Service
  *The Original File Name was CERTIFICATE OF SERVICE.pdf*
- 848011_Motion_20231127145645D1220996_9342.pdf
  This File Contains:
  Motion 2 - Publish
  *The Original File Name was Motion for publication.pdf*
- 848011_Motion_20231127145645D1220996_9861.pdf
  This File Contains:
  Motion 1 - Reconsideration
  *The Original File Name was motion for reconsideration.pdf*

**A copy of the uploaded files will be sent to:**

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

**Comments:**

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Sender Name: Jinru Bian - Email: jbian98@gmail.com
Address:
818 Hilliary Lane
Aurora, OH, 44202
Phone: (360) 318-4470

**Note: The Filing Id is 20231127145645D1220996**

**JINRU BIAN**

**December 29, 2023 - 10:02 AM**

**Transmittal Information**

| | |
|---|---|
| **Filed with Court:** | Court of Appeals Division I |
| **Appellate Court Case Number:** | 84801-1 |
| **Appellate Court Case Title:** | Jinru Bian, Appellant v. Olga Smirnova and John Doe Smirnova, Respondents |
| **Superior Court Case Number:** | 20-2-00253-1 |

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- 848011_Petition_for_Review_20231229095207D1734548_8100.pdf
  This File Contains:
  Petition for Review
  *The Original File Name was Corrected Pertition-Bian.pdf*

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- swoolson@csdlaw.com
- tegland@csdlaw.com

**Comments:**

This is a CORRECTED Petition for Discretionary Review to replace the Petition for Discretionary Review. filed on December 28, 2023. Thank you.

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Sender Name: Jinru Bian - Email: jbian98@gmail.com
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**Note: The Filing Id is 20231229095207D1734548**