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APPEAL NO. 68202-4-I

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

(Whatcom County Court Case No. 09-2-01773-1)

DAVID COTTINGHAM AND JOAN COTTINGHAM,

Appellants/Cross-Respondents,

vs.

RONALD MORGAN AND KAYE MORGAN,

Respondents/Cross-Appellants.

Respondent/Cross-Appellants' Reply Brief

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November 20, 2012

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I – INTRODUCTION

Cottinghams' August 6, 2012 Opening Brief assigns error to Supplemental Findings of Fact 23 (c) and (d), as well as Supplemental Conclusions of Law 5, 7, 8 and 11, which were not appealed by Cottinghams. However, neither Cottinghams' Opening Brief nor Cottinghams' October 24, 2012 Reply to Respondent Morgans' Response and Response to Cross- Appellant Morgan's Appeal (Cottinghams' Brief) provide any authority for this Court to consider Cottinghams' Assignments of Error Nos. 33, 34, 35, 36, 37 and 38. Absent any authority or briefing, this Court should not consider said assignments of error.

Cottinghams' Brief again argues that the trial court's revision of its earlier Partial Summary Judgment Order was in error, relying on subsequent trial testimony as support for this argument. Morgans maintain their position that Cottinghams have not established their claim of adverse possession, making the earlier Partial Summary Judgment Order erroneous. In the alternative, if this Court determines that adverse possession was established over a small portion of Morgans' Lot 11, the trial court's revisions of its

prior Partial Summary Judgment was proper. The record at Partial Summary Judgment clearly demonstrates disputed issues of material fact. Material facts related to adverse possession were first raised in a declaration of Cottingham, disputed by Morgan at summary judgment and at trial Cottinghams' arguments were not supported by any testimony or other evidence. Furthermore, Cottinghams' argument that adverse possession was established by way of maintenance lacks merit and is simply not supported by the record.

II – LEGAL ARGUMENT AND AUTHORITY

A. Cottinghams Have Not Appealed the Supplemental Findings of Fact and Conclusions of Law

On February 1, 2012, the trial court entered Supplemental Findings of Fact and Conclusions of Law, which in part, amended the trial court's December 30, 2011 Conclusions of Law as follows:

> The Cottinghams **have not** established all elements of adverse possession by clear, cogent and convincing evidence as to any portion of Lot 11. (Emphasis added.)

CP 638, Amended Conclusion of Law No. 5. Cottinghams did not appeal any of the Supplemental Findings of Fact and Conclusions of

Law. CP 4-20. Cottinghams' Appeal Brief does assign error to Supplemental Findings of Fact 23 (c) and (d), as well as Supplemental Conclusions of Law 5, 7, 8 and 11. Cottinghams' Opening Brief; Assignments of Error Nos. 33, 34, 35, 36, 37 and 38; pp. 6-7. However, Cottinghams' briefing does not provide any authority for this Court to consider Cottinghams' Assignments of Error Nos. 33, 34, 35, 36, 37 and 38, which Order was not appealed by Cottinghams.[1]

"The appellate court will review a trial court order or ruling not designated in the notice (of appeal), including an appealable order, if (1) the order or ruling prejudicially affects the decision designated in the notice, and (2) the order is entered, or the ruling is made, before the appellate court accepts review." RAP 2.4 (b). Admittedly, the reviewing court may consider issues which are technically beyond the scope the notice of appeal where

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[1] Cottinghams' Appeal Brief references the Supplemental Findings of Fact and Conclusions of Law at pages 41 and 42 with regard to the prior Partial Summary Judgment Order, but does not provide any authority nor argument to support this Court's review or reversal of the Amended Findings of Fact and Conclusions of Law.

Cottinghams appropriately assign error and present arguments on the issues raised. *Wells v. Western Washington Growth Management Hearings Bd.,* 100 Wn.App. 657, 997 P.2d 405 (2000), *reconsideration denied*. However, the brief must set forth a basis for the challenge to the assignments of error not appealed. *In re Perkins*, 93 Wn.App. 590, 969 P.2d 1101 (1999), *review denied*, 138 Wn.2d 1003, 984 P.2d 1033. Cottinghams have not presented any arguments to sufficiently set forth their basis for their challenges to the Supplemental Findings of Fact and Conclusions of Law, including Supplemental Conclusion of Law No. 5, that Cottinghams have not established adverse possession. Absent any argument or authority as to why this Court should consider Cottinghams' Assignments of Error Nos. 33, 34, 35, 36, 37 and 38, this Court cannot and should not consider said Assignments of Error, which were not properly appealed to this Court. Absent this Court's consideration of Cottinghams' Assignments of Error Nos. 33, 34, 35, 36, 37 and 38, Cottinghams cannot prevail on the issue of adverse possession and this Court should affirm Supplemental Conclusion of Law No. 5.

B. No Evidence of Adverse Possession By Way of Maintenance

Cottinghams argue that the trial court's entry of Amended Conclusion of Law No. 5, that adverse possession was not established was based "only upon the location of laurel trunks . . ." and without consideration of any evidence of maintenance along the line of laurel bushes. Cottinghams' Opening Brief, p. 42. Cottinghams argue that they established adverse possession by way of maintenance activities on a portion of Lot 11.

Cottinghams' claim of adverse possession by way of maintenance is not supported by the record or Washington case law. At summary judgment, Ron Morgan described ten visits to Lot 11 in 2004 and 2005 and declared that he "saw absolutely no evidence of any portion of Lot 11 having been maintained (including mowed) by anyone other than me." CP 465, ¶ 4. In response to Cottinghams' summary judgment motion, Larry Steele (Steele), Morgans' Surveyor, declared that:

> At no time between January 2005 and January of 2007, did I or anyone acting at my instruction and direction find any evidence of occupation by another, see evidence of any established boundary line, or witness

> or see evidence of any adverse occupation. Lot 11 was vacant, unoccupied and unimproved.

CP 437, 439, ¶5; RP Vol. 2, pp. 108, 111, 121-122.

Cottinghams' surveyor, Bruce Ayers (Ayers), agreed with the boundary line between Lots 10 and 11 as surveyed by Steele. RP Vol. 2, p. 83. Ayers' survey, which was generated at Cottinghams' request, was not intended to convey that the "occupation maintenance line" was being occupied or maintained by Cottinghams. RP Vol. 2, p. 91; Ex. 12. The "maintenance line" was labeled as such because it was a creation of the mind of Dave Cottingham. *Id.* Ayers does not establish property lines in his surveys based on the location of bushes. RP Vol. 2, p. 103.

Cottinghams did not provide any testimony to rebut Morgan and Steele's testimony regarding the lack of observed maintenance along the "maintenance line" or the laurel bushes. It is undisputed that Cottinghams, while planting the young laurel bushes sometime in 1995, did not possess, mow, or maintain the bushes in 2004, 2005 or 2006. To prove adverse possession, the alleged possessor must prove the possession was "actual and uninterrupted for the

statutory period of 10 years." *Teel v. Stading*, 155 Wn.App. 390, 393 – 394, 228 P.3d 1293 (2010). Where the possession is interrupted, this element is not met. *Id.* Transient uses such as cutting wild grass on unimproved or unfenced land, even though adverse, are not exclusive possession. *Wood v. Nelson*, 57 Wn.2d 539, 358 P.2d 312 (1961); see also *Happy Bunch, LLC v. Grandview North, LLC*, 142 Wn.App. 81, 92-3, 173 P.3d 959 (2007), *rev. denied* 164 Wn.2d 1009 (2008).

C. Partial Summary Judgment

Should this Court determine that Cottinghams proved their claim of adverse possession; the trial court properly revised its Partial Summary Judgment Order; thereby reducing the total area of Morgans' property allegedly adversely possessed by Cottinghams. Cottinghams argue that they supported their Partial Summary Judgment with evidence of adverse possession at page 140 of RP, lines 13-17; RP 140, lines 18-25; RP 141, lines 10 through 14; and RP 147, lines 6 through 8. There are three problems, factually with this argument.

First, Cottinghams' cite to the trial testimony as evidence supporting the earlier pre-trial Partial Summary Judgment of adverse possession. Second, the testimony does not establish adverse possession.

> Q. (By Cottingham) No, that's okay. I just thought it might be a matter that you knew about. Because you know that we're talking about an iron pipe on Lot 16, the railroad right-of-way, Lot 16. Back in '84 did you ever locate that or see that?
> A. Wasn't part of what we were requested to do. It's not actually on that side of the corner that you refer to is for the Burlington Northern plat, which was done in '72. This plat was done in '47. Our survey was done with Walt's observation in 1984.
>
> . . . .
> Q. (By Cottingham) Of course. My question has to do with the corner stake, iron pipe at the south corner of Lot 16.
> A. Uh-huh.
> Q. Did you locate that back then?
> A. Not to my knowledge.
> Q. Did you know if you talked with him about the location of that iron pipe back then?
> A. Well, there's a couple of things you've got to remember that (the RP referenced by Cottinghams' at page 4 of their October 24, 2012 Brief, ends in mid sentence, but the remainder of the answer is provided, **Cottingham v. Morgan/December 1, 2011/Vol. 2 141)** from a laymen's perspective, looking at the Burlington Northern plat map the lots on the lake side, not just Lot 16, but in the other one, the lots for the

> Burlington Northern Railroad plat are not coincident or projections of the Nixon Beach tracts. They never were.
>
> When Mr. Wilson and his firm, in the early '70's, did that plat for the railroad they basically used assessor records and did the best they could. And they were not surveying all of those lots. So basically they did the best job they could. And I think I know what you're referring to. When you look at the Burlington Northern Railroad plat that corner of Lot 16 looks like it's on the projection of the line between 10 and 11, but that, from a surveyor's perspective, has nothing to do with this.

. . . .

> Q. (By Cottingham)To prepare that document and those dimensions away from the house did you just calculate them based on information you already had in your office, or did you go out and shoot a line from the iron pipe to your shoreland or lakeward steel stake?
> A. Well, number one, this says court mandated line. We did not, that I recall, physically locate that. I do believe some of those dimensions were provided.

Finally, Cottinghams still fail to recognize that the answers to the questions asked and answers received at trial repeatedly denied the importance of an earlier survey stake on Lot 16. At page 18 of Cottinghams' Brief, they argue that Morgan offered no evidence to contradict Cottinghams' evidence of adverse possession. However, immediately after this argument, Cottinghams admit that Morgans' surveyor,

Steele, said he saw no structures on Lot 11, when he was on Lot 11 in 2005. Steele's trial testimony was:

> Q. When you were out there in 2005, before and after, did you see any evidence of an adverse occupation by anybody on the property?
> A. Well, I'm going to answer that this way. Typically, when you go to a site and somebody is asking you to do a survey, you're going to make some observations of what is there. But when you see certain features you would hope that somebody, when they put the features in, in this case the hedge, that they knew what they were doing when they put
>
> Q. So when you first went to the site you thought maybe the hedge was on an established boundary line or?
> A. Or on one side or the other. At the time that I visited before the crew was on site there was no way of knowing.
> . . . .
>
> Q. And when the survey was completed, what did you find out; was it on the line?
> A. It crossed the line. The existing hedge crossed the line. The lot corner one end away from the lake was on the north side of the hedge. And the lot line crossed as it went toward the lake. The lot line crossed the hedge or the hedge crossed the line.

More importantly, in response to Cottinghams' Partial Summary Judgment Motion, Steele's declaration provided the

following evidence in response to the allegation of adverse possession by Cottinghams:

> 5. At no time between January 2005 and January of 2007, did I or anyone acting at my instruction and direction find any evidence of occupation by another, see evidence of any established boundary line, or witness or see evidence of any adverse occupation. Lot 11 was a vacant, unoccupied and unimproved county lot. Except for evidence of an existing septic system and a small dock, Lot 11 contained areas of grass, trees, brush, with some evidence that it was likely used by prior owners as a camp site. . . .
>
> 6. Near the common boundary line between lots 11 and 10 was an uneven row of bushes some of which were north of lot 11, some of which were on the surveyed boundary line, and some of which were on Lot 11. The bushes were inspected by me in early 2005, and the property to the south of the bushes was not being mowed or maintained by anyone.
>
> 7. At no time when we were doing the survey work requested by Mr. Morgan did anyone suggest to me that the bushes were intended to demonstrate where the common property line was. . . .
>
> 8. In 1984, I surveyed Lots 1 through 8 for Walt Larson. I used the 1984 survey as the basis for the work I did in 2005.
>
> 9. Attached hereto as Exhibit 6 is a copy of what I understand to be the Proposed Partial Summary Judgment requested by Plaintiffs in the above matter, beginning with "Beginning at the Iron Pipe located at

> the southern corner ..." and ending with "abutting and between such decreed legal description and Burlington Northern Railroad Along Lake Whatcom Division One Lot Sixteen and Seventeen."
>
> 10. I have attempted to lay that legal description on my survey. However, as described by plaintiffs, it does not close. Further, as described by plaintiffs, it cannot be located accurately upon my survey without substitution and addition of words. If I were allowed to speculate, it appears Mr. Cottingham, has attempted to describe the pie shaped parcel on Ayres' unrecorded survey which is one of his exhibits, however, he has not done so.

CP 439-440. Clearly, the evidence before the trial court at Partial Summary Judgment created a disputed issue of material fact. Entry of the original Partial Summary Judgment order was in error.

If this Court determines that adverse possession was established, the trial court's revision of its earlier Partial Summary Judgment Order, which was not a final judgment, was proper and should be affirmed. A partial summary judgment ruling is "not a final judgment and the trial court had authority under CR 54(b) to modify it regardless of CR 60(b)." *Washburn v. Beatt Equipment Co.,* 120 Wn.2d 246, 301, 840 P.2d 860 (1992).

III – CONCLUSION

Cottinghams did not appeal the trial court's Supplemental Findings of Fact and Conclusions of Law. Despite assigning error to some of the Supplemental Findings of Fact and Conclusions of Law, Cottinghams have not provided any authority or briefing for this Court to consider the assignments of error which were not appealed and this Court should decline to consider those issues.

As previously briefed, if this Court determines that adverse possession was not established by Cottinghams by substantial evidence, the purchase ordered of Morgans by the trial court, is in error and should be reversed by this Court and title to all of Lot 11 should be quieted in Morgans, requiring no payment to Cottinghams. Furthermore, Cottinghams' argument that maintenance of the disputed property line constitutes adverse possession is not supported by the record or by Washington case law.

If this Court determines that adverse possession was established by substantial evidence, then the trial court did not err in revising its previous Partial Summary Judgment Order and the

equitable remedy fashioned by the trial court was not an abuse of discretion and should be affirmed by this Court.

The remainder of the decisions of the trial court should be affirmed, except its award of treble damages.

Respectfully submitted this 20th day of November 2012.

SHEPHERD AND ABBOTT

By _____
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APPENDIX A

RAP 2.4

SCOPE OF REVIEW OF A TRIAL COURT DECISION

(a) Generally. The appellate court will, at the instance of the appellant, review the decision or parts of the decision designated in the notice of appeal or, subject to RAP 2.3(e) in the notice for discretionary review and other decisions in the case as provided in sections (b), (c), (d), and (e). The appellate court will, at the instance of the respondent, review those acts in the proceeding below which if repeated on remand would constitute error prejudicial to respondent. The appellate court will grant a respondent affirmative relief by modifying the decision which is the subject matter of the review only (1) if the respondent also seeks review of the decision by the timely filing of a notice of appeal or a notice of discretionary review, or (2) if demanded by the necessities of the case.

(b) Order or Ruling Not Designated in Notice. The appellate court will review a trial court order or ruling not designated in the notice, including an appealable order, if (1) the order or ruling prejudicially affects the decision designated in the notice, and (2) the order is entered, or the ruling is made, before the appellate court accepts review. A timely notice of appeal of a trial court decision relating to attorney fees and costs does not bring up for review a decision previously entered in the action that is otherwise appealable under rule 2.2(a) unless a timely notice of appeal has been filed to seek review of the previous decision.

(c) Final Judgment Not Designated in Notice. Except as provided in rule 2.4(b), the appellate court will review a final judgment not designated in the notice only if the notice designates an order deciding a timely post-trial motion based on (1) CR 50(b) (judgment as a matter of law), (2) CR 52(b) (amendment of findings), (3) CR 59 (reconsideration, new trial, and amendment of judgments), (4) CrR 7.4 (arrest of judgment), or (5) CrR 7.5 (new trial).

(d) Order Deciding Alternative Post-trial Motions in Civil Case. An appeal from the judgment granted on a motion for judgment notwithstanding the verdict brings up for review the ruling of the trial court on a motion for new trial. If the appellate court reverses the judgment notwithstanding the verdict, the appellate court will review the ruling on the motion for a new trial.

(e) Order Deciding Alternative Post-trial Motions in Criminal Case. An appeal from an order granting a motion in arrest of judgment brings up for review the ruling of the trial court on a motion for new trial. If the appellate court reverses the order granting the motion in arrest of judgment, the appellate court will review the ruling on a motion for new trial.

(f) Decisions on Certain Motions Not Designated in Notice. An appeal from a final judgment brings up for review the ruling of the trial court on an order deciding a timely motion based on (1) CR 50(b) (judgment as a matter of law), (2) CR 52(b) (amendment of findings), (3) CR 59 (reconsideration, new trial, and amendment of judgments), (4) CrR 7.4 (arrest of judgment), or (5) CrR 7.5 (new trial).

(g) Award of Attorney Fees. An appeal from a decision on the merits of a case brings up for review an award of attorney fees entered after the appellate court accepts review of the decision on the merits.

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

DAVID COTTINGHAM and JOAN COTTINGHAM, Appellants/Petitioners, vs. RONALD MORGAN and KAYE MORGAN, Respondents/Cross-Appellants.	**Case No. 68202-4-I** **Whatcom County Superior Court Case No. 09-2-01773-1** **Declaration of Service**

I, Nicole Nichols, declare that on November 20, 2012, I caused to be served a copy of the following document: **Respondents/Cross-Appellants Morgans' Reply Brief;** and a copy of this **Declaration of Service**, in the above matter, on the following person, at the following address, in the manner described:

David C. Cottingham, Esq. Cottingham Law Office, PS 103 E. Holly Street Suite 418 Bellingham, WA 98225	(X) ( ) ( ) ( ) ( )	U.S. Mail E-Mail Fax Messenger Service Personal Service

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 20th day of November 2012, at Bellingham, Washington.

Nicole Nichols

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