

71102-4

71102-4

No. 71102-4-1

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

CHING-CHIH MA aka JASON MA, and CHIH-YI CHANG,
husband and wife,

Appellants,

v.

BRIAN MCKINLEY,

Respondent.

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2014 JUL -1 PM 3:05

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
HONORABLE: CATHERINE SHAFFER

RESPONDENT'S BRIEF

David A. Nold, WSBA #19009
Amy K. D'Amato, WSBA #43076
NOLD MUCHINSKY PLLC
Attorneys for Respondent
10800 N.E. 8th St., Ste. 930
Bellevue, WA 98004
(425) 289-5555
dnold@noldmuchlaw.com
adamato@noldmuchlaw.com

TABLE OF CONTENTS

I. INTRODUCTION..... 1

II. STATEMENT OF THE CASE..... 1

 A. Facts..... 1

 B. Procedural History..... 4

III. ARGUMENT.5

 A. Standards of Review. 5

 1. Summary Judgment..... 5

 2. Award of Attorney Fees. 5

 B. Almost All of Ma’s Arguments Are Improperly Raised For
 the First Time On Appeal. 6

 1. Issues Raised on Appeal Should Not Be Considered
 Absent a Well Defined Exception..... 6

 2. Defendants Do Not Cite Any Exceptions to this Rule,
 Nor Do Any Exceptions Apply. 7

 C. The Court Properly Ruled that McKinley Adversely
 Possessed a Portion of Ma’s Property..... 10

 1. Ma’s Arguments Were Not Raised at the Trial Court.
 10

 2. McKinley Sufficiently Pled Adverse Possession. 11

 3. Attorney Fees Were Properly Awarded Pursuant to
 RCW 7.28.083.....13

 D. The Trial Court Properly Dismissed Ma’s Intentional
 Trespass Claim..... 13

 1. There is No Evidence that McKinley Acted

	Intentionally.	14
2.	Ma Failed to Submit Any Evidence That He Suffered Actual and Substantial Damages.	16
3.	Injunctive Relief Should Not Be Granted; McKinley Offered to Remove the Fence, but Ma Refused.	16
E.	McKinley Established Timber Trespass Pursuant to RCW 4.24.630.....	17
1.	Ma’s Arguments Should Not Be Heard For the First Time on Appeal.....	17
2.	Ma Incorrectly Asserts that RCW 64.120.630 applies as opposed to RCW 4.24.630.....	19
3.	Even if the Court Finds that RCW 64.12.030 Applies, Treble Damages and Attorney Fees Would Still Be Properly Awarded to McKinley.	24
F.	Ma Is Not Entitled to Attorney Fees On Appeal.....	26
G.	The Trial Court Did Not Improperly Weigh Settlement Negotiations When Granting Summary Judgment.	26
H.	McKinley is Entitled to an Award of Attorney Fees.....	27
IV.	CONCLUSION.....	28

Table of Authorities

Cases

<i>Ashcraft v. Wallingford</i> , 17 Wn.App. 853, 860, 565 P.2d 1224 (1977).....	6, 16
<i>Beckman v. Wilcox</i> , 96 Wn.App. 355, 369, 979 P.2d 890 (1999).....	27
<i>Bellevue School Dist. 405 v. Lee</i> , 70 Wn.2d 947, 425 P.2d 902 (1967).....	8
<i>Birchler v. Castello Land co. Inc.</i> , 133 Wn.2d 106, 942 P.2d 968 (1997).....	20
<i>Bradley v. Am. Smelting & Ref. Co.</i> , 104 Wn.2d 677, 692, 693, 709 P.2d 782 (1985).....	14
<i>Briggs v. Murray</i> , 29 Wn. 245, 69 P. 765 (1902).....	12
<i>Brutsche v. City of Kent</i> , 164 Wn.2d 664, 674 n.7, 193 P.3d 110 (2008).....	14
<i>Centralia v. Miller</i> , 31 Wn.2d 417, 197 P.2d 244 (1948).....	12
<i>Cf. State v. Linton</i> , 156 Wn.2d 777, 787, 132 P.3d 127 (2006).....	9
<i>Clipse v. Michels Pipeline Constr., Inc.</i> , 154 Wn.App. 573, 577-78, 225 P.3d 492 (2010).....	19, 21
<i>Estate of Johan Kvande v. Olsen</i> , 74 Wn.App. 64, 71, 871 P.2d 669 (1994).....	5
<i>Farrell v. Score</i> , 67 Wn.2d 957, 411 P.2d 146 (1966).....	6

<i>Green v. Normandy Park Riviera Section Cmty. Club, Inc.,</i> 137 Wn.App. 665, 681, 151 P.3d 1038 (2007).....	5
<i>Gross v. City of Lynnwood,</i> 90 Wn.2d 395, 400, 583 P.2d 1197 (1978).....	8
<i>Grundy v. Brack Family Trust,</i> 151 Wn.App. 557, 213 P.3d 619 (2009).....	14
<i>Guay v. Wash. Nat. Gas Co.,</i> 62 Wn.2d 473, 383 P.2d 296 (1963).....	20
<i>Hill v. Cox,</i> 110 Wn.App. 394, 405-06, 41 P.3d 495 (2002).....	23, 24
<i>Hisle v. Todd Pac. Shipyard Corp.,</i> 113 Wn. App. 401, 427, 54 P.3d 687 (2002).....	5
<i>Magerstaedt v. Eric Co.,</i> 64 Wn.2d 298, 391 P.2d 533 (1964).....	6
<i>Maier v. Giske,</i> 154 Wn.App. 6, 21, 223 P.3d 1265 (2010).....	20
<i>Mannington Carpets, Inc. v. Hazelrigg,</i> 94 Wn.App. 899, 910, 973 P.2d 1103 (1999).....	27
<i>Maynard Inv. Co. v. McCann,</i> 77 Wn.2d 616, 621, 465 P.2d 657 (1970).....	8, 9
<i>Panorama Vill. Condo. Owners Ass'n Bd. Of Dirs. v. Allstate Ins.,</i> 144 Wn.2d 130, 143, 26 P.3d 910 (2001).....	26
<i>Roberson v. Perez,</i> 119 Wn.App. 928, 83 P.3d 1026 (2004).....	8
<i>Saddle Mountain Minerals, LLC v. Joshi,</i> 152 Wn.2d 242, 247-248, 257, 95 P.3d 1236 (2004).....	20
<i>Sims v. Horton,</i> 43 Wn.2d 907, 264 P.2d 879 (1953).....	8

Wallace v. Lewis County,
134 Wn.App. 1, 15, 137 P.3d 101 (2006)..... 16

Statutes

RCW 7.28.120..... 12

Rules

RAP 18.1.....27, 28
RAP 2.5.....7

Treatises

Restatement (Second) of Torts §§ 8A, cmt. b at 15..... 14

I. INTRODUCTION

Appellants (“Ma”) managed to turn a very simple fence dispute into a two year (and counting) ordeal. Despite repeated attempts to resolve the matter by Respondent Brian McKinley (“McKinley”), Ma continued to “ratchet up” the dispute by asserting baseless claims ostensibly believing that the best defense is a strong offense. Ma’s claims were so baseless that the trial court stated *sua sponte* that Ma and his counsel should consider themselves fortunate that sanctions were not requested.

All of Ma’s claims were dismissed upon summary judgment. His fourth and fifth attorneys support this appeal with facts and legal theories never raised in the trial court. The trial court correctly ruled that there is no need for a trial in this case. McKinley asks this Court to affirm the trial court’s findings and award attorney fees and costs on appeal.

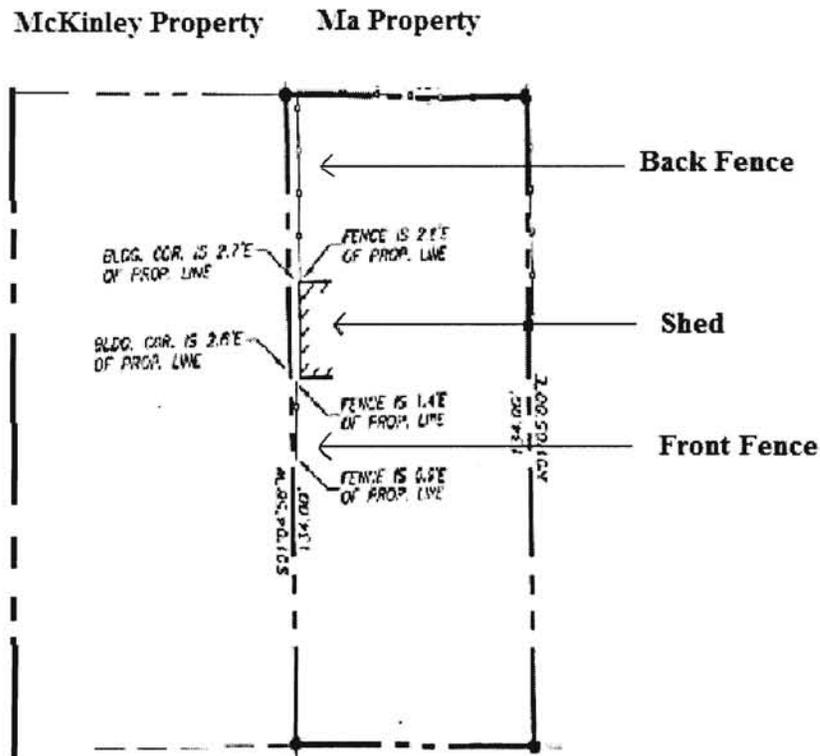
II. STATEMENT OF THE CASE

A. Facts.

McKinley and Ma own rental properties that share a boundary. McKinley’s property has a street address of 10022 NE 23rd St., Bellevue, Washington (“McKinley Property”) and Ma’s property has a street address of 10028 NE 23rd St., Bellevue, Washington (“Ma Property”). (CP 65.)

Currently, there are two fences that separate the back yards of the McKinley and Ma properties. These fences are separated by a shed, which

is located on the Ma Property. While the fence running from the back of the houses to the shed (“Front Fence”) has acted as a boundary line for more than ten (10) years (CP 156), the fence running from the other side of the shed to the end of the lots (“Back Fence”) was built by McKinley in the summer of 2012. (CP 65-66, 71.)



(CP 72.)

Prior to the summer of 2012, a wire fence was temporarily erected by a tenant who owned a dog. The wire fence was erected sometime after February 1, 2010, but before Ma purchased the property. (CP 66.)

Ma resides in Taiwan. Ma has only visited the Ma Property once – in 2010, around the time he purchased it. (CP 52-53.) After Ma

purchased the Ma Property, he hired Max Lin (“Lin”), to care for and maintain it, paying him a monthly fee for such work.

In the summer of 2012, after efforts to contact Lin failed, McKinley took down the temporary wire fence and built the Back Fence. (CP 67.) Ma objected to the placement of the Back Fence. (CP 58.)

To prevent discord, McKinley agreed in a letter that the Back Fence was not intended to establish a boundary line and any use of the Ma Property as a result of the Back Fence was permissive. (See CP 297-300.) McKinley also offered to remove the Back Fence, but Ma objected and asked the Back Fence to remain. (CP 67.)

Lin hired a surveyor to determine the location of the property line. (CP 297.) The survey showed that the Back Fence encroached slightly upon the Ma Property. (CP 72, 293.) After much discussion, the parties agreed to have Ma relocate the Back Fence to the property line. (CP 74-83.) Lin obtained quotes and hired a contractor, instructing the contractor to relocate the Back Fence to the property line.

For unknown reasons, Ma’s contractor totally cleared the land, removing all trees, bushes, vegetation and made huge piles of the debris on the McKinley Property. This was entirely unauthorized. The piles of waste ruined the sod. The piles were later removed by McKinley’s contractor when the repair to the yard was completed. (CP 67, 85-87.)

The trees and shrubs had been in place since before 1999, when McKinley first resided there. The trees and vegetation were not there for decoration purposes, but had grown to provide complete privacy from the

Ma Property, acting as buffer between the properties. (CP 67-68.)

The McKinley and Ma Properties are located on a hill, with the McKinley Property elevated above the Ma Property. Now that the trees and vegetation have been removed, McKinley can see Ma's entire backyard. To restore a similar level of privacy to the McKinley Property, the reasonable replacement cost was \$4,795.66, which included not only the costs to replace the trees, but the costs associated with removing the waste left by Ma's contractor and restoring the land damaged by Ma's contractor. (CP 67-68, 95, 149-154.)

B. Procedural History.

McKinley brought this action on December 3, 2012, alleging timber trespass. (CP 1-4.) Ma counterclaimed, alleging adverse possession, trespass and abandonment and asked the Court to quiet title to the property as separated by the wire fence constructed sometime in 2010. (CP 5-10.) McKinley filed an amended complaint on August 26, 2013, adding a claim for adverse possession, alleging the Front Fence established the boundary between the McKinley and Ma properties. (CP 16-20.)

Upon McKinley's Motion for Summary Judgment, the trial court dismissed all of Ma's claims and awarded McKinley (a) the property adversely possessed, (b) damages trebled, and (c) attorney fees. (CP 155-56, 342-44, 547-48.)

Because the trial court declined to *order* McKinley to obtain a survey of the adversely possessed property (CP 156), the parties discussed

stipulating to a supplemental judgment to add a legal description. (CP 349-50, 372.) After Ma filed Appellants' Brief, McKinley moved to supplement the judgment in the trial court to add the legal description. (CP 352-56.) Ma conceded that the legal description was correct, and the trial court granted the motion. (CP 454-55.) A Supplemented Order Granting Summary Judgment and a supplemented Judgment Quieting Title, containing the full legal property description were entered on or around July 1, 2014. (CP 560-67.)

III. ARGUMENT

A. Standards of Review.

1. Summary Judgment.

This Court reviews *de novo* the order granting summary judgment, and any orders made in conjunction with that order. *See Green v. Normandy Park Riviera Section Cmty. Club, Inc.*, 137 Wn.App. 665, 681, 151 P.3d 1038 (2007).

2. Award of Attorney Fees.

A trial court's decision regarding attorney fees is reviewed using an abuse of discretion standard. *Estate of Johan Kvande v. Olsen*, 74 Wn.App. 64, 71, 871 P.2d 669 (1994). An abuse of discretion occurs when the trial court's decision rests on untenable grounds or untenable reasons. *Hisle v. Todd Pac. Shipyard Corp.*, 113 Wn. App. 401, 427, 54 P.3d 687 (2002). When the Court reviews whether the trial court can

award attorneys' fees under an applicable statute, the issue is reviewed *de novo*.

B. Almost All of Ma's Arguments Are Improperly Raised For the First Time On Appeal.

1. Issues Raised on Appeal Should Not Be Considered Absent a Well Defined Exception.

It is settled that an appeal is not to be used as a "second bite at the apple". For a plethora of reasons, litigants have a fundamental right and duty to assert and defend claims one time in the trial court. Misusing an appeal destroys this expectation and it is a rare occurrence when allowed by an appellate court. "A party has an obligation to assert his claims, legal positions, and arguments to the trial court to preserve the alleged error on appeal. Issues not raised in the hearing for summary judgment cannot be considered for the first time on appeal." *Ashcraft v. Wallingford*, 17 Wn.App. 853, 860, 565 P.2d 1224 (1977). This is generally true regardless of whether the issues might result in the creation or destruction of a party's cause of action. *See e.g., Farrell v. Score*, 67 Wn.2d 957, 411 P.2d 146 (1966); *Magerstaedt v. Eric Co.*, 64 Wn.2d 298, 391 P.2d 533 (1964).

Of the nine issues raised by Ma in this appeal, only *two* were presented at the trial court level. Three of them are not even listed in the Issues Raised, and appear in the brief for the first time.

Alleged Error and Issue	Presented to Trial Court
1. Did contractor act intentionally or have reason to know he lacked authorization to remove trees	No
2. Are there are issues of fact surrounding extent of damages incurred by McKinley for removal of trees	Yes
3. Whether contactor violated 4.24.630 when liability, if any, should be under 64.12.030	No
4. Whether there were any facts to support Ma's counterclaim of Trespass	Yes
5. Whether McKinley properly pled adverse possession claim	No
6. Did the trial court properly awarded McKinley fees under RCW 4.24.630 and RCW 7.28.083	No
x. Whether McKinley's damages should be trebled	No. Not listed as Issue
xx. Whether Ma is entitled to Attorney Fees pursuant to RCW 4.24.630	No. Not listed as Issue
xxx. Whether Injunctive Relief Should be issued against McKinley	No. Not listed as Issue

This appeal is not a request for review; it is a request to start over. Despite litigating for over nine months, being sanctioned twice and warned about CR 11 sanctions, Ma filed this appeal. (See CP 210, 537, 542.) Entertaining Ma's "revised" case runs against the policies of protecting the finality of judgments and conserving judicial resources.

2. Defendants Do Not Cite Any Exceptions to this Rule, Nor Do Any Exceptions Apply.

There are, of course, exceptions to this general rule. They are wholly unaddressed by Ma. Anticipating argument on reply, they are addressed by McKinley here. RAP 2.5(a) provides three exceptions to the general rule:

The appellate court may refuse to review any claim of error

which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right.

RAP 2.5(a).

Clearly exceptions one and three do not apply. Trial court jurisdiction was never an issue and there are no constitutional rights involved.

And the second exception, more of the general catch all, is equally inapplicable. This exception is applied narrowly, for example “when the question raised determines standing,” *Gross v. City of Lynnwood*, 90 Wn.2d 395, 400, 583 P.2d 1197 (1978); *Roberson v. Perez*, 119 Wn.App. 928, 83 P.3d 1026 (2004), when the facts are before the appellate court and “justice of the case” requires such determination, or when the matter affects the public interest. *Maynard Inv. Co. v. McCann*, 77 Wn.2d 616, 621, 465 P.2d 657 (1970).

Absent these exceptional circumstances, the court has consistently held that matters relating to the substance of a litigant’s case may not be considered for the first time on appeal even though such consideration might result in the creation or destruction of a litigant’s cause of action. *See e.g., Farrell v. Score*, 67 Wn.2d 957, 411 P.2d 146 (1966); *Magerstaedt v. Eric Co.*, 64 Wn.2d 298, 391 P.2d 533 (1964). Even when the record indicates a possible noncompliance with statutes, the court has refused to consider an issue or theory not presented to the trial court. *See Sims v. Horton*, 43 Wn.2d 907, 264 P.2d 879 (1953); *Bellevue*

School Dist. 405 v. Lee, 70 Wn.2d 947, 425 P.2d 902 (1967).

Accordingly, the newly raised issues and defenses should fail.

Quite frankly, this is a dispute between neighbors that never should have seen the inside of a courtroom. (CP 309.) McKinley recognized this and attempted to resolve the dispute many times before and after the suit began. His overtures of settlement were always rejected. (CP 305-07.)

This is not a matter of public interest nor is it a matter where justice requires review. *Cf. State v. Linton*, 156 Wn.2d 777, 787, 132 P.3d 127 (2006) (finding it was not confined by the issues framed or theories advanced by the parties when an improper court inquiry to the jury resulted in an improper finding of an implied acquittal); *Maynard*, 77 Wn.2d at 624 (permitting the review of a statute on review when failing to do so would allow defendant to convert money, and essentially “rob Peter to pay Paul”).

Even the trial court recognized that this case was not one of “constitutional” proportions:

This case shouldn't be before the Court. If ever a case called out for summary judgment, this is it . . . Mr. Mar [sic] in particular should hope that nobody ever looks too hard at what the basis was for the claims made in [sic] the counter-claims in this case.

(CP 542.) In fact, with each claim the trial court found that the evidence put forth by Ma was egregiously insufficient. As to the counterclaims, the trial court stated: “I do not see a basis for any of them. Some of them are frivolous on their face, such as the adverse possession claim.” (CP 542.) As to the intentional trespass claim, “it dissolves when I look closely at

what's before me, because I have no evidence from which I can infer a material disputed issue of fact as to Mr. McKinley's intent in going onto Mr. Ma's land I don't have any evidence to suggest . . . what damages flowed. And the answer is: Apparently none." (CP 542-43.) Finally, as to McKinley's timber trespass claim:

[I]n response [to McKinley's claim for damages], I have nothing to counter that contention, even though the bill has been out there for a long time, long before this lawsuit was filed. And to the extent that Mr. Ma via Mr. Lin feels that it's an unreasonable bill, he should by this time have come up with some evidence to establish why that is, which he hasn't given me. On summary judgment, more than that is required to raise a material disputed issue of fact.

(CP 543.)

Simply put, Ma is attempting to reargue summary judgment. Accordingly, this Court should not consider these arguments, as they are improperly raised for the first time on appeal.

C. The Court Properly Ruled that McKinley Adversely Possessed a Portion of Ma's Property.

Significantly, Ma does not argue that McKinley did not establish the elements of adverse possession for the statutorily prescribed period of ten (10) years. Rather, Ma argues that summary judgment was not proper for two entirely different reasons, neither of which were raised before the trial court.

1. Ma's Arguments Were Not Raised at the Trial Court.

After litigating McKinley's adverse possession claim and losing

summary judgment *on the merits*, Ma now raises two new arguments for the first time on appeal. First, Ma contends that McKinley did not properly plead the cause of action by failing to adequately describe the property adversely possessed by McKinley. Yet, no motion to dismiss was brought and no objections were made in response to McKinley's motion for summary judgment. Ma never even filed an answer. In fact, it is rather obvious that Ma understood McKinley's property description, proceeded to defend against his adverse possession claim on summary judgment and finally conceded that the legal description correctly identified the adversely possessed property. (CP 97, n.1.) Second, Ma argues that attorney fees were not properly awarded pursuant to RCW 7.28.083. Again, these arguments were not raised at the trial court and should not be considered on appeal.

2. McKinley Sufficiently Pled Adverse Possession.

It is incredibly incongruous to argue now that the property description was not properly pled. If, as Ma now contends, he did not know what property was being adversely possessed, how can he explain why he never raised that issue below? In fact, Ma refused to stipulate to the amended complaint causing McKinley to file a motion. Ma, of course, objected but even though the amended complaint was part of the motion, Ma did not complain about the sufficiency of the property description. (CP 345-51.)

Rather, Ma seizes on the fact that a metes and bounds description

was not pled and thus argues that the complaint was deficient. This, after substantial motion practice and a revised judgment in which Ma conceded to the legal description of the adversely possessed portion of property. (CP 454-55.)

RCW 7.28.120 states in pertinent part: “The property shall be described with such certainty as to enable the possession thereof to be delivered if a recovery be had.” A property description enabling anyone of reasonable intelligence to locate the property is sufficient pursuant to the statute. *See Centralia v. Miller*, 31 Wn.2d 417, 197 P.2d 244 (1948); *Briggs v. Murray*, 29 Wn. 245, 69 P. 765 (1902) (finding the property was adequately described when the property could be located and boundary traced). Ma has cited no authority for the proposition that a formal metes and bounds legal description is necessary to bring a claim of adverse possession.

Here, the First Amended Complaint adequately described the property adversely possessed, stating, that “[t]he fence running from the back of the houses to the shed has acted as a boundary line for more than 10 years (the ‘Front Fence’).” (CP 17.) It continued, “McKinley has used, cared for and enjoyed the property located on the side of the Front Fence toward the McKinley Property (the ‘Subject Property’) since 1999.” (CP 18.) Accordingly, as a reasonable person would understand the Front Fence acted as – and eventually established – the boundary line, the property description provided such certainty as to enable the possession thereof to be delivered to McKinley if a recovery be had.

3. Attorney Fees Were Properly Awarded Pursuant to RCW 7.28.083.

RCW 7.28.083 provides in pertinent part:

The prevailing party in an action asserting title to real property by adverse possession may request the court to award 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.

RCW 7.28.083(3).

Here, Ma does not challenge the trial court's dismissal of his adverse possession claim, which the court noted was clearly frivolous. (CP 530, 535.) Nor does he challenge the finding that McKinley adversely possessed the property along the Front Fence. (CP 155-56; 560-67.) Accordingly, McKinley is the prevailing party, and was properly awarded attorney fees.

D. The Trial Court Properly Dismissed Ma's Intentional Trespass Claim.

McKinley does not dispute that he inadvertently erected the Back Fence on Ma's property. (CP 67.) Once that was discovered, he told Ma in writing that he would never claim ownership of the small area (CP 67, 300) and that if Ma wanted, Ma could remove the fence or McKinley would. (CP 45, 67.) Instead, counsel for Ma asked that the fence be left in place. (Id.) Incredibly, Ma then sued McKinley for this "intentional trespass" and now complains that the trial court erred in dismissing this claim.

The Back Fence was constructed flush with the storage shed – which had been in place for more than 20 years. (CP 67, 72.) McKinley testified that he used, enjoyed and cared for the property west of the storage shed (toward the McKinley Property), believing it was his own. (CP 66.)

It was only after Ma conducted a survey that it was known that the Back Fence encroached on the Ma Property. (CP 67.) The survey shows that the storage shed – which was used as the boundary line for over 20 years – actually sits 2.8 feet east of the property line (toward the Ma Property). (CP 72.) Accordingly, by building the Back Fence flush with the storage shed and along a small rock wall, McKinley reasonably, albeit mistakenly, believed that he built the Back Fence on the McKinley Property line. Accordingly, there is no evidence that McKinley was substantially certain that a trespass would result from his actions.

Ma presents a letter, dated February 20, 2012 to support his argument. (CP 300.) This letter, however, fails to address what McKinley knew *when he erected the Back Fence*. (See *id.*) The letter was written merely as a preventative measure. (CP 298-99.) In an effort to avoid unnecessary dispute and costs, McKinley had his attorney draft the letter to dispel any notion that any of the Ma Property could be adversely possessed by McKinley. By claiming that an encroachment was permissive only, McKinley hoped to avoid having to obtain a survey or file a lawsuit. (CP 298.) At that time, no survey had been conducted, so McKinley did not know the actual boundary lines. (*Id.* “If Mr. Ma wants a survey just so

everyone knows where the boundary is located and the fence stays, I am happy to pay half the survey fee.”)

In fact, based on the location of the Front Fence, McKinley assumed the Back Fence was built on the McKinley Property. It was only after the survey was conducted that McKinley knew that he had built the Back Fence on the Ma Property. After the survey was obtained (CP 93) and upon discovering the trespass, McKinley offered to “take the fence down and relocate it to one of the other sides of the property.” (CP 92.) Ma asked that the fence remain. (CP 45.)

2. Ma Failed to Submit Any Evidence That He Suffered Actual and Substantial Damages.

To commit intentional trespass, a person must cause “actual and substantial damage” to the property of another. *Wallace v. Lewis County*, 134 Wn.App. 1, 15, 137 P.3d 101 (2006). There is no evidence in the record that Ma suffered any damages. Lacking is a delineation of any amount or even a calculation of damages. (See CP 108-09, 134-35.)

3. Injunctive Relief Should Not Be Granted; McKinley Offered to Remove the Fence, but Ma Refused.

For the first time on appeal, Ma argues that the “unwanted” fence is a continuing trespass on the Ma Property and now seeks injunctive relief.

Injunctive relief should not be granted on appeal. It was not requested nor argued in response to McKinley’s motion for summary judgment. *Ashcraft*, 17 Wn.App. at 859-60 (finding the trial court

properly granted summary judgment, dismissing Plaintiff's complaint due to the bar of contributory negligence when Plaintiff failed to raise the argument that comparative negligence applied and prevented such dismissal).

However, even if this Court were to consider this argument, it must fail. To avoid dispute, McKinley acknowledged that the location of the Back Fence did not establish a boundary. McKinley offered to take down the Back Fence. (See CP 189.) Ma refused. (CP 189-90.) Rather than take McKinley up on his offer, Ma demanded it stay. (CP 45-46.) Ma's alleged inability to use and enjoy his land is no fault of McKinley's. Ma simply cannot have it both ways – claiming he is “damaged” by the Back Fence but simultaneously insist it not be taken down.

Accordingly, the status of the Back Fence remains the same. It is a fence on the Ma Property which belongs to Ma. Ma is legally entitled to remove the Back Fence at any time if he so desires. (See CP 189-90.) Ma needs to decide whether he wants the fence to stay as a boundary between the properties. Right now it appears Ma is merely using the fence as fodder for appeal.

E. McKinley Established Timber Trespass Pursuant to RCW 4.24.630.

1. Ma's Arguments Should Not Be Heard For the First Time on Appeal.

In support of his contention that the trial court improperly granted McKinley summary judgment, Ma makes four new arguments on appeal.

First, Ma now argues that RCW 4.24.630 does not apply. This not only was not raised at the trial court, but Ma specifically argued in his response to McKinley's motion for summary judgment that *RCW 4.24.630 did apply and precluded McKinley from recovering for conversion.* (CP 102-03.) This particularly illustrates why raising issues for the first time on appeal is prejudicial. Had Ma raised this defense below, McKinley could have presented evidence of why RCW 4.24.630 applies. Or McKinley could have simply amended his complaint to assert the alternative statute (RCW 64.120.630). The result would have been the same. Both statutes allow for treble damages. While one statute does not allow for attorney fees, that deficiency is easily addressed in that the adverse possession statute provides for attorney fees. In short, McKinley could have tailored his case accordingly. The results would be the same.

Second, Ma argues for the first time on appeal that the contractor did not know that he lacked authorization to remove trees, create large piles of debris and substantially damage the McKinley Property. Ma presented *no evidence* pertaining to the contractor's¹ intent to rebut McKinley's evidence on summary judgment. (See CP 108-09; 134-35.) Rather, Ma merely stated – without producing any evidence – that “Plaintiff was aware of the scope of the work to be conducted by Ma's contractor.” (CP 100.)

Finally, Ma argues that treble damages were not proper and that

¹ Ma does not challenge the trial court's findings that Lin and the contractor are agents of Ma so these findings become verities on appeal.

McKinley was not entitled to attorneys' fees under RCW 4.24.630. Again, these arguments should not be considered for the first time on appeal.

2. Ma Incorrectly Asserts That RCW 64.120.630 Applies as Opposed to RCW 4.24.630.

RCW 4.24.630 provides in pertinent part:

Every person who goes onto the land of another and who removes timber, crops, minerals, or other similar valuable property from the land, or wrongfully causes waste or injury to the land, or wrongfully injures personal property or improvements to real estate on the land, is liable to the injured party for treble the amount of the damages caused by the removal, waste, or injury. For purposes of this section, a person acts "wrongfully" if the person intentionally and unreasonably commits the act or acts while knowing, or having reason to know, that he or she lacks authorization to so act.

RCW 4.24.630(1) (emphasis added).

In *Clype v. Michels Pipeline Constr., Inc.*, 154 Wn.App. 573, 577-78, 225 P.3d 492 (2010), the court held that there are three types of statutory trespass under RCW 4.24.630: "(1) removing valuable property from the land, (2) *wrongfully* causing waste or injury to the land, and (3) *wrongfully* injuring personal property or real estate improvements on the land." *Id.* (emphasis added). The court further held that the requirement that the defendant act wrongfully means that the defendant knew or had reason to know that he or she lacked authorization to act. *Id.* at 580.

Ma is incorrect that only RCW 64.12.030 provides relief in this action. RCW 64.12.030 provides:

Whenever any person shall cut down, girdle or otherwise

injure, or carry off any tree, timber or shrub on the land of another person, or on the street or highway in front of any person's house, village, town or city lot, or cultivated grounds, or on the commons or public grounds of any village, town or city, or on the street or highway in front thereof, without lawful authority, in an action by such person, village, town, or city against the person committing such trespasses or any of them, if judgment be given for the plaintiff, it shall be given for treble the amount of damages claimed or assessed.

RCW 64.12.030.

Accordingly, RCW 4.24.630 provides for damages to land and property while RCW 64.12.030 only applies if the damages are limited to the removal of ornamental trees. *Compare Maier v. Giske*, 154 Wn.App. 6, 21, 223 P.3d 1265 (2010) (removal of plants); *Birchler v. Castello Land Co. Inc.*, 133 Wn.2d 106, 942 P.2d 968 (1997) (removal of trees); *Guay v. Wash. Nat. Gas Co.*, 62 Wn.2d 473, 383 P.2d 296 (1963) (removal of trees, finding no damage to land) *with Saddle Mountain Minerals, LLC v. Joshi*, 152 Wn.2d 242, 247-248, 257, 95 P.3d 1236 (2004) (damage to land).

This case involves damage to both vegetation *and* land. (CP 95.) First, while ornamental trees were removed, this removal does not account for the removal of the waste left on the McKinley Property and the damage to McKinley's yard as a result of such waste.

McKinley could not be made whole by merely the replacing the trees. Rather, without authorization the contractor removed the trees, tilled the land near the fence and improperly placed the waste in McKinley's backyard. (Id.) McKinley objected to the contractor's actions, and ordered the contractor off of his property. (CP 282-83.)

The land near the fence was destroyed and the waste was never removed, causing damage to the McKinley Property. (See CP 151-52.) Ma admitted that the contractor removed the vegetation, and originally agreed to replace it. (CP 45.) McKinley eventually had to remove the waste, till the land and install mulch to restore the land damaged by the waste. (CP 95.) Accordingly, as McKinley's damages were not limited to the removal of vegetation, the trial court properly granted summary judgment to McKinley under RCW 4.24.630.

i. The Contractor Wilfully Trespassed on McKinley's Property.

Ma challenges the trial court's finding of willfulness. Under 4.24.630, a person acts willfully when he "intentionally and unreasonably committed one or more acts and knew or had reason to know that he lacked authorization." *Clype v. Michels*, 154 Wn.App. at 580 (emphasis added). For the first time on appeal, Ma argues the contractor did not know or have reason to know that he lacked authorization to remove the vegetation. These allegations are not supported by the record. The parties agreed to rebuild the fence on the boundary line. (CP 75-76.)

Ma attempts to create a genuine issue of material fact by inferring from an email between Lin and McKinley that the contractor misunderstood where the Back Fence was to be located. If read carefully, however, the correspondence only reiterates the parties' agreement: The Back Fence was to be rebuilt along the boundary line as established by the survey obtained by Ma. The Back Fence was properly marked by the

contractor. (CP 75-76.) The Front Fence (not at issue) was to be rebuilt in the same location it had been for over 20 years. McKinley did not dispute the marked location of the Back Fence, he was concerned the contractor would move the Front Fence. (Id.)

In fact, all parties knew the Back Fence was to be rebuilt on the property line. Ma had recently obtained a survey, so the property line was known to all. (CP 289-90.) Ma cannot reasonably claim that the contractor did not know where the boundary line was located.

Moreover, Ma cannot claim (without any competent evidence) that the contractor believed he was authorized to remove the vegetation from the McKinley Property. The contractor sought and obtained authorization to remove vegetation and trees from the Ma Property. (See CP 45.) Neither Lin nor the contractor sought or obtained authorization from McKinley. (CP 67.) Rather, Lin and the contractor knew they did not have such authorization.

Ma later claimed the contractor “mistakenly believed” that he removed trees and vegetation from the Ma Property, as authorized. (CP 45.) There can be no reasonable claim of mistake. The contractor acted intentionally, unreasonably and without authorization. (CP 536, “There is no doubt at all that when whoever hired the contractor . . . that it appears almost contemporaneously over Mr. McKinley’s ongoing objections the contractor went onto Mr. McKinley’s land and removed quite a lot of established vegetation and destroyed his privacy.”) Knowing the contractor was unauthorized to remove the trees and vegetation, Ma even

offered to replace what was removed. (CP 189.) Accordingly, removal of the trees and vegetation should be found willful and treble damages should be awarded.

ii. Treble Damages Were Properly Awarded As Damages Are Trebled Under 4.24.630.

RCW 4.24.630 expressly provides that treble damages are to be awarded to the injured party, providing that one liable under the statute “is liable to the injured party for treble the amount of damages caused by the removal, waste, or injury.” RCW 4.24.630(1). The statute is not ambiguous. Treble damages are not discretionary. Ma cites no authority to the contrary.

Rather in support of this proposition, Ma cites two cases applying RCW 64.12.030 for the proposition that only singular damages can be awarded when ornamental trees are damaged. *See Hill v. Cox*, 110 Wn.App. 394, 405-06, 41 P.3d 495 (2002) (affirming award of treble damages when actions found willful), and *Sherrell v. Selfors*, 73 Wn.App. 596, 603-04, 871 P.2d 168 (1994) (same). Both *Hill* and *Sherrell*, however, affirm treble damage awards for timber trespass of ornamental trees, as RCW 64.12.030 provides for treble damages upon a finding of willfulness. *See id.* Accordingly, treble damages were properly awarded.

iii. Ma Presented No Evidence to Rebut McKinley’s Damages.

While Ma claims that McKinley’s damages cannot be established, again he presented no competent evidence to counter the claimed amount. (CP 536, “The information I have from one person with knowledge, Mr.

McKinley, is this is what had to be done for him to restore his property, and specifically to restore the destruction of vegetation and trees. And I will point out the statute does not only protect trees, it also does protect vegetation.”)²

Rather, the vegetation that was removed had been in place since before 1999 and had grown to provide complete privacy from the Ma Property. (CP 67.) To restore a similar level of privacy to the McKinley Property, McKinley planted smaller emerald greens. (CP 67, 95, 541.) In addition to replacing the trees, McKinley had to restore the damage to his property. Specifically, the waste piles had to be removed, the ground tilled and mulch installed to dress the lawn where the piles melted out the grass. (CP 95.) Accordingly, the trial court properly awarded McKinley’s damages.

3. Even If the Court Finds That RCW 64.12.030 Applies, Treble Damages and Attorney Fees Would Still Be Properly Awarded to McKinley.

Even assuming, *arguendo*, that the Court finds that RCW 64.12.030 applies, it would not change the outcome of this case. Both RCW 4.24.630 and RCW 64.12.030 award treble damages for willful trespass. *See Hill*, 110 Wn.App. at 405-06; *Sherrell*, 73 Wn.App. at 603-04.

Additionally, McKinley was properly awarded fees pursuant to

² While McKinley argued at oral argument that the sprinkler system was necessary for the new trees to survive, the trial court declined to address the issue as Ma’s Response did not address or challenge it. (CP 529.)

RCW 7.28.083 for establishing adverse possession and for defending against Ma's baseless adverse possession counterclaim. (CP 334-44.)

Ma is correct that the trial court awarded \$4,000 for establishing McKinley's adverse possession claim. Fees were also properly awarded, however, for *defending* against Ma's claim. RCW 7.28.083(3). Thus, contrary to Ma's contentions, the award pursuant to RCW 7.28.083 is not limited to \$4,000. Rather, it must include all reasonable amounts defending against Ma's adverse possession claim, including reasonable fees incurred for discovery purposes.

Most of the fees in this case were incurred in discovery related matters. (See CP 175-180; 307.) Specifically, from March 28, 2013 to August 15, 2013 the reasonably incurred fees related almost exclusively to discovery. (Id.) These fees included \$2,432.00 of sanctions that were reasonably incurred bringing Plaintiff's Motion to Compel and responding to Ma's Motion to Stay, which were subtracted from the overall fee award. (CP 171.)

As a result of McKinley's prior discovery, less than a month before filing his Motion for Summary Judgment, McKinley moved to amend the complaint to include a claim for adverse possession. (CP 321.) From the filing of the Motion to Amend the Complaint, McKinley incurred \$4,000 of fees establishing his adverse possession claim. (CP 322.)

Accordingly, even if RCW 64.12.030 were to apply, the result would be the same: McKinley is entitled to, and was awarded, treble damages and attorney fees.

F. Ma Is Not Entitled to Attorney Fees On Appeal.

"Washington follows the American rule 'that attorney fees are not recoverable by the prevailing party as costs of litigation unless the recovery of such fees is permitted by contract, statute, or some recognized ground in equity.'" *Panorama Vill. Condo. Owners Ass'n Bd. Of Dirs. v. Allstate Ins.*, 144 Wn.2d 130, 143, 26 P.3d 910 (2001) (quoting *McGreevy v. Or. Mut. Ins. Co.*, 128 Wn.2d 26, 35 n.8, 904 P.2d 731 (1995)). For the first time and without citing any authority, Ma argues that should the Court find that RCW 4.24.630 does not apply, Ma should be awarded attorney fees as the prevailing party. RCW 4.24.630 does not permit such an award. *See* RCW 4.24.630. Contrary, to Ma's assertion, it does not award fees to the prevailing party, rather fees are *only* recoverable upon a showing of liability under the statute. *Id.* In fact, there is no basis under which such an award would be appropriate. Accordingly, even if the Court finds that RCW 4.24.630 does not apply, the Court should deny this request.

G. The Trial Court Did Not Improperly Weigh Settlement Negotiations When Granting Summary Judgment.

Ma alleges that the trial court improperly weighed evidence of protected ER 408 settlement negotiations.

ER 408 provides in pertinent part:

In a civil case, evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or

its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, [or] negating a contention of undue delay

ER 408.

The only evidence offered by Ma is the finding of fact in the Order Granting Plaintiff's Motion for Fees and Costs:

13. At the hearing, the Court noted that this case should have settled before McKinley was forced to bring a lawsuit and questioned whether a reasonable investigation was conducted prior to bringing counterclaims against Plaintiff.

(CP 307.)

Accordingly, Ma presents no evidence that the trial court considered settlement negotiations. (CP 155-56.) Ma's challenge should fail as a matter of law.

H. McKinley is Entitled to an Award of Attorney Fees.

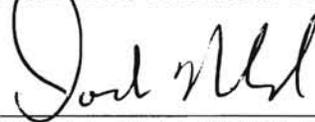
McKinley is entitled to its reasonably incurred attorney fees and costs on appeal pursuant to RAP 18.1(a), which provides for such an award when applicable law grants their recovery. RAP 18.1(a). *See e.g., Beckman v. Wilcox*, 96 Wn.App. 355, 369, 979 P.2d 890 (1999); *Mannington Carpets, Inc. v. Hazelrigg*, 94 Wn.App. 899, 910, 973 P.2d 1103 (1999). As delineated above, attorney fees are recoverable by McKinley pursuant to RCW 7.28.083 and RCW 4.24.630. Should the Court of Appeals affirm the trial court, McKinley will submit an affidavit of fees and expenses pursuant to RAP 18.1(d).

IV. CONCLUSION

The record is replete of example after example of how McKinley attempted to amicably resolve this simple boundary dispute. Ma, on the other hand, has taken increasingly aggressive positions at every turn. This appeal is no different. McKinley was entitled to (a) summary judgment on his claims and (b) dismissal of Ma's claims. The trial court ruled correctly on all counts and should be affirmed. Further, McKinley should be awarded his attorney fees on appeal.

DATED this 1st day of July, 2014.

NOLD MUCHINSKY PLLC



David A. Nold, WSBA #19009

Amy K. D'Amato, WSBA #43076

Attorneys for Respondent

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 JUL -1 PM 3:05

No.71102-4-I

COURT OF APPEALS DIVISION I
OF THE STATE OF WASHINGTON

CHING-CHIH MA AKA JASON
MA and CHIH YI CHANG,

Appellant/Plaintiff,

v.

BRIAN MCKINLEY,

Respondent.

NO. 71102-4-I

DECLARATION OF SERVICE
OF RESPONDENT'S BRIEF

I, Jodi Graham, declare as follows:

1. I am not a party to the above-captioned action and am over the age of 18.

2. I am competent to testify to the matters herein and do so based upon my personal knowledge.

3. I caused the following documents to be served on July 1, 2014 in the manner indicated below:

A. Respondent's Brief; and

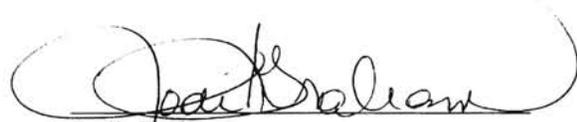
B. Declaration of Service.

4. The above documents were served on the following:

Catherine C. Clark
The Law Office of Catherine C. Clark PLLC
701 Fifth Avenue, Suite 4105
Seattle, WA 98104
Via Hand Delivery

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

Signed at Bellevue, Washington this 1st day of July 2014.

A handwritten signature in black ink, appearing to read "Jodi Graham", written over a horizontal line.

Jodi Graham

10500 NE 8th Street, Suite 930
Bellevue, Washington, 98004
Telephone: (425) 289-5555
Facsimile: (425) 289-6666