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

Jerry Riddell and Lillian Riddell, Appellants
v.
Zachary Montgomery and Sara A. Montgomery, Respondents

RESPONDENT'S BRIEF

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I. INTRODUCTION

This appeal arises from an underlying action in which Plaintiffs Jerry and Lillian Riddell (hereinafter "Appellants" or "Riddells" when referred to in the Canham related lawsuit) sought to quiet title in certain real estate property owned by Defendants Sara and Zachary Montgomery (hereinafter "Respondents") under theories of adverse possession and location of common boundary by common grantor. The underlying action concluded in the trial court's grant of Respondents' summary judgment motion as to the entire action and an award of attorneys' fees.

II. ASSINGMENTS OF ERROR

Respondents assert that there are no assignments of error in the Mason County Superior Court's granting of the summary judgment and award of reasonable attorney fees in Respondents' favor.

The issues before this Court are:

1) Did the trial court err in dismissing the Appellants' underlying lawsuit based on res judicata grounds?
2) Should this Court Consider new issues never before presented before the trial court?

3) Did the trial court abuse its discretion in awarding Respondents attorneys' fees in the amount of $12,352.00?, and

4) Should Respondents prevail in this appeal, are they entitled to additional attorneys' fees and costs incurred in defending this appeal?

The pertinent facts and evidence as well as supporting case law and statutory law will prove a negative answer to the first three issues and an affirmative answer to the last one.

III. STATEMENT OF THE CASE

A. Summary of Facts

Respondents Zach Montgomery and Sara Montgomery, husband and wife, are the owners in fee simple, by statutory warranty deed, of real property on Hood Canal located at 11890 E SR 106, Union, Washington ("Montgomery Property"), which was purchased from a Mrs. Lisa Canham in July 2005. CP 143-144. The Montgomery Property was owned by Lisa Canham from 2000 to 2005, and was owned by Lisa Canham's mother, from 1989 to 2000.

Appellants Jerry Riddell and Lillian Riddell, husband and wife, are the owners of the adjoining property west of the Montgomery

Property located at 11850 E SR 106, Union, Washington ("Riddell Property"), which they purchased in 1979. CP 52, 54-55, 100.

In 2004 Appellants commenced a lawsuit against Lisa Canham in Mason County under theories of adverse possession and location of a common boundary by a common grantor, in *Riddell v. Canham*, Mason County Superior Court No. 03-2-0630-4 ("Canham Lawsuit"). CP 77-86. Basically, the Riddells sought to quiet title by adverse possession in certain real estate owned by Lisa Canham, as depicted in the survey map prepared by Steven Stillwell of Bracy & Thomas Land Surveyors. CP 75.

The Canham lawsuit culminated in a bench trial, where the Riddells' arguments were mostly unsuccessful and the court only awarded a portion of the claimed property by adverse possession, where their septic tank was located, and established the present boundary between the Montgomery/Canham and Riddell properties as to the portion lying south of SR 106 (depicted by the bold line in the map at CP 44). The Riddell-Canham court issued "Findings of Fact and Conclusions of Law" and a "Judgment and Decree" on June 23, 2005, legally describing the boundaries of the Riddell property. CP 88-91 and CP 93-96. No appeal was taken from that decision, nor did the Riddells seek to modify or correct the judgment in any way.

About a year after the Canham lawsuit, the Riddells brought another action in Mason County, Superior Court action No. 06-2-00463-2 (hereinafter "the underlying lawsuit"), this time against Respondents, under theories of adverse possession and location of a common boundary by a common grantor, seeking to quiet title over a portion of tidelands legally owned now by Respondents from their purchase from Lisa Canham.

B. Procedural History

On May 22, 2006, Appellants commenced the underlying action by bringing a Complaint to Quiet Title to certain real estate legally owned by Respondents. CP 145-148.

On August 7, 2006, Appellants filed a Lis Pendens on Respondents' property, Mason County recording number 1874705. CP 25-28.

Respondents filed an Answer and two Amended Answers and Counterclaims during 2007 and early 2008, claiming causes of action for quieting title, conversion, slander of title and wrongful recording of lis pendens. CP 127-144.

Although the case was originally scheduled for trial for January 31, 2008, it was bumped several times due to the criminal calendar in Mason County Superior Court, thus resulting in trial delays to July 10,

2008, January 21, 2009, and eventually to May 14, 2009 with an alternative date of September 15, 2009.

On April 20, 2009, Respondents' Motion for Summary Judgment was granted on the grounds of res judicata. RP 13-14.

On May 4, 2009, a presentation of order hearing took place which was followed by the entry of the Summary Judgment Order and Final Judgment on the same date. RP 16-24 and CP 36-39.

On May 6, 2009, the Notice of Appeal was filed. CP 29-30.

On June 18, 2009, Respondents' Motion for Attorneys' Fees was heard before Honorable Toni A. Sheldon, who held that Respondents were entitled to an award of attorney fees based on the wrongful recording of lis pendens statute (RCW 4.28.328) since Appellants had no substantial justification in bringing the underlying action and recording a lis pendens on Respondents' property. RP 25-57. Although an award for attorneys' fees was granted, Judge Sheldon stated that she would issue an opinion letter later on with the amount of the award. RP 56-57.

On July 2, 2009, an Order Supplementing Order on Summary Judgment was entered at the request of the Appellants to add a few documents relating to the summary judgment. CP 9-11. Respondents did not object to such amendment. CP 7-8.

On or about August 31, 2009, Appellants submitted their first opening brief which was rejected by this court as improperly presented.

On September 8, 2009, Judge Sheldon issued above-mentioned opinion letter awarding Respondents $12,352.00 in reasonable attorney fees in relation to the summary judgment motion.[1] No costs were awarded.

On September 8, 2009, Appellants filed their second opening brief which was accepted by this court. At that time, Appellants were probably not aware of the Memorandum of Decision issued the same day by Judge Sheldon regarding attorney fees; therefore this issue is first addressed by Respondents here.

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[1] On October 1, 2009, and again on October 5, 2009 Respondents filed Supplemental Designations of Clerk's Papers (with Appellants' counsel approval) to include this document as well as the motion and related pleadings on which this award was given; however, at the time of filing this brief, a specific reference to the exact pages in the CP was not available from Mason County Superior Court. This filing was delayed since Respondents were trying to amend the Summary Judgment Order/Final Judgment with the amount of the attorneys' fees and include such amended judgment in the Supplemental Designation. However, due to some unexpected delay, the process of entering the Amended Judgment is yet to be finalized before the Mason County Superior Court.

IV. ARGUMENT

A. Respondents' Summary Judgment Should Be Affirmed Because The Underlying Action Is Barred by Res Judicata Principles

1. Standard of Review

The standard of review on appeal of a summary judgment is de novo, with the reviewing court performing the same inquiry as the trial court. *Ski Acres, Inc., v. Kittitas County*, 118 Wash.2d 852, 854 (1992), citing *Herron v. Tribune Pub'g Co.*, 108 Wash.2d 162 (1987).

A court shall grant summary judgment if there is no genuine issue of material fact, and the moving party is entitled to a judgment as a matter of law. CR 56(c). *Ski Acres, supra.* The nonmoving party avoids summary judgment when it "set[s] forth specific facts which sufficiently rebut the moving party's contentions and disclose the existence of a genuine issue as to a material fact." *Meyer v. Univ. of Wash.,* 105 Wash.2d 847, 852 (1986).

The Rules of Appellate Procedure specifically address an appeal from a summary judgment order. RAP 9.12 entitled "Special Rule for Order on Summary Judgment" provides that:

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

> judgment shall designate the documents and other evidence called to the attention of the trial court before the order for summary judgment was entered. Documents and other evidence called to the attention of the trial court but not designated in the order shall be made part of the record by supplemental order of the trial court or by stipulation of counsel.
> RAP 9.12

In reviewing a ruling on a motion for summary judgment, the appellate court engages in the same inquiry as the trial court and will consider only evidence and issues called to the attention of the trial court. *Zaleck v. Everett,* 60 Wash.App.107 (1991) (emphasis added). "It is the appellate court's task to review a ruling on a motion for summary judgment based solely on the record before the trial court [...] The purpose of RAP 9.12 'is to effectuate the rule that the appellate court engages in the same inquiry as the trial court.'"*Green v. Normandy Park*, 137 Wash.App. 665, 678, citing *Wash. Fed'n of State Employees, Council 28 v. Office of Fin. Mgmt.,* 121 Wash.2d 152, 163 (1993).

2. Res Judicata Bars the Underlying Lawsuit

Res judicata, or claim preclusion, bars the relitigation of claims and issues that were litigated, or might have been litigated, in a prior action. *Symington v. Hudson*, 40 Wn.2d 331 (1952). Application of

the doctrine requires identity between a prior judgment and a subsequent action as to (1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of persons for or against whom the claim is made. *Symington* at 337. The doctrine of res judicata prevents repetitive litigation of claims or causes of action arising out of the same facts, and is used by courts to conserve judicial resources and prevent the moral force of court judgments from being undermined. *Hyatt v. Department of Labor Industries of State of Washington*, 132 Wn.App. 387, 394 (2006).

Moreover, res judicata encompasses the idea that when the parties to two successive actions are the same, and the prior action culminated in a final judgment, a matter may not be relitigated, or even litigated for the first time, if it could have been raised, and in the exercise of reasonable diligence should have been raised, in the prior action. *In re Marriage of Dicus*, 110 Wn.App. 347, 355 (2002) (res judicata barred ex-husband from seeking credit against child support obligation; issue should have been raised in earlier proceeding). Further, the bar applies not only to points upon which the court was actually required to pass judgment, but also "to every point which properly belonged to the subject of litigation, and which ...[by]

exercising reasonable diligence, might have been brought forward." *Meder v. CCME Corp.,* 7 Wash.App. 801, 805 (1972).

The underlying lawsuit is barred under the doctrine of res judicata because it involved identical (1) subject matter and (2) causes of action as the Canham lawsuit, and it involved (3) parties in privity to a real estate deed, and (4) the claims of both lawsuits were made against the same quality of persons, landowners in fee simple.

a. Identity of Subject Matter and Causes of Action

The first two res judicata elements of identity of subject matter and causes of action are present here. The causes of action raised in the Canham lawsuit are identical to the causes of action raised in the underlying complaint: adverse possession and location of a common boundary by a common grantor. CP 145-148 (underlying complaint); CP 58-64 (Memorandum of Law Re Summary Judgment in underlying lawsuit), and CP 77-86 (Plaintiff's Memorandum of Law in Canham lawsuit).

The subject matter of the underlying lawsuit and the Canham lawsuit is also identical, i.e. the Montgomery property described in the Canham-Montgomery deed, which constitutes only one parcel of land,

with one assigned tax number, which was acquired by Respondents from Lisa Canham in a single deed. CP 143-144.

Appellants litigated the location of the easterly boundary line between their property and the Canham/Montgomery property in the Canham lawsuit. Their claim that only a segment of the boundary line was involved (upland segment of the boundary rather than the tideland segment of the boundary) (Opening Brief 4-6) is not a valid argument to bar the application of res judicata here, but rather a weak attempt to rectify their neglect or mistake in not including this claim in the Canham lawsuit.

The case at bar is factually identical to *Kline v. Stein*, 46 Wash.546 (1907), where the Supreme Court held that where plaintiffs in an action to recover land, through accident or mistake, failed to ask recovery of all the land in the tract to which they were entitled, their remedy was to seek relief in the original action by opening up the judgment, amending their pleadings, and not to sue for the omitted portion. In *Kline*, appellants brought an action in adverse possession to recover possession of a tract of land from which they were forcibly dispossessed. *Kline* at 547. Appellants recovered in the action all the property which they thought they were entitled at that time. However, later, they brought a second action under adverse possession to recover

a larger area of the same tract as before, claiming that the tract of land in the second action was distinct from the first action. *Id.* The Supreme Court held that:

> [T]his difference does not allow the claim that the two suits represent different causes of action. On the contrary there has been a splitting of a single cause of action. If this action can be maintained, there is no end to the number of actions that may be maintained for trespass. The appellants can, as soon as judgment is finally entered in this action, maintain another action to recover another parcel of the same tract, and so on indefinitely. It is the policy of the law that there be an end to litigation; and, as a means to this end, the law requires causes of action to be prosecuted as a whole, and forbids dividing them into parts and prosecuting them severally. *Kline* at 548-549.

This is exactly what the Appellants are seeking to do in the underlying lawsuit, splitting their cause of action and opening the door for the possibility of later lawsuits against the same eastern neighbor landowner to claim a different portion of that property; therefore, Appellants need to be stopped from relitigating these causes of action for the second time.

Appellants' argument that the State of Washington's ownership in fee simple of SR 106, which crosses Appellants' and Respondents' properties, creates two parcels of land for Respondents and two parcels

of land for Appellants is without merit, as it lacks legal support. Actually, this exact argument was rejected by this appellate court in *Kemmer v. Keiski*, 116 Wash.App.924 (2003).

Kemmer involved an action by a landowner seeking to enforce a judgment establishing an expansion of an earlier adjudged easement since practicality afterwards determined that such easement should have been broader to allow the proper use of trucks and equipment. *Kemmer* at 929-931. In holding that res judicata applied to bar expansion of that easement, the court's analysis was not in any way affected by the fact that the properties in question were all straddled by Highway 101 (in a similar way that the properties here are crossed by SR 106). The 101 Highway existence on the parties' properties did not play any role in determining whether the party seeking to expand the previously established easement was barred or not by res judicata. The court ultimately applied res judicata in finding that after the first judgment granting the easement, even if the surface of the easement turned out to be impracticable in size in reality, a second action to expand that easement was barred by res judicata. *Kemmer, supra.*

Therefore, under *Kemmer*, the fact that SR 106 crosses the properties in question, or whether the State has ownership in fee simple rather than having a right-of-way (an issue not in dispute since

neither Appellants or Respondents claim ownership of that 60-foot strip of SR 106), does not affect the premise that Appellants should have brought their adverse possession claim over the tidelands in the Canham lawsuit.

Spath v. Larsen, 20 Wash.2d 500 (1944), cited by Appellants only addresses the way in which the lateral boundary lines between different tracts of tidelands located upon a concave bay or a shoreline are determined, an issue of first impression back in 1944. *Spath* at 508. Although a landmark decision, this authority has no bearing on the issues addressed in the summary judgment motion. If Appellants were unsure about the exact location of the tideland boundary line between their property and the Canham property, they should have brought and explored that issue in the Canham lawsuit. Ultimately, *Spath, supra* could have been relevant authority in the Canham lawsuit, but does not create an issue of material fact in addressing the res judicata bar.

Similarly, *Knuth v. Beneficial Washington*, Inc., 107 Wash.App.727 (2001), relied upon by Appellants, does not support their position. *Knuth* upheld an application of res judicata to a second class action lawsuit where the first class action involved the same claims in connection with a fee charged when borrowers paid off their loans. The *Knuth* court barred the second action by applying the same

principles of res judicata, identity of (1) persons and parties, (2) cause of action, (3) subject matter, and (4) the quality of the persons against whom the claims were made, between the two actions. *Knuth* at 731.

Because there was a claim that the two actions did not involve the same causes of action, the *Knuth* court analyzed the issue by determining whether (1) the second action would impair rights or interests established in the prior judgment; (2) whether the two actions deal with substantially the same evidence; (3) whether the two suits involve an alleged infringement of the same right, and (4) whether the two suits arise out of the same transactional nucleus of facts. *Knuth* at 732.

Analyzing the *Knuth* factors is not necessary here since the causes of action between the Canham lawsuit and the underlying lawsuit are identical, as both lawsuits were brought under adverse possession and location of common boundary by a common grantor. CP 145-148; CP 58-64; CP 77-86.

Appellants' claim that the adverse possession use of the uplands would be entirely different than the adverse possession use of tidelands is not supported by law. See *McLeary v. Department of Game,* 91 Wash.2d 647 (1979), where the Supreme Court refused to

acknowledge a distinction between different uses of water (the nonconsumptive right to use creek waters for fish hatchery purposes, as contrasted to water use for irrigation purposes) in a riparian water rights action. The Court held that "Appellants' attempted distinction between consumptive and nonconsumptive uses is not helpful and may not be used to narrow the scope of a general adjudication." *McCleary* at 651.

Res judicata has been applied even in cases where landowners' rights in their properties might have been affected by a subsequent change in law. Thus, in *Columbia Rentals, Inc. v. The State of Washington,* 89 Wash.2d 819 (1978), the Supreme Court applied the res judicata bar by refusing to allow the altering of a final judgment of a court because of a change in judicial interpretation of the law in a subsequent case. There, the Court held that quiet title actions brought by landowners owning oceanfront properties against the State of Washington to redetermine their oceanfront boundaries by modifying earlier judgment against their predecessors in interest, because of changed judicial interpretation of applicable law in subsequent separate action, was barred by res judicata. This holding was based on the reasoning that landowners had not suffered a "manifest injustice" since in the prior judgment, their predecessors in interest were

represented by attorneys and could have appealed from such judgment. *Columbia Rentals, Inc.* at 822.

Under *Columbia Rentals, Inc.*, even if a change in law would have occurred after the Canham lawsuit, Appellants would still be precluded from bringing the underlying action. Here, however, no such change even occurred. All Appellants' contentions as to the state ownership of the SR 106/Highway 21 parcel, the *Spath v. Larsen* method of establishing tideland boundaries, as well as all the elements needed to bring an adverse possession claim, were all established issues at the time of the Canham lawsuit. Appellants did not address those issues, nor did they sought to open the judgment of appeal from that decision, and to allow them to address those issues now would defeat the policy of finality of judgments behind the res judicata doctrine.

Since there was no change in the subject matter between the Canham lawsuit and the underlying lawsuit, and the causes of action were identical in both lawsuits, the first two elements of res judicata are met.

b. Identity of Persons and Parties and Quality of Persons

The last two elements of res judicata, identity of parties and quality of persons are also met. Under the principles of res judicata, a judgment is binding upon parties to the litigation and persons in privity with those parties. *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 764 (1995).

"Privity within the meaning of the doctrine of res judicata is privity as it exists in relation to the subject matter of the litigation, and the rule is construed strictly to mean parties claiming under the same title. It denotes mutual or successive relationship to the same right or property. The binding effect of the adjudication flows from the fact that when the successor acquires an interest in the right it is then affected by the adjudication in the hands of the former owner." *Loveridge* at 764; *United States v. Deaconess Med. Center*, 140 Wash.2d 104, 111 (2000).

The identity of the parties between the Canham and the underlying lawsuit is the same: plaintiffs Riddells are the same individuals. As to defendants/respondents, there is privity of real estate contract with the previous litigant, Lisa Canham by way of statutory warranty deed. Since Respondents are the successor in

interest to the same real estate property, they are considered same party as Lisa Canham. *Loveridge, supra.*

Lastly, the quality of the persons is identical too, as the claims are being brought against landowners, who had the same reason to defend in both actions, i.e. to keep their property intact and defend ownership.

Therefore, the additional two elements of identity of parties and quality of persons are met, resulting in the proper and just application of res judicata principles to bar the underlying lawsuit.

"[I]n the conflict between the principles of finality in judgments and the validity of judgments, modern judicial development has been to favor finality rather than validity." *In re Marriage of Brown*, 98 Wash.2d 46, 49 (1982). The doctrine of res judicata is based on public policy and its purpose is to relieve the court from trying the same issue between the same parties, and although courts are hesitant to apply the doctrine as to deprive any person of property rights without having this day in court (*Meder, supra* at 804), this is not the case here. Appellants had plenty of opportunity, since 1989 when the adverse possession claim for the claimed tidelands would have been ripe (10 year required statutory period for adverse possession claim since Appellants' purchase of their property in 1979),

until the Canham lawsuit in 2004, to bring such an adverse possession claim. CP 52, 101, where Appellant Jerry Riddell testified that he was using the claimed tidelands area and picking oysters and clams since 1979. Appellants already had their day in court regarding any adverse possession claim as to their easterly boundary with the Canham-Montgomery property, and including the tidelands in the Canham lawsuit would have saved Appellants, Respondents, and the judicial system unnecessary monetary expense and judicial resources.

Because the parties and the subject matter are identical between the Canham lawsuit and the underlying lawsuit, and because the identity of parties and quality of persons are identical too, this action should be barred by res judicata. Since res judicata bars all Appellants' claims in this lawsuit, Respondents are entitled to summary judgment as a matter of law since there are no genuine issues of material fact.

B. The Issues of Obliterated or Lost Boundary, the Affidavit of Steven Stillwell, and the Issue of Statute of Frauds Are Raised For the First Time in This Appeal and Therefore Should Be Disregarded

An argument that was neither pleaded nor argued to the trial court cannot be raised for the first time on appeal. *Sneed v. Barna*, 80 Wash.App.843, 847 (1996) (where this Court held that a former school

principal's contention that her transfer to a new position constituted nonrenewal of her contract in violation of state statute was not a proper issue for appeal since the appellant never claimed before a violation of that statute); see also *Concerned Coupeville Citizens v. Town of Coupeville,* 62 Wash.App. 408 (1991) (where the appellate court declined to consider appellant's contentions regarding violation of city ordinances which were not made before the trial court), and *Home Depot USA, Inc., v. State of Washington*, 215 P. 3d 222, 230 (August 2009), where this very court, based on RAP 9.12, refused to allow appellants to present a new argument on appeal when such issue was not presented to the trial court).

Further, even in appeals not taken from a summary judgment, appellate courts have been reluctant to consider new issues for the first time on appeal, out of fairness to trial court and opposing party. *Espinoza v. City of Everett*, 87 Wn.App.857 (1997). It has been long established that "the practice of initiating in this court the trial of issues for the benefit of unsuccessful litigants will not be tolerated." *Mielke v. Miller*, 100 Wash.119, 124 (1918). There, an action was brought by appellants to quiet title in certain real property owned by defendants based on an adverse possession theory. Later on appeal,

appellants made a new claim of ownership by virtue of resulting trust, a theory which the Washington Supreme Court refused to consider.

Similarly, the issues of "obliterated or lost" monument as the boundary of the ordinary line of high tide, the declaration of land surveyor Steven Stillwell, as well as the Statute of Frauds argument should be disregarded in this appeal. Similarly to *Mielke, supra*, Appellant filed a complaint under theories of adverse possession and common location of boundary by a common grantor, and on appeal seeks relief under a new theory of obliterated or lost boundary.

1. The Obliterated or Lost Boundary Argument and the Declaration of Land Surveyor Steven Stillwell

Appellants claim for the first time in their opening brief that the location of the boundary line of ordinary high tide is obliterated or lost as established by the government surveyors, and therefore there is an issue of fact warranting reversal. Opening Brief 13-16.

Such contention should be disregarded since the trial court was never presented with this issue and Respondents never had an opportunity to address this issue. The complaint is based on causes of action for adverse possession and common boundary by common grantors (CP 145-148), and the papers submitted in response to the

summary judgment also fail to claim such issue. CP 58-64. At the summary judgment hearing, Appellants did touch on the issue but ironically, defeated their present argument by admitting that one of their "surveyors might be able to determine where on earth the high water mark is." RP 9.

Even if this argument would be proper this court, the determination of the line of the ordinary high tide is irrelevant here. First, the issue raised by Appellants in this action is the location of the easterly boundary between the Riddell and Montgomery property, wherever that might start. (Stated by Appellants in their argument, RP 9, and their complaint to quiet title, CT 145-148). According to Appellants' own citation to *Spath, supra*, that standard can easily be determined by a land surveyor according to established government monuments starting from the upland boundary points (see determination of boundary lines over tidelands according to *Spath v. Larsen, supra*).

Further, the case law cited in regards to the issue of lost or obliterated boundaries is inapposite here. Both *Washington Nickel v. Martin,* 13 Wn.App. 180 (1975) and *Hale v. Ball*, 70 Wash.435 (1912) (and case law cited in *Hale*), dealt with obliterated or lost "quarter corners" established by government monuments, which according to

RCW 58.04.020, makes possible for the trial court, in cases where the boundary between adjoining landowners becomes obscure or obliterated, to appoint a commissioner to establish where the true monument has been originally set by the government. Such is not the case here; Appellants have not claimed that the tideland boundary between them and Montgomery became obliterated or obscured over time; rather they claim the exact boundary location over tidelands, starting from the iron pipe (see Exhibit Map prepared by Steven Stillwell, CP 75) to which they claim title by adverse possession.[2]

Therefore, such argument regarding the uncertainty of the line of high tide is baseless and irrelevant, and does not create an issue of fact which defeats the trial court's grant of the summary judgment motion.

Further, the Declaration of land surveyor Steven Stillwell and attached exhibits should also be disregarded since it was not considered by the trial court and was made after the summary judgment order had been entered. CP 17-28. The declaration was submitted on June 5, 2009, long after the trial court granted

[2] This issue was addressed in the summary judgment motion under collateral estoppel argument (CP 122-123); however the trial court did not reach that issue as the lawsuit was dismissed on res judicata grounds.

defendants' summary judgment motion on April 20, 2009. The trial court did not address the declaration and there is no surprise since it was a declaration of the land surveyor submitted in support of a Motion for Attorneys' Fees and Costs. Respondents respectfully request that this Court disregard this late and improper declaration and not waste time in addressing its merits.

2. Statute of Frauds as to Respondents' Deed

Another issue that should be disregarded by this court is Appellants' contention that the Montgomery-Canham deed does not meet the Statute of Frauds. Opening Brief 16-17. Not only was this issue not raised as an affirmative defense in Riddells' Answer to Montgomerys' counterclaim, and is brought here for the first time in an unclear way as to how the description of tidelands is ambiguous and how it should have been stated correctly, but again, this argument defeats Appellants' own claims: if the Respondents' deed is void, then they are not in fact the proper owner of the tidelands, and they have been wrongfully and maliciously sued, resulting in a lis pendens filed in bad faith on their property for over three years. Under this contention, this appeal should be summarily dismissed and Respondents awarded sanctions under CR 11 in addition to attorneys' fees and costs as detailed below.

C. **The Trial Court Did Not Abuse Its Discretion in Awarding Respondents $12,352.00 for Attorneys' Fees Under RCW 4.28.328.**

1. Standard of Review

"An appeal from a decision on the merits of a case brings up for review an award of attorneys fees entered after the appellate court accepts review of the decision on the merits." RAP 2.4(g).

When reviewing an award of attorney fees, the relevant inquiry is first, whether the prevailing party was entitled to attorneys' fees, and second, whether the award of fees is reasonable. *Public Util. Dist. 1 v. International Ins. Co.*, 124 Wash.2d 789, 814 (1994). A trial court's determination of attorneys' fees will not be reversed absent an abuse of discretion. The trial court abuses its discretion when its exercise of discretion is manifestly unreasonable or based on untenable grounds." *Wheeler v. Catholic Archdiocese,* 65 Wash.App. 552, 574 (1992), *review granted in part & denied in part,*120 Wash.2d 1011 (1992), citing *Allard v. First Interstate Bank*, 112 Wash.2d 145, 148 (1989).

A trial judge is given broad discretion in determining the reasonableness of an award, and in order to reverse that award, it must be shown that the trial court manifestly abused its discretion. *Scott Fetzer Co. v. Weeks*, 122 Wash.2d 141, 147 (1993).

2. Entitlement to Attorneys' Fees

The trial court did not abuse its discretion by awarding Respondents attorneys' fees under RCW 4.28.328 which provides:

> Unless the claimant establishes a substantial justification for filing the lis pendens, a claimant is liable to an aggrieved party who prevails in the defense of the action in which the lis pendens was filed for actual damages cause by filing the pendens, and in the court's discretion, reasonable attorneys' fees and costs incurred in defending the action.
>
> RCW 4.28.328 (3)

In applying this provision, this Court held in *South Kitsap Family Worship Center v. Weir,* 135 Wash.App.900, 940-941 (2006), that "under the lis pendens statute, claimants maybe liable for damages and attorneys' fees to a party who prevails in defense of an action, unless the claimants establish a substantial justification for the filing." Further, a lis pendens is "substantially justified" where a claimant has a reasonable and good faith basis in fact or law for believing he has an interest in the property. *Weir* at 912.

In *Weir* a vendor of a real property sued purchaser, alleging breach of repurchase option, and filed a lis pendens against the property. Purchaser filed a counterclaim for damages caused by the lis pendens. The court held that the statutory warranty deed conveyed title to a purchaser in fee simple, free of encumbrances, there was no

justification for the vendor's filing of lis pendens against the property, and both vendor and developer, who were properly joined as parties given their purchase and sale agreement with vendor that created the risk of exposing purchaser to double or inconsistent obligations, were liable to purchaser for damages and attorney fees for clouding purchaser's title with a lis pendens for three and a half years. *Weir, supra.*

Moreover, damages and fees are appropriate under RCW 4.28.328(3) where claimants provide no evidence of a legal right to the property. *Richau v. Rayner*, 98 Wash.App. 190 (1999). In *Richau* the appellate court held that there was no substantial justification for filing a lis pendens where claimants knew that they only had title to lots within their possession and showed no evidence for lots they were claiming. More specifically, the dispute involved a subdivision in which the claimants purchased lots 7 and 8; before closing the seller reduced the size of the lots and retained a piece of the property designated as lot 10, and gave claimants valuable consideration for this reduction in size of lots 7 and 8. When a dispute arose over a description of an easement in the deeds, the claimants filed a lis pendens on lot 10. *Richau* at 193. The appellate court noted that the claimants presented no evidence of a legal right to the property and

that their only basis was a "belief" that the property would revert to them under certain conditions. *Id.* at 198.

Here Appellants had no reasonable, good faith basis in fact or law for believing that they had an interest in the Montgomery property because Appellants should have known that they were barred by res judicata because the previous Canham lawsuit and the underlying lawsuit involved the same property with same legal description (including tidelands), the causes of action were identical, the persons or parties were the same (or in privity), and the quality of persons was identical. Appellants could not prove to the trial court, nor can they prove here, that any event, fact, or change in circumstances provided them with a reasonable belief that they could claim adverse possession all over again on their easterly neighbor's property.

The trial court did not abuse its discretion in finding that under these circumstances Appellants had no substantial justification for starting the underlying lawsuit and filing a lis pendens on Respondents' property. RP 55-56.

3. The Amount of Attorneys' Fees Was Reasonable

In reviewing requests for attorneys' fees and costs, Washington courts follow the "loadstar" method, which examines both the hours included and the rates charged in the fee request. *Bowers v. Transamerica Title Insurance Co.,* 100 Wn.2d 581 (1983); *Absher*

Construction Co. v. Kent School Dist., 79 Wn.App. 841 (1995). Under the "loadstar" method, the primary focus in calculating fees is determining the attorneys' reasonably hourly rate and multiplying that rate by the reasonable time expended.

The trial court awarded $12,352.00 for time spent by Respondents' counsel in preparing and presenting the summary judgment. CP* Memorandum of Decision by Judge Toni Sheldon[3]

The court awarded the 37.3 billable hours spent by counsel on the summary judgment motion, and found that the billable rate of $240/hour was reasonable according to market rates and the experience of counsel. An upward adjustment of $3,400.00 was made to account for other time also spent in conjunction with the summary judgment motion. Judge Sheldon did not award any amount for recovery of costs incurred.

Further, this figure did not include the additional time spent in preparing the Summary Judgment Order and attending the presentation of order hearing on May 4, 2009, nor did it include the fees spent in preparing and attending the hearing of the Motion for Attorneys' Fees and Costs on June 18, 2009. RP 16-24 and RP 25-57. Respondents spent additional fees for these two hearings, and in fact, are still

[3] Since this document as well as the pleadings regarding the motion or fees and costs are being supplemented as part of the Clerk's Papers, CT* (Name of the Pleading) will be used for reference to that particular pleading.

incurring fees in trying to amend the final Summary Judgment Order and Final Judgment with the Award for Attorneys' Fees.

The delay claimed by Appellants in bringing the Summary Judgment, although warranted, had no effect on the amount of fees awarded since the same amount of time would have been spent by Respondents' counsel in preparing the same motion prior to March 2009. Again, the trial court's award was limited to the amount of reasonable fees for time spent researching, preparing the pleadings and evidence in support of the summary judgment motion, and appearance for hearing . RP 56, CP* Memorandum of Decision by Judge Sheldon.

Therefore, the amount of $12,352.00 for attorneys' fees was reasonable and should be upheld on appeal.

D. **Should Respondents Prevail on Appeal, Respondents Are Entitled to Additional Attorneys' Fees and Costs Associated With This Appeal**

Respondents should be awarded additional attorneys' fees and costs in having to defend this appeal if they substantially prevail. "If applicable law grants to a party the right to recover reasonable attorney fees or expenses before either the Court of Appeals or the Supreme Court, the party must request the fees or expenses as provided in this rule, unless the statute specifies that the request is to be directed to the trial court." RAP 18.1.

RCW 4.28.328 is the applicable law which grants Respondents the right to an award of attorney fees and costs on appeal if they prevail in defending this appeal. As discussed in part C, *supra*, Respondents are entitled to attorney fees since they are an aggrieved party who would prevail in "defense of an action" in which the lis pendens was filed, and they are entitled to be awarded "reasonable attorneys' fees and costs incurred in defending the action." RCW 4.28.328(3) (emphasis added). The statute does not limit the recovery of such fees and costs to litigation in the trial court, but rather broadly provides for recovery of such costs and fees in defending the entire action in relation to the wrongful filing of lis pendens.

Such broad interpretation was confirmed in *Richau, supra*, where the Court of Appeal awarded the aggrieved party who was affected by the wrongful recording of lis pendens, attorneys' fees incurred in arguing this issue on appeal, in an amount to be determined by the court commissioner. *Richau* at p. 199.

Similarly, in *Weir, supra,* this Court awarded attorneys' fees on appeal to respondent who was the substantially prevailing party on review, subject to respondent's compliance to RAP 18.1.

Here, the Court should award Respondents the attorneys' fees incurred in conjunction with this appeal if Respondents substantially

prevail. A substantially prevailing party is a party who prevails on the major issues on the appeal, and prevailing on the appeal does not necessarily depend upon a decrease or increase in the amount of recovery involved. *Lundsten v. Largent,* 49 Wn.2d 40 (1956).

Further, Respondents request an award of their costs incurred on appeal, in an amount to be later submitted by affidavit in accordance with the procedure set forth in the Rules of Appellate Procedure. "A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review." RAP 14.2.

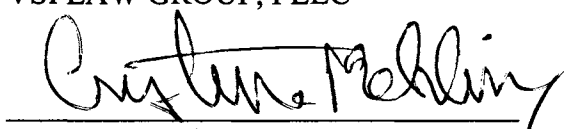
V. CONCLUSION

Based on the foregoing arguments, Respondents respectfully request that the trial court's granting of summary judgment be affirmed, since the underlying action is barred under the doctrine of res judicata, and the award of attorneys' fees be upheld since it was properly awarded under RCW 4.28.328 and the trial court did not abuse its discretion in awarding the reasonable amount of $12,352.00 spent in conjunction with the summary judgment motion. Lastly, in the event Respondents are the substantially prevailing party, this Court

should award Respondents additional attorneys' fees and costs for defending this appeal.

RESPECTFULLY SUBMITTED this 7th day of October, 2009.

VSI LAW GROUP, PLLC



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DIVISION II

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STATE OF WASHINGTON
BY _____
DEPUTY

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

JERRY RIDDELL and LILLIAN RIDDELL, husband and wife, Appellants, vs. ZACHARY M. MONTGOMERY and SARA A. MONTGOMERY, husband and wife, Respondents.	COURT OF APPEALS NO. 39509-6-II MASON COUNTY CAUSE NO. 06-2-00463-2 DECLARATION OF MAILING

The undersigned makes the following Declaration under penalty of perjury as permitted by RCW 9A.72.085:

I am employed by VSI Law Group, PLLC.

At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

On October 8th, 2009, I transmitted via the methods indicated below a copy of the Respondent's Brief and this Declaration of Mailing as follows:

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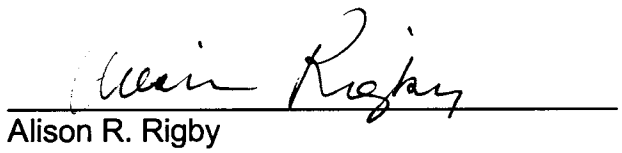
I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Tacoma, Washington, this 8th day of October, 2009.



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