Supreme Court No. 97746-1

Court of Appeals No. 51357-9

SUPREME COURT OF THE STATE OF WASHINGTON

ADRIEN PETERSEN,

Petitioner,

vs.

ROBERT K. MCCORMIC, JR., a married man as his separate estate, as to defenses to Plaintiff's complaint to quiet title and First Counterclaim (Quiet Title),

Respondent,

and WILLIAM OMAITS, a single man, as the successor in interest to ROBERT K. MCCORMIC, JR. as to Counterclaims 2, 3 and 4 (Trespass, Ejectment and Waste or Injury to Land),

Counterclaim Defendant.

PETITION FOR REVIEW

SANCHEZ, MITCHELL, EASTMAN & CURE, PSC

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I. IDENTITY OF PETITIONER

Plaintiff Adrien Petersen requests that this Court accept review of the Court of Appeals decisions designated in Part II of this Petition.

II. COURT OF APPEALS DECISION

Petitioner seeks review of Division II's opinion in *Petersen v. McCormic, et al.* (No. 51357-9) dated July 9, 2019[1] and of the court's order denying motion for reconsideration dated September 5, 2019[2]. Division II reversed orders granting summary judgment to Mr. Peterson and denying summary judgment to Mr. McCormic, and remanded for entry of summary judgment in Mr. McCormic's favor. Opinion at 22.

III. ISSUES PRESENTED FOR REVIEW

ISSUE ONE: Is review warranted under RAP 13.4(b)(1), (b)(2) and (b)(4) because the Court of Appeals decision conflicts with decisions of this Court and of the Court of Appeals holding that title to real property "vests" upon completion of ten or more years of

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[1] A copy of the Court of Appeals opinion is attached as **Appendix A** (the "Opinion").

[2] A copy of the order denying reconsideration is attached as **Appendix B** and a copy of the motion for reconsideration is attached as **Appendix C**.

adverse possession and that title is conveyed to successor owners notwithstanding the real property's absence in the deeds of record and because the applicability of this rule in boundary disputes is a matter of substantial public interest?

ISSUE TWO: Is review warranted under RAP 13.4(b)(1), (b)(2) and (b)(4) because the Court of Appeals decision conflicts with decisions of this Court and of the Court of Appeals that historically apply the after-acquired property doctrine to mortgages and recognize that the doctrine is not strictly limited to that property legally described in the conveyance document and because recognizing changes to boundaries and legal descriptions of mortgaged properties is a matter of substantial public interest?

ISSUE THREE: Is review warranted under RAP 13.4(b)(1), (b)(2) and (b)(4) because the Court of Appeals decision conflicts with decisions of this Court and the Court of Appeals holding that a trial court may apply judicial estoppel to bar a litigant from advancing a claim where he or she asserted the opposite position in a previous court action to great advantage and because upholding the integrity of our judicial system is a matter of substantial public interest?

IV. STATEMENT OF THE CASE

Petersen was successful bidder at a December 2016 trustee's sale for McCormic's foreclosed residential property on Bainbridge Island along the Port Madison shoreline. Soon after, McCormic claimed to own an abutting and auxiliary strip of land not included in the deed of trust's legal description. McCormic had long ago adversely possessed the strip but only gained formal title during the lifespan of his mortgage. McCormic demanded that Petersen pay him rent for the strip and acted to assert his ownership. Petersen accordingly filed this action to quiet title in the strip.

A. McCormic and his spouse owned their residential property for 40-plus years and acted to possess the disputed strip.

In 1974, McCormic and his spouse Alina McCormic purchased a parcel of real property consisting of Lots 1 and 2 of the Plat of Port Madison ("Lots 1 and 2") (CP 46, CP 51, CP 53). From 1974 until the property was sold at trustee's sale in 2016, the McCormics (a) owned and resided at the property and (b) exclusively used and maintained the northern half of the abutting "Portway" property. (CP 342)[3].

[3] The northern half of the Portway supported the use and utility of the house on Lots 1 and 2, with features including water lines, the water meter, fencing and landscaping. CP 320-21, CP 329, CP 654-55.

Thus, McCormic adversely possessed the Portway's northern half (Opinion, at 1), though he was not owner of record until 2014.

In February 2004, the McCormics sued their uphill neighbors for timber trespass and outrage in Kitsap County Superior Court for cutting down three mature pine trees on the disputed strip. (CP 313, 319-26). In December 2004, McCormic testified that he was the owner of the disputed strip, had maintained it since 1974, and had planted the three pine trees in 1994. CP 314, 328-29. In June 2005, the trial court entered judgment upon a jury verdict awarding $86,000.00 of damages to the McCormics. (CP 315, 354-57).[4]

In February 2006, the McCormics refinanced their property's mortgage. The McCormics granted a deed of trust to their mortgage lender to secure a promissory note. The deed of trust legally described Lots 1 and 2 as the loan's collateral. (CP 67-93).

In February 2014, McCormic prompted the Kitsap County Assessor's Office to treat the Portway's northern half and Lots 1 and 2 as one unified parcel in the office's records. (CP 595, CP 598-602).

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[4] In February 2007, McCormic was deposed in a separate action and testified that his timber trespass lawsuit was predicated on his ownership of the disputed strip. (CP 390-91, 394, 397-98)

In November 2014, the McCormics and their neighboring landowner to the south executed and recorded reciprocal quit claim deeds. The neighbor's deed to McCormic legally described Lots 1 and 2 and the northern half of the Portway (CP 550-52; CP 557-59). The deeds were prefaced "for the sole purpose of clearing title" and the owners' real estate excise tax affidavits claimed the boundary line dispute exemption[5] (CP 550, CP 554, CP 557, CP 561).

In 2016 McCormic defaulted on the 2006 deed of trust and the lender conducted a nonjudicial foreclosure. The notice of trustee's sale legally described only Lots 1 and 2. Petersen purchased the property at the trustee's sale and the trustee's deed to him legally described only Lots 1 and 2. (CP 97-99, CP 104-5).

In early 2017, based on the trustee's deed, the Assessor's Office created a new tax parcel for the Portway's northern half "to reflect [McCormic's] presumed continued ownership". (CP 596).

B. McCormic failed to disclose the disputed strip in supplemental proceedings that pre-dated this litigation

Years before the foreclosure, McCormic took out a large private loan from Bill Omaits. In 2011, Omaits filed a collections

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[5] WAC 458-61A-109(2)(b).

action against the McCormics in Kitsap County Superior Court (the "Omaits case") and in 2013 Omaits obtained two judgments upon which the court authorized writs of execution against the McCormics. (CP 360, 632-33). In 2015 Omaits conducted supplemental proceedings and three times, under oath, McCormic failed to identify the strip when ordered to inventory real property.

On June 11, 2015, McCormic filed a declaration inventorying his real properties, which identified his only residential property and his two rental properties. (CP 613, 632-35). Thus, McCormic failed to disclose or segregate his ownership interest in the disputed strip to the court. (CP 363, 634)

In October 2015, the court entered an Order for Supplemental Proceedings directing McCormic to appear in court on a certain date and provide testimony concerning his assets and to bring with him the records and documents including:

> [a]ll deeds and other instruments evidencing any interest of McCormic ... in any real property acquired on or after June 1, 2013 to the present.

(CP 360-61, 365-66). McCormic did not produce the 2014 quitclaim deed or any other documents pertaining to the strip. (CP 362[6])

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[6] McCormic claimed to obtain "record title" to the "McCormic Portway Property" via the 2014 quit claim deed. (CP 21, 362, 376)

Pursuant to the Supplemental Proceedings Order, McCormic testified in December 2015 that he (a) produced all records and documents responsive to the Supplemental Proceedings Order, and (b) did not own any real property other than the residential property and two rental properties. (CP 362, 547, 576, 578[7]). Omaits relied on McCormic's testimony and as a result of McCormic's failure to disclose his interest in the disputed strip, Omaits was denied the opportunity to execute on it to satisfy his judgment. (CP 362-63).

V. ARGUMENT

A. The Court of Appeals decision conflicts with decisions of this Court holding that the after-acquired property doctrine is not strictly limited to real property legally described in the deed of trust securing a mortgage, which is a matter of substantial interest because mortgages are ubiquitous and property boundaries can morph over the life of a mortgage.

The after-acquired property doctrine has been fundamental to Washington mortgages since territorial times, and it is codified in the 1965 Deed of Trust statute:

> [T]he trustee's deed shall convey all of the right, title, and interest in the real and personal property sold at the trustee's sale **which the grantor had or had the power to convey at the time of the execution of**

[7] At the time, McCormic acknowledged being at least six months behind on his home mortgage for his personal residence on Lots 1 and 2. (CP 587)

> **the deed of trust, and such as the grantor may have thereafter acquired.**

RCW 61.24.050(1) (emphasis added).

To examine "and such as the grantor may have thereafter acquired", the Court of Appeals cited to the Washington Real Property Deskbook, WSBA, (3d. ed. 1997) (the "Deskbook")). The Court of Appeals quotes the Deskbook's statement that "after-acquired title concerns the vesting of title to property actually described in a deed, but which the grantor did not own at the time of conveyance". Opinion at 12 (citing Deskbook § 32.7(7). However, that quote's context reveals that it refers to conveyances. In its entirety, the sentence reads as follows:

> ***As previously mentioned***, after-acquired title concerns the vesting of title to property actually described in a deed, but which the grantor did not own at the time of conveyance.

Deskbook § 32.7(7) (emphasis added). Chapter 32 is the Deskbook's "conveyances" chapter which pertained to warranties attached to the various species of conveyances. Deskbook § 32.3.[8]

[8] See Opinion at 12 ("The doctrine is 'based on the premise that a grantor should not be allowed to dispute to warranties of ownership given in the deed.'" (quoting Deskbook § 32.7(7))).

The Court of Appeals ignored the Deskbook's discussion of additional property not originally described in the conveyance:

> The after-acquired title which flows to a grantee pursuant to RCW 64.04.070 includes any title or interest later acquired by the grantor, irrespective of how or when acquired. **This includes not only rights or expectancies that existed at the time the deed was given, and later matured, but also any title subsequently acquired by the grantor, even if acquired through an independent purchase transaction.** *Stevens v. Stevens*, 10 Wn. App. 493, 519 P.2d 269 (1974).

Deskbook, § 32.7(7) (emphasis added). In *Stevens v. Stevens,* former spouses litigated the effect of an after-acquired property clause included in a quitclaim deed conveyed executed between the spouses as part of their divorce settlement. The deed pertained to rental property on which the former spouses had resided, and for which the husband incorrectly believed they had an ownership interest. The trial court held that the clause was ineffective as it could only apply to expectancies that existed at the time of the deed's execution. Division II eviscerated that analysis, writing:

> [A] clause in a quitclaim deed expressing an intention to convey after-acquired interests will have the effect of passing such interests to the grantee. RCW 64.04.070; *Brenner v. J.J. Brenner Oyster Co.* [48 Wn.2d 264, 292 P.2d 1052 (1956) (*aff'd on rehearing*, 50 Wn.2d 869, 314 P.2d 417 (1957)].

> The trial court in this case was of the opinion that such a clause operates only to pass those after-acquired interests traceable to inchoate rights or expectancies which existed at the time of the giving of the deed and which mature thereafter, or to such perfection of interest as the removal of preexisting encumbrances. Accordingly, the trial court concluded that title subsequently acquired in an independent purchase transaction would not pass to the grantee under the clause.
>
> This is an erroneous conclusion. Where an instrument has the effect of conveying after-acquired title, the general rule is that it will do so *irrespective* of how the subsequent title is acquired. R. Patton, *Land Titles* § 215 (2d ed. 1957); 3 *American Law of Property* § 15.21 (1952).

Stevens v. Stevens, 10 Wn. App. at 495-96 (emphasis in original). In the instant case, the Court of Appeals missed this critical holding cited in the WSBA Deskbook.

From the case's earliest stages, McCormic strenuously insisted that "land cannot be appurtenant to land." (see e.g. CP 7, CP 202, CP 467). To the contrary, the WSBA Deskbook states "that land may become appurtenant to other land by the acts and intentions of the parties." Deskbook, § 32.7(6).

The trustee's deed's legal description is defective notwithstanding its facial compliance with RCW 61.24.050(1). McCormic obtained title to the Portway's northern half via adverse possession in his capacity as owner of Lots 1 and 2. Because he did

not previously divest that title, the nonjudicial foreclosure divested his ownership in the whole of his real property as a matter of law.

B. The Court of Appeals decision conflicts with decisions of this Court long recognizing that title to occupied land "vests" upon ten-plus years of adverse possession notwithstanding the land's absence from legal descriptions in conveyance documents, which is a matter of substantial public interest because adverse possession is a central issue in boundary contests throughout our court system.

Washington's adverse possession jurisprudence flies in the face of the maxim that "land cannot be appurtenant to other land".

McCormic acknowledged the 2014 quitclaim deed reflected McCormic's likely adverse possession claim. (Appellant's Brief at 29) If land is adversely possessed for the statutorily required 10 years, title is said to be "vested" notwithstanding the property's absence in a deed's description. *El Cerrito, Inc. v. Ryndak*, 60 Wn.2d 847, 855, 376 P.2d 528 (1962). In fact, the deed need not expressly convey both the property to which the seller holds record title and the property acquired through adverse possession. *Howard v. Kunto*, 3 Wn. App. 393, 400, 477 P.2d 210 (1970) (recognizing conveyance of title acquired by adverse possession despite deed's total misdescription of the property), overruled in part on other grounds by *Chaplin v. Sanders,* 100 Wn.2d 853, 857, 676 P.2d 431 (1984); See also 17

Stoebuck & Weaver, Washington Practice, §8.18, at 540 (2d ed. 2004) (Washington courts recognize transfer of adversely possessed property notwithstanding defects in "paper title").[9]

A "title acquired through adverse possession is as strong as a title acquired by deed and 'cannot be divested ... by any other act short of what would be required in a case where [ ] title was by deed.'" *Gorman v. City of Woodinville*, 175 Wn.2d 68, 73, 283 P.3d 1082 (2012) (quoting *Mugaas v. Smith*, 33 Wn.2d 429, 431, 206 P.2d 332 (1949) (quoting *Towles v. Hamilton*, 94 Neb. 588, 143 N.W. 935 (1913))). A quiet title action is unnecessary to establish title by adverse possession. *Gorman*, 175 Wn.2d at 74 (citing *Halverson v. City of Bellevue*, 41 Wn. App. 457, 460, 704 P.2d 1232 (1985)).

Conveyance of title to a bona fide purchaser does not extinguish title acquired by adverse possession. Under RCW 65.08.060(3), a "conveyance" includes "every written instrument by which any estate or interest in real property is created, transferred, mortgaged or assigned or by which the title to any real property may

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[9] It is immaterial when the 10-year statutory period occurred. "Once a person has title (which was acquired by him or his predecessor by adverse possession), the 10-year statute of limitations does not require that the property be continuously held in an adverse manner up to the time his title is quieted in a lawsuit." *El Cerrito*, 60 Wn.2d at 855. A quiet title action may be brought "at any time after possession has been held adversely for 10 years." Id.

be affected." In the *Mugaas* case, the court held that conveyance of a title to a bona fide purchaser did not extinguish title acquired by adverse possession. *Mugaas*, 33 Wn.2d at 432. The "'recording acts. . . . relate exclusively to written titles.'" *Mugaas*, 33 Wn.2d at 432 (quoting *Schall v. Williams Valley R.R. Co.*, 35 Pa. 191, 204, 1860 WL 8240). Therefore, certain interests in land are "beyond the ambit of the recording act." 18 Stoebuck & Weaver, Washington Practice: Real Estate: Transactions § 14.12, at 157 (2d ed. 2004). Where a transfer is by definition non-documentary, "there is no instrument to record, nothing upon which we can expect the recording act to operate." 18 Washington Practice, § 14.12, at 158.

A person acquiring title by adverse possession "can convey it to another party without having had title quieted in him prior to the conveyance." *El Cerrito*, 60 Wn.2d at 855. This holding has a glaring implication for the instant case: McCormic never conveyed his interest in the strip prior to the non-judicial foreclosure. The strip therefore remained attached to the deed of trust's legally described property and passed to Petersen under the Trustee's Deed, notwithstanding its absence from the legal description.

The trustee's deed's legal description facially complies with RCW 61.24.050(1), but the Court of Appeals did not reconcile the

statute with McCormic's acquisition of the northern half of the Portway via adverse possession in his capacity as owner of Lots 1 and 2. This analysis implicates any adverse possession case involving mortgaged real property.

C. The Court of Appeals decision conflicts with decisions of this Court upholding the trial court's equitable authority to apply judicial estoppel to preclude parties from asserting contrary positions in successive court actions to their unfair advantage, which is a matter of substantial interest because litigants cannot be allowed to make a mockery of our judicial system.

Judicial estoppel "'precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position.'" *Anfinson v. FedEx Ground,* 174 Wn.2d 851, 861, 281 P.3d 289 (2012) (quoting *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007) (internal quotations omitted)). Judicial estoppel's purpose is to:

> ...preserve respect for judicial proceedings without the necessity of resort to perjury statues; to bar as evidence statements by a party which would be contrary to sworn testimony the party has given in prior judicial proceedings; and to avoid inconsistency, duplicity, and ... waste of time.

Cunningham v. Reliable Concrete Pumping, Inc., 126 Wn. App. 222, 226-27, 108 P.3d 147 (Div. 1 2005). Judicial estoppel is invoked to "'protect the integrity of the judicial process'" by "'preventing parties

from playing fast and loose with the courts to suit the exigencies of self-interest'". *Miller v. Campbell*, 137 Wn. App. 762, 155 P.3d 154 (Div. 1 2007) (quoting *Brandon v. Interfirst Corp.*, 858 F.2d 266, 268 (5th Cir. 1988)).

A trial court's application of judicial estoppel is discretionary. *CHD, Inc. v. Taggart*, 153 Wn. App. 94, 101, 220 P.3d 229 (2009) (citing *Miller v. Campbell*, 164 Wn.2d 529, 536, 192 P.3d 352 (2008); *New Hampshire v. Maine*, 532 U.S. 742, 750, 121 S. Ct. 1808, (2001) (exercising original jurisdiction)). The trial court's decision or order will not be disturbed on review except on a clear showing of abuse of discretion. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Three "core factors" guide the trial court's application of judicial estoppel; all factors are clearly satisfied by the undisputed facts of this case. Those factors are:

1. whether a party's later position is clearly inconsistent with its earlier position;

2. whether judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled; and

3. whether the party seeking to assert an inconsistent position would derive an unfair

> advantage or impose an unfair detriment on the opposing party if not estopped.

Arkison v. Ethan Allen, Inc., 160 Wn.2d 535, 538-39, 160 P.3d 13 (2007). Intent to mislead is not an element of judicial estoppel. *Cunningham,* 126 Wn. App. at 234.

With respect to the first core factor, McCormic's position in this case – that he owns the disputed strip as a separate and distinct parcel of real property from that of the residential property – is clearly inconsistent with his earlier position – that the only real property he owned was the residential property and two rental properties. McCormic contends that his failure to disclose the disputed strip reflected his "mistaken understanding of the question." (Appellant's Brief at 26). However, a debtor's failure to "satisfy its statutory disclosure duty is 'inadvertent' only when, in general, the debtor either lacks knowledge ... or has no motive for their concealment." *Cunningham*, 126 Wn. App. at 234.

In this case, McCormic has claimed ownership of the disputed strip since as early as 1994, obtained a judgment for property damages to the property in 2005, received the 2014 quitclaim deed, and then failed to disclose his ownership interest in the disputed strip to his judgment creditor in 2015.

McCormic might plausibly claim mistake or inadvertence if his lone failure to identify the disputed strip consisted of his omission in the heat of the December 2015 deposition. However, that failure is coupled with omitting the disputed strip from his June 2015 declaration and omitting the 2014 quit claim deed from his document disclosure upon the trial court's Supplemental Proceedings Order. There is no reconciling McCormic's claim of ownership in the 2004 property lawsuit with his three-time omission of the disputed strip in the Omaits case.

The second core factor has also been met, because a creditor's action relies on truthfulness under court order. In *Cunningham*, the debtor argued on appeal that judicial estoppel was inapplicable because his failure to disclose an asset in his bankruptcy petition did not sufficiently involve the court to establish an acceptance of his position. The court rejected that argument, writing:

> Judicial estoppel applies "only if a litigant's prior inconsistent position benefited the litigant or was accepted by the court." **Either of these two results permits the application of judicial estoppel.** Both are not [required].

Cunningham, 126 Wn. App. at 230-31 (quoting *Johnson v. Si-Cor, Inc.*, 107 Wn. App. 902, 909, 28 P.3d 832 (2001)) (emphasis added). Like the debtor in *Cunningham*, McCormic similarly failed

to disclose an asset, but he now claims that his interest is separate and apart from his former interest in Lots 1 and 2.

Washington courts apply judicial estoppel in the bankruptcy context to preclude debtors from pursuing legal claims or interests post-bankruptcy when those interests were not disclosed in the bankruptcy. *Cunningham*, supra; *Bartley-Williams v. Kendall*, 134 Wn. App. 95, 138 P.3d 1103 (2006) (failure to disclose medical malpractice lawsuit as asset in bankruptcy).

Judicial estoppel is proper, because, but for McCormic's repeated failure to disclose the disputed strip under oath, his creditor Omaits would have executed on the strip before his mortgage lender started the foreclosure process.[10] As a result, the instant case would be unnecessary because Petersen would have been dealing with Omaits (or his successor), not McCormic, as owner of the disputed strip. The fact that real property is at stake does not change the grievousness of McCormic's omissions.

McCormic claimed to have never disavowed ownership of the disputed strip in the Omaits case (Appellant's Brief, at 24-26), citing

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[10] Had McCormic disclosed the disputed strip, Omaits would have executed upon this unencumbered real property, which would enjoy no homestead protection as a separate parcel. (CP 362-65).

Overlake Farms B.L.K. III, LLC v. Bellevue-Overlake Farm, LLC, 196 Wn. App. 929, 936, 386 P.3d 1118 (2016), *rev. denied*, 118 Wn.2d 1007 (2017), for the proposition that the "inconsistent positions must be diametrically opposed to one another" and *Arkison*, 160 Wn.2d at 539 for the proposition that "application of the doctrine may be inappropriate when a party's prior position was based on inadvertence or mistake".

Here, McCormic's positions could not be more diametrically opposed and cited *Arkison* "inadvertence or mistake" passage is a cautionary note. The *Arkison* court wrote:

> These factors are not an "exhaustive formula" and "[a]dditional considerations" may guide a court's decision. [*New Hampshire*, 532 U.S.] at 751; see, e.g., *Markley v. Markley*, 31 Wn.2d 605, 614-15, 198 P.2d 486 (1948) (listing six factors that may likewise be relevant when applying judicial estoppel). Application of the doctrine may be inappropriate "'when a party's prior position was based on inadvertence or mistake.'" *New Hampshire*, 532 U.S. at 753 (quoting *John S. Clark Co. v. Faggert & Frieden, PC*, 65 F.3d 26, 29 (4th Cir. 1995)).

Arkison, 160 Wn.2d at 539.

The third core factor is also met. McCormic's deception not only harmed both Omaits and Petersen, but it caused "inconsistency, duplicity, and waste of time" in our justice system. McCormic's on-again, off-again, and on-again claim to ownership of the disputed

strip caused both Omaits and Petersen to suffer an unfair detriment. McCormic derived an unfair advantage over Petersen, because McCormic's non-disclosure needlessly prolonged the day when Petersen could resolve the strip's ownership issues.

VI. CONCLUSION

For the reasons set forth above, this Court should accept review under RAP 13.4(b)(1), (b)(2) and (b)(4). The Court of Appeals applied a strict reading of what constitutes after-acquired property which ignored the real-world impact of modifying boundary lines during a deed of trust's lifespan, so there is clear need for the Court to clarify this area of real property law. The Court of Appeals rejected judicial estoppel of McCormic's claim to the strip of land – not his residential property but an auxiliary strip – and this Court should affirm that trial courts can exercise their equitable authority to countermand flagrant abuses of the judicial system.

Dated this 7th day of October, 2019.

SANCHEZ, MITCHELL,
EASTMAN & CURE, PSC

By: _____
Neil R. Wachter
WSBA No. 23278
Attorneys for Respondent

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on October 7, 2019, I arranged for service of the foregoing Petition for Review, to the court and to the parties to this action as follows:

Office of the Clerk Court of Appeals – Division II 950 Broadway, Suite 300 Tacoma, WA 98402	☐ ☐ ☐ ☒ ☐	Via Facsimile Via Messenger Via U.S. Mail Via E-File Via E-Mail
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EXECUTED at Bremerton, Washington this 7 day of October, 2019.

JON D. BRENNER

Petition for Review

Appendix A

Filed
Washington State
Court of Appeals
Division Two

July 9, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

ADRIEN PETERSEN, Respondent, v. ROBERT K. McCORMIC, JR., a married man as his separate estate, as to defenses to Plaintiff's complaint to quiet title and First Counterclaim (Quiet Title), Appellant, And WILLIAM OMAITS, a single man, as the successor in interest to ROBERT K. McCORMIC, JR., as to Counterclaims 2, 3 and 4 (Trespass, Ejectment and Waste or Injury to Land, Counterclaim Defendant.	No. 51357-9-II UNPUBLISHED OPINION

GLASGOW, J. — Robert McCormic owned two residential lots of waterfront property. Adjacent to McCormic's two lots was another piece of land called the Portway. McCormic adversely possessed and then obtained title to the north half of the Portway, adding to his property waterfront footage that was equal to each of his other two lots.

McCormic obtained a loan, borrowing against his original two residential lots. While the lender was aware of McCormic's claim of ownership of the north half of the Portway, the lender's deed of trust did not describe the additional Portway property in its legal description of the property encumbered by the loan. Some years later, McCormic received and recorded a quitclaim deed that conveyed to him title to the north half of the Portway. McCormic eventually

defaulted on his loan, and a trustee instituted a nonjudicial foreclosure against the original two residential lots. Adrien Petersen bought the two residential lots at the trustee's sale.

A dispute then arose about whether the north half of the Portway should have been included in the trustee's deed that conveyed to Petersen the residential lots. The trustee's deed did not include or otherwise describe the adjacent Portway land in the legal description. The trial court granted summary judgment and quieted title in Petersen's favor. McCormic appeals.

McCormic contends that a trustee can convey title only to property described in a deed of trust and, therefore, title to the north half of the Portway was not conveyed to Petersen. Petersen argues that we should apply the after-acquired property doctrine to reform his deed to include the north half of the Portway. Alternatively, Petersen argues that the omission of the north half of the Portway was a scrivener's error, that a mutual mistake supports reformation of the deed, or judicial estoppel precludes McCormic from claiming ownership of the disputed land.

We agree with McCormic that the trustee conveyed to Petersen only the land described in the deed of trust, and none of Petersen's arguments warrant reformation of the deed. We therefore reverse and remand for the trial court to enter summary judgment in McCormic's favor. Although McCormic also asks that we quiet title in his favor, we leave that request for the trial court to resolve on remand.

FACTS

In 1974, McCormic bought a residential property consisting of two lots—Lot 1 and Lot 2—in the Port Madison community of Bainbridge Island. Adjacent to Lots 1 and 2 was another piece of land called the Portway. The Portway was a 100 foot wide parcel of platted real property on the south shore of Port Madison Bay. Historically, the Portway was an avenue likely

used for public access to the bay. For many years, McCormic landscaped, mowed, and maintained the north half of the Portway.

In 1994, McCormic planted three pine trees on the northern 50 feet of the Portway. In addition, McCormic obtained a commitment for title insurance that documented McCormic's purported fee ownership of the north 50 feet of the Portway and included a legal description of the property. Lots 1 and 2 totaled 100 frontage feet of waterfront, and the north half of the Portway totaled an additional 50 frontage feet of waterfront. So, the north half of the Portway amounted to about equal water frontage as each of the other two lots.

In 1995, the City of Bainbridge Island commissioned a survey of the Portway that was recorded with the Kitsap County Auditor in August 1996. The survey notes that McCormic's title insurance policy "vests ownership to adjoiners [the McCormics]." Clerk's Papers (CP) at 630.

In 2004, McCormic sued his uphill neighbors for timber trespass, outrage, and intentional infliction of emotional distress, alleging that they entered his part of the Portway and cut down the three pine trees he had planted in 1994. The complaint alleged that the "McCormics are the legal owners of . . . [t]he north 50 feet of a 100 foot waterfront Lot known as Portway which Lot is located immediately to the south of their home." CP at 320. The complaint also alleged that "[t]he Port Madison Company is the legal owner of the South 50 feet of the Portway." CP at 320.

In a declaration filed in the timber trespass case, the President of the Port Madison Water Company, a homeowners association for the Port Madison community, stated that the Port Madison community was the legal owner of the south 50 feet of the Portway, and the Port

Madison Company did not dispute McCormic's claim that he owned the north half of the Portway. The jury in that case returned a verdict in McCormic's favor.

Later that year, McCormic looked into obtaining a loan from Quality Express Mortgage, which then commissioned an appraisal of his property. This appraisal noted that "[t]he subject enjoys 150 F[rontage] F[eet] of medium to low bank waterfront located in the prestigious neighborhood of Port Madison." CP at 416. The appraiser combined McCormic's portion of the Portway with Lots 1 and 2 when valuing his property at $2.4 million.

McCormic also looked into obtaining a loan from another lender, MortgageIT, which also commissioned an appraisal of his property. That appraisal valued McCormic's property at $1.9 million. The appraiser similarly noted that "[p]er Land Title Company of Kitsap County, the subject site also includes an additional .06 acre and 50 frontage feet of the adjoining vacated street. The appraisal has been written to include this additional area." CP at 444.

In 2006, McCormic borrowed $1.33 million from MortgageIT, which it secured with a deed of trust against his property. The deed of trust included Lots 1 and 2 in its legal description of the property, but it did not include or describe any portion of the Portway.

In 2013, William Omaits, obtained two judgments against McCormic. As part of the associated collection action, Omaits obtained a copy of a 1994 insurance policy McCormic obtained for the Portway.

In 2014, McCormic visited the Kitsap County Assessor's Office to inquire why the county had not taxed him separately for his ownership of the north half of the Portway. He provided the assessor with a copy of his 1994 title insurance policy. Based on that policy, the assessor added the description of the 50 foot strip of property to the tax description of the

adjoining property. Later that year, Port Madison Water Company executed a quitclaim deed, for the sole purpose of clearing title, which conveyed to McCormic, as his separate property, title to the north 50 feet of the Portway. In return, McCormic executed a quitclaim deed that conveyed to Port Madison Water Company title to the south 50 feet of the Portway.

In 2015, McCormic filed a declaration inventorying his real property as a part of the Omaits collection action. In his declaration, McCormic listed his properties with their assessed values and encumbrances, including Lots 1 and 2, but he omitted any reference to his ownership of the north half of the Portway. Later that year, the court ordered McCormic to appear at a deposition and provide testimony, records, and documents concerning his assets. When asked under oath whether he had provided all the required records and documents, McCormic answered: "Yes." CP at 361, 374, 576. However, McCormic did not produce the 2014 quitclaim deed or any other documents related to his ownership of the north half of the Portway. Omaits also asked McCormic: "Other than the two rental properties and your personal residence, do you own any other real property?" CP at 578. McCormic answered: "No." CP at 578.

In 2016, the trustee for McCormic's loan with MorgageIT provided him with a written notice of default and then notice of nonjudicial foreclosure. It also published a notice of trustee's sale in the newspaper. The notice included Lots 1 and 2 in its legal description, but it did not include or describe any part of the Portway. The trustee sold the property at auction to Petersen for $1.051 million.

The trustee's deed granted and conveyed title to Petersen "without representations or warranties of any kind, expressed or implied." CP at 99. Petersen "acknowledge[d] and agree[d]

that the Property was purchased in the context of a foreclosure, that the current Trustee made no representations to" him "concerning the Property and that the current Trustee owed no duty to make disclosures . . . concerning the Property." CP at 99. Peterson also "acknowledge[d] and agree[d]" he relied solely upon his own due diligence investigation before electing to bid for the property. CP at 99.

The trustee's deed upon sale again included Lots 1 and 2 in its legal description, but, in accord with the deed of trust and the notice of trustee's sale, it did not include or describe any part of the Portway.

In February 2017, the Kitsap County Treasurer levied a new property tax on the north half of the Portway separate from the tax assessed on Lots 1 and 2. Because the trustee's deed upon sale did not include the Portway in the legal description, the assessor created a parcel number for the Portway separate from the one for Lots 1 and 2.

In March, McCormic proposed to Petersen a rental agreement for Petersen's use of McCormic's portion of the Portway to facilitate remodeling on Lots 1 and 2. Over the next several days, McCormic also put orange tape between the Portway and Lots 1 and 2, spray painted the boundary line between the properties, placed construction material on the ground at the boundary line, removed sections of fencing that formerly stood on the Portway, turned off the water main serving Lots 1 and 2, and padlocked the water main in the meter box, which is on the north half of the Portway.

In April, Petersen sent an e-mail requesting that the trustee, Quality Loan Corporation of Washington, reform its trustee's deed to add the legal description of the north half of the Portway

because "[t]he trustee's deed failed to include it." CP at 270. The trustee declined. General counsel for the trustee explained:

> In my experience *if* [*the trustee*] *had intended to foreclose upon or did foreclose upon any after-acquired real property, it would have specifically included the legal description of that after-acquired property in the Notice of Trustee's Sale and corresponding Trustee's Deed Upon Sale*. In my experience and practice, [the trustee] can only convey the real property legally described in the Trustee's notice of trustee's sale, barring a court order or decree that includes additional property prior to the foreclosure proceedings.

CP at 224 (emphasis added).

Petersen filed a complaint to quiet title of the north half of the Portway and for declaratory and injunctive relief. The parties filed cross motions for summary judgment. Petersen argued that the trustee's deed conveyed the north half of the Portway to him as after-acquired property, the trial court should reform the trustee's deed based on mutual mistake or scrivener's error, and judicial estoppel should preclude McCormic from taking inconsistent positions concerning his ownership of the north half of the Portway. McCormic argued that conveyance of after-acquired property relates solely to property actually described in a deed of trust, and Petersen's allegations of scrivener's error, mutual mistake, and judicial estoppel were unsubstantiated.

The trial court granted Petersen's motion for summary judgment and denied McCormic's motion. The trial court entered a judgment and order quieting title in favor of Petersen, giving him full and exclusive ownership and right of possession to the north half of the Portway. The judgment extinguished any claim of right, title, estate, lien, or interest McCormic had in the Portway.

McCormic appeals.

ANALYSIS

We review an order granting summary judgment de novo. *Jackowski v. Borchelt*, 174 Wn.2d 720, 729, 278 P.3d 1100 (2012). We "will consider only the evidence and issues called to the attention of the trial court." RAP 9.12; *see also Kofmehl v. Baseline Lake, LLC*, 177 Wn.2d 584, 594, 305 P.3d 230 (2013). Summary judgment is appropriate only if the moving party shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). We construe the facts and draw all inferences in the light most favorable to the nonmoving party. *Kofmehl*, 177 Wn.2d at 594. If the undisputed facts on the record prove that the party against whom summary judgment was entered is actually entitled to summary judgment, we can order entry of summary judgment in that party's favor. *See Impecoven v. Dep't of Revenue*, 120 Wn.2d 357, 365, 841 P.2d 752 (1992).

A. Deeds of Trust and the Statute of Frauds

McCormic argues that a trustee can only sell and convey title to the property that is described in the deed of trust. We agree.

"A deed of trust is a form of a mortgage, an age-old mechanism for securing a loan." *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 782, 295 P.3d 1179 (2013). In Washington, deeds of trust are governed by chapter 61.24 RCW. A deed of trust involves three parties. *Id*. at 782-83. The borrower conveys land to a trustee who holds title in trust for a lender as security for credit or a loan to the borrower. *Id*. at 782-83. "If the deed of trust contains the power of sale, the trustee may usually foreclose the deed of trust and sell the property without judicial supervision," i.e., a nonjudicial foreclosure. *Id.* at 783.

RCW 61.24.050(1) provides that "the trustee's deed shall convey all of the right, title, and interest in the real and personal property sold at the trustee's sale, which the grantor had or had the power to convey at the time of the execution of the deed of trust, and such as the grantor may have thereafter acquired." "'The trustee sells the title he receives. It is not his duty to guarantee the title in any way or to assure anyone that it is good and marketable. Even if that title be defective, the trustee must still on proper demand proceed to sell such title as he took.'" *McPherson v. Purdue*, 21 Wn. App. 450, 452, 585 P.2d 830 (1978) (quoting *Brown v. Busch*, 152 Cal.App.2d 200, 313 P.2d 19, 21 (1957)); *see also Mann v. Household Fin. Corp. III*, 109 Wn. App. 387, 392, 35 P.3d 1186 (2001) (likewise noting that "the trustee sells only the title he or she receives"). Moreover, "[t]he trustee for a deed of trust is not empowered to change the legal description of the deed." *Wash. Fed. v. Azure Chelan LLC*, 195 Wn. App. 644, 660, 382 P.3d 20 (2016).

The statute of frauds requires "[e]very conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed." RCW 64.04.010; *Key Design Inc. v. Moser*, 138 Wn.2d 875, 881, 983 P.2d 653 (1999), *as amended*, 993 P.2d 900 (1999). A "conveyance" for purposes of the statute includes "every written instrument by which any estate or interest in real property is created, transferred, mortgaged or assigned or by which the title to any real property may be affected." RCW 65.08.060(3). Accordingly, "[d]eeds of trust and trustee's deeds are subject to the statute of frauds." *Glepco, LLC v. Reinstra*, 175 Wn. App. 545, 554, 307 P.3d 744 (2013).

In *Martin v. Seigel*, 35 Wn.2d 223, 229, 212 P.2d 107 (1949), our Supreme Court held "that every contract or agreement involving a sale or conveyance of platted real property must

contain, in addition to the other requirements of the statute of frauds, the description of such property by the correct lot number(s), block number, addition, city, county and state." While *Martin* discussed a contract, rather than a conveyance, the court explained why strict application of the statute of frauds is important. *Id.* at 228. "We do not apologize for the rule. We feel that it is fair and just to require people dealing with real estate to properly and adequately describe it, so that courts may not be compelled to resort to extrinsic evidence in order to find out what was in the minds of the contracting parties." *Id.* And our Supreme Court has declined to depart from this rule when asked to do so. *Key Design*, 138 Wn.2d at 884.

In this case, McCormic obtained a loan, which the lender secured with a deed of trust against Lots 1 and 2. The deed of trust did not include or describe any part of the Portway in its legal description. After McCormic defaulted on the loan, the trustee published a notice of trustee's sale in the newspaper. The notice included Lots 1 and 2 in its legal description, but did not include or describe any portion of the Portway. The trustee sold the property at auction to Peterson. The trustee's deed included Lots 1 and 2 in its legal description, but, in accord with the deed of trust and notice of trustee's sale, the trustee's deed did not include or describe any part of the Portway.

Because the trustee can sell only the title they receive, *McPherson*, 21 Wn. App. at 452, *Mann*, 109 Wn. App. at 392, and because the trustee has no power to change the legal description of the trustee's deed, *Washington Federal*, 195 Wn. App. at 660, we hold the trustee in this case could sell only Lots 1 and 2, as described in the deed of trust and conveyed to Petersen via the trustee's deed. The trustee could not convey land that was not described in the trustee's deed. *See Martin*, 35 Wn.2d at 228.

B. After-Acquired Title and Related Theories

1. After-Acquired Title

Petersen argues that the after-acquired title doctrine applies here to vest title to the north half of the Portway in him as the buyer of the adjacent property. McCormic argues that the term "after-acquired property," as used in RCW 61.24.050(1), applies only to property actually described in the deed. Br. of Resp't at 14-18; Reply Br. of Resp't at 2-7. We agree with McCormic.

RCW 61.24.050(1) provides: "[T]he trustee's deed shall convey all of the right, title, and interest in the real . . . property sold at the trustee's sale which the grantor had or had the power to convey at the time of the execution of the deed of trust, and such as the grantor may have *thereafter acquired*." (Emphasis added.) But the statute does not define what constitutes property *thereafter acquired*.

We review questions of statutory interpretation de novo. *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 908, 154 P.3d 882 (2007). Our objective in interpreting a statute is to determine the legislature's intent. *Id*. at 909. "'[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent.'" *Id*. (quoting *Tingey v. Haisch*, 159 Wn.2d 652, 657, 152 P.3d 1020 (2007)). "Plain meaning is 'discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.'" *Id.* (quoting *Tingey*, 159 Wn.2d 657). "Reference to a statute's context to determine its plain meaning also includes examining closely related statutes, because legislators enact legislation in light of existing statutes." *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11, 43 P.3d 4

(2002) (quoting 2A Norman J. Singer, STATUTES AND STATUTORY CONSTRUCTION § 48A:16, at 809-10 (6th ed. 2000)). And statutes that relate to the same subject matter should be read together. *Hallauer v. Spectrum Props., Inc.*, 143 Wn.2d 126, 146, 18 P.3d 540 (2001). "[T]he deed of trust act 'must be construed in favor of borrowers because of the relative ease with which lenders can forfeit borrowers' interests and the lack of judicial oversight in conducting nonjudicial foreclosure sales.'" *Klem*, 176 Wn.2d at 789 (quoting *Udall*, 159 Wn.2d at 915-16).

RCW 64.04.070, a related statute albeit in a different title, clarifies that an after-acquired title follows the deed. It states that "[w]henever any person . . . convey[s] by deed any lands . . . and who, at the time of such conveyance, had no title to such land," but later "acquire[s] a title to such lands so sold and conveyed, such title shall inure to the benefit of the purchasers or conveyee . . . of such lands to whom such deed was executed and delivered." In addition, our Supreme Court has applied the doctrine where the property at issue was actually described in the deed. *See, e.g.*, *Gough v. Center*, 57 Wash. 276, 277, 106 P. 774 (1910) (after-acquired property at issue actually described in deed); *Davis v. Starkenburg*, 5 Wn.2d 273, 279-80, 105 P.2d 54 (1940) (same).

The *Washington Real Property Deskbook*, § 32.7(7) (3d ed. 1997), also explains that "after-acquired title concerns the vesting of title to property *actually described in a deed*, but which the grantor did not own at the time of conveyance." (Emphasis added.) The doctrine is "based on the premise that a grantor should not be allowed to dispute to warranties of ownership given in the deed." *Id.* *Black's Law Dictionary* at 72 (10th ed. 2014), echoes this concept and defines the after-acquired-title doctrine as: "The principle that title to property automatically

vests in a person who bought the property from a seller who acquired title only after purporting to sell the property to the buyer."

Petersen relies on additional language in the *Deskbook* for his contrary interpretation of the doctrine. He contends that broad language in the *Deskbook* explains that an after-acquired title "includes any title or interest later acquired by the grantor, irrespective of how or when acquired." *Wash. Real Property Deskbook* § 32.7. "This includes not only rights or expectancies that existed at the time the deed was given, and later matured, but also any title subsequently acquired by the grantor, even if acquired through an independent purchase transaction." *Id*. However, this language must be read in context with the *Deskbook*'s prior statement that after-acquired property includes only property described in the deed. *Id.*

Petersen also relies on *Stevens v. Stevens*, 10 Wn. App. 493, 495-97, 519 P.2d 269 (1974), to support his understanding of the doctrine. *Stevens* is distinguishable because, in that case, the quitclaim deed expressly applied to the grantor's after-acquired interest in property that was described in the deed. *Id.* at 494. Here, the deed of trust and trustee's deed described only Lots 1 and 2 and did not describe any portion of the Portway.

McCormic did not purport to encumber the north half of the Portway in his deed of trust with MortgageIT, as it did not include any portion of the Portway in the legal description of the property securing the loan. There is no evidence on the record that MortgageIT had bargained for any right, interest, or expectancy in any part of the Portway that existed at the time McCormic executed the deed of trust. MortgageIT thus had no rights, interests, or expectancies in the Portway that later matured to its benefit. Moreover, the trustee also appears to have viewed the deed of trust and trustee's deed as reflecting the lender's intent not to include the

north half of the Portway in either the deed of trust or trustee's deed. General counsel for the trustee explained: "In my experience if [the trustee] had intended to foreclose upon or did foreclose upon any after-acquired real property, it would have specifically included the legal description of that after-acquired property in the Notice of Trustee's Sale and corresponding Trustee's Deed Upon Sale." CP at 224.

Thus, we hold that the reference to after-acquired property in RCW 61.24.050(1) did not incorporate into the trustee's deed the north half of the Portway because that property was not specifically described in the deed.

2. Appurtenance

Petersen also argues that land "may become appurtenant to land . . . by the acts and intentions of the parties." Br. of Resp't at 18. We disagree.

Petersen relies again on the *Deskbook,* which provides that "[a]n appurtenance is an incidental or accessory right or benefit that belongs to the land that it benefits. . . . [A]s a general rule, land is not appurtenant to other land, and so title to land not described in the deed will not pass as an appurtenance." *Wash. Real Property Deskbook* § 32.7(6). That said, the *Deskbook* at section 32.7(6), recognizes that in some cases, "[l]and may become appurtenant to land" only "if all the facts and circumstances show that it was the grantor's intent to convey it."

But Washington courts have not necessarily agreed, and some cases hold that land cannot, even rarely, become appurtenant to land. *See, e.g.*, *Butler v. Craft Eng'g Constr. Co.*, 67 Wn. App. 684, 697, 843 P.2d 1071 (1992) ("land cannot be appurtenant to land"); *Hurley v. Liberty Lake Co.*, 112 Wash. 207, 211, 192 P. 4 (1920) ("real property cannot be appurtenant to real property"); *Brown v. Carkeek*, 14 Wash. 443, 447-48, 44 P. 887 (1896) ("It is true that, in a

strict legal sense, land cannot be appurtenant to land."). Moreover, McCormic expressly disavowed any intent to encumber the north half of the Portway via the deed of trust. Thus, title to the Portway, which was not described in the deed of trust or trustee's deed, could not pass as an appurtenance.

3. Tacking of Adverse Possession

Finally, Petersen analogizes this case to *El Cerrito, Inc. v. Ryndak*, 60 Wn.2d 847, 854-57, 376 P.2d 528 (1962), arguing that the adversely possessed north half of the Portway became indivisible from McCormic's other lots through the theory of tacking. But tacking involves accumulation of *time* for purposes of determining whether a piece of property was adversely possessed. "This state follows the rule that a purchaser may tack the adverse use of its predecessor in interest to that of his own where the land was intended to be included in the deed between them, but was mistakenly omitted from the description." *Id*. at 856.

El Cerrito is distinguishable. In that case, successive landowners both adversely possessed an adjacent two and a half foot strip of property. *Id*. at 854-55. The court held that "the failure to include the disputed strip in the deed did not prevent the subsequent purchaser from acquiring title by adverse possession." *Id*.

Here, Petersen cannot show that McCormic or his lender intended the north half of the Portway to be included in the deed of trust or the trustee's deed. And tacking periods of adverse possession does not apply here in light of the intervening quitclaim deed that precisely described the north half of the Portway and was recorded for the purpose of clearing title. Nor is it appropriate to use tacking to overcome McCormic's intent where the land at issue here is not merely an adjacent strip, but the size of an entire lot. McCormic's tacking argument fails.

C. Mutual Mistake and/or Scrivener's Error

Petersen argues a mutual mistake or scrivener's error produced the incomplete legal description in the deed of trust, which unintentionally excluded the north half of the Portway.We disagree.

A trial court has equitable power to reform a writing that is materially contrary to the parties' intent. *See Denaxas v. Sandstone Court of Bellevue, L.L.C.*, 148 Wn.2d 654, 669, 63 P.3d 125 (2003); *Glepco*, 175 Wn. App. at 560. A mutual mistake arises if the parties had the same intentions, but their written agreement does not accurately express their intentions. *Glepco*, 175 Wn. App. at 561. A mistake is a belief that is not in accord with the facts, held at the time the contract is made, that relates to a basic assumption held by both parties, and that has a material effect on the agreement. *Denaxas*, 148 Wn.2d at 668.

A party may invoke mutual mistake only if the party did not bear the risk of mistake. *Id.* "[A] party bears the risk of mistake when, at the time the contract is made, the party is aware of limited knowledge with respect to the facts to which the mistake relates but treats such limited knowledge as sufficient." *Pub. Util. Dist. No. 1 of Lewis County v. Wash. Pub. Power Supply Sys.*, 104 Wn.2d 353, 362, 705 P.2d 1195 (1985), *modified*, 713 P.2d 1109 (Wash. 1986). "A party with constructive knowledge of the circumstances giving rise to the alleged mistake does not hold a belief not in accord with the facts." *Denaxas*, 148 Wn.2d at 668.

A scrivener's error arises when the intention of the parties is identical at the time the contract was executed, but the written agreement errs in expressing that intention. *Glepco*, 175 Wn. App. at 561. A court determines the parties' intent "'by viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the

contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties.'" *Glepco*, 175 Wn. App. at 561 (quoting *Berg v. Hudesman*, 115 Wn.2d 657, 667, 801 P.2d 222 (1990)).

The general rule is that an incomplete legal description is not subject to reformation. *Key Design*, 138 Wn.2d at 888. An exception is when mutual mistake or scrivener's error caused the incomplete legal description. *Id*. A trial court may reform a conveyance of real property on the ground of mutual mistake only where such mistake is proven by clear, cogent, and convincing evidence. *Id*. The evidence must show that the parties had an identical intent at the time of the transaction and that the written agreement did not express that intent. *Id*.

Petersen argues MortgageIT and McCormic shared an intent to include the north half of the Portway in the deed of trust's legal description of the property and, therefore, the north half of the Portway should have been included in the trustee's deed upon sale. Petersen asks us to rewrite the deed of trust and the trustee's deed, but he fails to establish that a mutual mistake or scrivener's error occurred.

The undisputed evidence establishes that MortgageIT and McCormic, in executing the 2006 deed of trust, intended to secure the loan with only Lots 1 and 2. MortgageIT commissioned an appraisal of McCormic's property. The appraiser noted: "Per Land Title Company of Kitsap County, the subject site also includes an additional .06 acre and 50 frontage feet of the adjoining vacated street. The appraisal has been written to include this additional area." CP at 444. That appraisal valued McCormic's property, including Lots 1 and 2, and the north half of the Portway, at $1.9 million. McCormic borrowed $1.33 million from MortgageIT, which the lender secured with a deed of trust against only Lots 1 and 2.

McCormic declares he never intended to encumber the north half of the Portway when he sought the loan. There is no evidence in the record of MortgageIT's intent outside of the four corners of the writing. The deed of trust's legal description of the property securing the loan did not include or describe any part of the Portway. General counsel for the trustee also confirmed its interpretation of both the deed of trust and the trustee's deed, which he understood evidenced an intent not to include the Portway. Significantly, the appraised value of the two lots covered the amount of the loan without the value of the north half of the Portway. The only reasonable inference based on these facts is that MortgageIT knew McCormic owned the north half of the Portway, but it did not require that land as security for McCormic's loan.

Furthermore, the appraisal provided MortgageIT with actual and constructive knowledge of McCormic's claim to the north half of the Portway when it contracted with McCormic; thus, MortgageIT bore the risk of any mistake in not securing its loan properly. *See Denaxas*, 148 Wn.2d at 668; *Pub. Util. Dist. No. 1*, 104 Wn.2d at 362. Petersen cannot show by clear, cogent, and convincing evidence that MortgageIT and McCormic shared an identical intent to include the north half of the Portway as security for the loan. We cannot rewrite the deed of trust to force a bargain that the parties never made. *See Denaxas*, 148 Wn.2d at 670.

Petersen has presented no evidence to establish the existence of either mutual mistake or scrivener's error. *See id*. Thus, we hold reformation is an improper remedy in this case.

D. Judicial Estoppel

Petersen next argues that judicial estoppel bars McCormic from claiming ownership of the north half of the Portway. We decline to apply judicial estoppel here.

"'Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position.'" *In re the Committed Intimate Relationship of Amburgey & Volk*, No. 49389-6-II, slip op. at *3, 2019 WL 1997678 (Wash. Ct. App. May 7, 2019) (quoting *Chonah v. Coastal Vill. Pollock, LLC*, 5 Wn. App. 2d 139, 147, 425 P.3d 895 (2018), *review denied* 192 Wn.2d 1012 (2019)). The doctrine seeks to preserve respect for judicial proceedings, and to prevent inconsistency, duplicity, and waste of time. *Id.* (citing *Chonah*, 5 Wn. App. 2d at 147). The doctrine is not designed to protect litigants. *Id.*

Generally, we review a trial court's decision to apply the equitable doctrine of judicial estoppel for abuse of discretion. *Id*. But on summary judgment there are no findings of fact, so our review is de novo. *See id*.

First, while Petersen argues that judicial estoppel requires the court to deem the north half of the Portway property his, despite its omission from the deed conveying the property to him, it is not clear that judicial estoppel is a viable exception to the strict application of the statute of frauds. In *Key Design*, our Supreme Court rejected a similar doctrine, deciding instead that the statute of frauds strictly applied. *See* 138 Wn.2d at 884. The court explained that "in the statute of frauds context, the judicial admissions doctrine allows courts to enforce oral agreements involving title to real estate as long as the party against whom enforcement is sought has admitted in court or during discovery that an oral agreement existed." *Id.* But the court firmly declined to adopt the judicial admissions exception to the statute of frauds. *Id*. at 888. Moreover, "[t]itle to real property is a most valuable right and will not be disturbed by estoppel unless the evidence is clear and convincing." *Mugaas v. Smith*, 33 Wn.2d 429, 434, 206 P.2d

332 (1949); *Finley v. Finley*, 43 Wn.2d 755, 765-66, 264 P.2d 246 (1953); *see also King County v. Boeing Co.*, 62 Wn.2d 545, 551, 384 P.2d 122 (1963).

The strict application of the statute of frauds and the courts' reluctance to use estoppel to divest ownership of real property both raise serious doubt as to whether judicial estoppel is even available as an exception to the statute of frauds.

Even if it is, judicial estoppel does not support the transfer of the north half of the Portway from McCormic to Petersen. Whether to apply judicial estoppel is guided by three nonexclusive core factors:

> (1) whether a party's later position is clearly inconsistent with its earlier position; (2) whether judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled; and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Arkison v. Ethan Allen, Inc., 160 Wn.2d 535, 538-39, 160 P.3d 13 (2007) (internal quotations marks omitted) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 753, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001)). "The inconsistent positions 'must be diametrically opposed to one another.'" *Overlake Farms B.L.K. III, LLC v. Bellevue-Overlake Farm, LLC*, 196 Wn. App. 929, 936, 386 P.3d 1118 (2016) (quoting *Kellar v. Estate of Kellar*, 172 Wn. App. 562, 581, 291 P.3d 906 (2012)). Further, "[a]pplication of the doctrine may be inappropriate 'when a party's prior position was based on inadvertence or mistake.'" *Id*. (quoting *New Hampshire*, 532 U.S. at 753).

Petersen has not established by clear and convincing evidence that McCormic took a diametrically opposite position in prior litigation. *See Arkison*, 160 Wn.2d at 538-39. In connection with the Omaits collection action, McCormic filed a declaration inventorying his real property that omitted any reference to the north half of the Portway. McCormic also did not

produce the 2014 quitclaim deed or any other documents establishing his ownership of the north half of the Portway in that case. Omaits also asked McCormic in a deposition: "Other than the two rental properties and your personal residence, do you own any other real property?" CP at 578. McCormic answered: "No." CP at 578.

But Omaits did have a copy of the 1994 insurance policy McCormic obtained for the north half of the Portway. Omaits also had copies of the two appraisals commissioned on McCormic's property by Quality Express Mortgage and MortgageIT, both of which included the north half of the Portway. Thus, Omaits had information that clearly showed McCormic owned or claimed ownership of the north half of the Portway. Thus, the evidence in the Omaits collection action about the north half of the Portway was at best, mixed.

In addition, McCormic has not presented evidence that McCormic misled *the trial court* in the Omaits collection action. *See Arkison*, 160 Wn.2d at 538-39. Petersen does not point to any evidence in the record that shows the trial court was even aware of McCormic's deposition testimony. The record does not provide clear and convincing evidence that McCormic misled the trial court.

Finally, McCormic's current assertion of ownership does not create an unfair advantage for him. *See Arkison*, 160 Wn.2d at 538-39; *In re Amburgey & Volk*, No. 49389-6-II, slip op. at *10-11. To the contrary, allowing McCormic to retain record title to the north half of the Portway will provide his creditors, like Omaits, with an asset to execute on. *See also Chonah*, 425 P.3d at 900-01. And the alleged harm that Omaits suffered—namely, his inability to execute on the north half of the Portway in a separate collection action—would not be remedied by vesting title in Petersen.

We conclude that the doctrine of judicial estoppel does not divest McCormic of ownership of the north half of the Portway.

CONCLUSION

For the reasons outlined above, we hold the trial court erred when it granted summary judgment in Petersen's favor. We reverse the order granting summary judgment to Petersen and denying summary judgment to McCormic. We remand for entry of summary judgment in McCormic's favor. *See Impecoven*, 120 Wn.2d at 365. Although McCormic also asks that we quiet title in his favor, we leave that request for the trial court to resolve on remand.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Glasgow, J.

We concur:

Melnick, P.J.

Sutton, J.

Petition for Review

Appendix B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

Filed
Washington State
Court of Appeals
Division Two

September 5, 2019

DIVISION II

ADRIEN PETERSEN,

Respondent,

v.

ROBERT K. McCORMIC, JR., a married man as his separate estate, as to defenses to Plaintiff's complaint to quiet title and First Counterclaim (Quiet Title),

Appellant,

And

WILLIAM OMAITS, a single man, as the successor in interest to ROBERT K. McCORMIC, JR., as to Counterclaims 2, 3 and 4 (Trespass, Ejectment and Waste or Injury to Land,

Counterclaim Defendant.

No. 51357-9-II

ORDER DENYING MOTION FOR RECONSIDERATION

Respondent, Adrian Petersen, filed a motion for reconsideration of the unpublished opinion filed on July 9, 2019. After review, it is hereby

ORDERED that the motion for reconsideration is denied.

Jjs.: Glasgow, Melnick, Sutton

FOR THE COURT:

Melnick, J.

Melnick, P.J.

Petition for Review

Appendix C

CASE No. 51357-9

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ADRIEN PETERSEN,

Respondent,

vs.

ROBERT K. MCCORMIC, JR., a married man as his separate estate, as to defenses to Plaintiff's complaint to quiet title and First Counterclaim (Quiet Title),

Appellant,

and WILLIAM OMAITS, a single man, as the successor in interest to ROBERT K. MCCORMIC, JR. as to Counterclaims 2, 3 and 4 (Trespass, Ejectment and Waste or Injury to Land),

Counterclaim Defendant.

APPEAL FROM THE SUPERIOR COURT
FOR KITSAP COUNTY
THE HONORABLE KEVIN D. HULL

RESPONDENT'S MOTION FOR RECONSIDERATION

SANCHEZ, MITCHELL, EASTMAN
& CURE, PSC

By: Neil R. Wachter
WSBA No. 23278
Attorneys for Respondent
4110 Kitsap Way, Suite 200
Bremerton, WA 98312
(360) 479-3000

I. IDENTITY OF MOVING PARTY

The Respondent, ADRIEN PETERSEN, by and through his attorney Neil R. Wachter, asks this Court for the relief designated in Part II of this motion.

II. RELIEF REQUESTED

Respondent respectfully moves pursuant to RAP 12.4 for this Court to withdraw and revise its July 9, 2019 unpublished opinion upon reconsideration of the disputed property's status in this action, to affirm the trial court's judgment and order quieting title in Petersen as the successor-in-interest to adversely possessed property, a subject not previously addressed by the Deed of Trust Statute's "after-acquired property" definition at RCW 61.24.050(1).

III. FACTS RELEVANT TO MOTION

In 1974, Petitioner McCormic and his spouse Alina McCormic purchased a parcel of real property consisting of Lots 1 and 2 of the Plat of Port Madison ("Lots 1 and 2") (CP 46, CP 51, CP 53). From 1974 until the property was sold at trustee's sale in 2016, the McCormics (a) owned and resided at the property and (b) exclusively used and maintained the northern half of the abutting "Portway"

property. (CP 342)[1]. McCormic thereby adversely possessed the northern half of the Portway (Slip Opinion, at 1), though he did not have title of record until November 2014.

In February 2006, the McCormics refinanced their property's mortgage. The McCormics granted a deed of trust to their mortgage lender to secure a promissory note. The deed of trust legally described Lots 1 and 2 as the loan's collateral. (CP 67-93).

In February 2014, McCormic prompted the Kitsap County Assessor's Office to treat the northern half of the Portway and Lots 1 and 2 as one unified parcel in the Assessor's records. (CP 595, CP 598-602).

In November 2014, the McCormics and their neighboring landowner to the south executed and recorded reciprocal quit claim deeds to formalize their claims to the Portway. The neighbor's deed to McCormic legally described Lots 1 and 2 and the northern half of the Portway (CP 550-52; CP 557-59). The deeds were prefaced "for the sole purpose of clearing title" and the owners' real estate excise tax affidavits claimed the boundary line dispute exemption[2] (CP 550,

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[1] The northern half of the Portway supported the use and utility of the house on Lots 1 and 2, with features including water lines, the water meter, fencing and landscaping. CP 320-21, CP 329, CP 654-55.

[2] WAC 458-61A-109(2)(b).

CP 554, CP 557, CP 561). Thus, for the first time, McCormic was an owner of record of land in the Portway.

In 2016 McCormic defaulted on the 2006 deed of trust and the lender conducted a nonjudical foreclosure. The notice of trustee's sale legally described only Lots 1 and 2. Petersen purchased the property at the trustee's sale and the trustee's deed to him legally described only Lots 1 and 2. (CP 97-99, CP 104-5).

In early 2017, based on the trustee's deed, the Assessor's Office created a new tax parcel for the Portway's northern half "to reflect [McCormic's] presumed continued ownership". (CP 596).

IV. GROUND FOR RELIEF AND ARGUMENT

A. Introduction

The Opinion's application of RCW 61.24.050(1)'s after-acquired property clause, respectfully, yields an incongruous and untenable proposition:

> A landowner who: (a) grants a deed of trust to secure his or her mortgage loan, (b) adversely possesses a strip of abutting land to which he or she obtains formal title during the lifespan of the deed of trust, (c) defaults on the mortgage loan and (d) has his or her mortgage foreclosed, still retains ownership of

the strip after the trustee sells the deed of trust-described property at a trustee's sale.

This proposition would apply regardless of the adversely possessed strip's dimensions. The disputed strip here is 50 feet wide, but more typically an adverse possessor gains title to real property measured in inches or a few feet. By this logic, if a mortgage borrower quieted title in a two-inch wide strip of adversely possessed land before foreclosure, that borrower would continue to own the two-inch wide strip notwithstanding foreclosure.

This proposition undercuts the very function of adverse possession, which is to adjust land boundaries to match the realities of established exclusive use on the ground. This outcome should feel wrong because, despite losing all of his or her rights in the foreclosed parcel, the foreclosed adverse possessor gets to keep a random strip of land right next door to it.

Remarkably, the appellate courts have apparently not encountered the collision of foreclosed deeds of trust with modified land boundaries. Quieting title to recognize adverse possession is not the lone mechanism to revise property lines; boundary line adjustments, boundary line agreements, land condemnations and the granting or recognition of easements, each modify a property's

actual legal description. Any of these changes can occur during a deed of trust's lifespan. Thus, while the trustee has no obligation to guarantee title, the analysis of changed boundary lines cannot stop there.

From the case's earliest stages, McCormic strenuously insisted that "land cannot be appurtenant to land." (see e.g. CP 7, CP 202, CP 467). If this is a maxim, the WSBA Real Property Deskbook clarifies that it is a general rule with exceptions. This motion will explain McCormic's misdirection and will show why the trial court properly quieted title notwithstanding the Deed of Trust statute's after-acquired property provision:

- Adversely possessed property may be "appurtenant" to the adverse possessor's land in the sense that it is annexed to the adverse possessor's land.
- McCormic never caused his adversely possessed Portway property to be divested from Lots 1 and 2.
- Quieting of title is legal and equitable; even if the trial court could not reform the deed of trust or the trustee's deed, it was empowered to recognize the true owner of the disputed Portway land.

- The Deskbook discusses after-acquired property in its Conveyances chapter, which focuses on deeds under RCW Chapter 64.04, not on deeds of trust. On closer examination, the Deskbook's varying statements on after-acquired property can only be reconciled by recognizing a general rule with exceptions.
- The trustee's explanation for not revising the deed of trust is tangential: The deed of trust statute forbids trustees from changing the legal description from that in the deed of trust, so the trustee describes the industry practice.
- As a conveyance, a deed of trust does not extinguish title acquired by adverse possession.

This Court may affirm "on any basis supported by the record." *Coppernoll v. Reed*, 155 Wn.2d 290, 296, 119 P.3d 318 (2005). Here, the Court rejected reformation of the deed of trust, strictly interpreted the deed of trust statute's after-acquired property provisions and rejected judicial estoppel. The common thread has been McCormic's adverse possession, which does not fit neatly into any of these three boxes. It is not just incongruous to disregard adverse possession's impact on the foreclosed property's legal description; it is contrary to Washington's adverse possession

doctrine and creates a windfall for the adverse possessor, who loses his or her real property described in the trustee's deed but retains a strip of land that he or she can lord over the grantee.

B. Petersen Cites to *El Cerrito* not for Tacking, but for Washington's Recognition that Adverse Possession "Vests" Notwithstanding Defects in the Deed.

The *El Cerrito* case is pertinent not because it affirms the principle of tacking between owners in privity, but because it explains the phenomenon of "vesting" upon ten years of adverse possession, i.e. the adverse possessor becomes the title owner of the adversely possessed land, notwithstanding the land's absence from legal descriptions in conveyance documents. *El Cerrito, Inc. v. Ryndak*, 60 Wn.2d 847, 855, 376 P.2d 528 (1962).

Moreover, the deed need not expressly convey both the property to which the seller holds record title and the property acquired through adverse possession. *Howard v. Kunto*, 3 Wn. App. 393, 400, 477 P.2d 210 (1970) (recognizing conveyance of title acquired by adverse possession despite deed's total misdescription of the property), overruled in part on other grounds by *Chaplin v. Sanders*, 100 Wn.2d 853, 857, 676 P.2d 431 (1984). Thus, Washington courts recognize transfer of adversely possessed

property notwithstanding defects in "paper title". 17 Stoebuck & Weaver, Washington Practice, §8.18, at 540 (2d ed. 2004).

In Washington, a "title acquired through adverse possession is as strong as a title acquired by deed and 'cannot be divested ... by any other act short of what would be required in a case where [ ] title was by deed.'" *Gorman v. City of Woodinville*, 175 Wn.2d 68, 73, 283 P.3d 1082 (2012) (quoting *Mugaas v. Smith*, 33 Wn.2d 429, 431, 206 P.2d 332 (1949) (quoting *Towles v. Hamilton*, 94 Neb. 588, 143 N.W. 935 (1913))).

A quiet title action is unnecessary to establish title by adverse possession. "The law is clear that title is acquired by adverse possession upon passage of the 10-year period.'" *Gorman*, 175 Wn.2d at 74 (quoting *Halverson v. City of Bellevue*, 41 Wn. App. 457, 460, 704 P.2d 1232 (1985)). "The new title holder need not sue to perfect his interest: '[t]he quiet title action merely confirm[s] that title to the land ha[s] passed to [the adverse possessor].'" *Gorman*, 175 Wn.2d at 74 (quoting *Halverson*, 41 Wn. App. at 460; citing *Ryndak*, 60 Wn.2d at 855).

C. The Maxim "Land Cannot be Appurtenant to Other Land" Never Met Adverse Possession, Washington Style.

Washington's adverse possession jurisprudence flies in the face of the maxim that "land cannot be appurtenant to other land". In 1936, the United States Supreme Court discussed this principle:

> A mere easement may, without express words, pass as an incident to the principal object of the grant; but ***it would be absurd to allow the fee of one piece of land, not mentioned in the deed, to pass as appurtenant to another distinct parcel***, which is expressly granted by precise and definite boundaries.

Harris v. Elliott, 35 U.S. 25, 54, 9 L. Ed. 333, 344 (1836) (emphasis added) (where deeds reserved easements for highway, the highway's discontinuance caused the fee to revert to adjoining owners).

And yet, Washington's adverse possession law does exactly this; the fee of adversely possessed land passes as appurtenant notwithstanding its absence from the deed.

The Opinion, at 14-15, cites to several cases citing the "maxim": *Butler v. Craft Eng Constr. Co.*, 67 Wn. App. 684, 697, 843 P.2d 1071 (1992) (comparing easements in and fee interest in a property's abutting roadway, citing *Harris v. Elliott*, supra, *Washington Med. Ctr., Inc. v. United States*, 545 F.2d 116, 127 (Ct. Cl. 1976)); *Hurley v. Liberty Lake Co.*, 112 Wash. 207, 211, 192 P. 4

(1920) (rejecting claim that septic systems included in deed to real property as appurtenances); *Brown v. Carkeek*, 14 Wash. 443, 447-48, 44 P. 887 (1896)) ("It is true that, in a strict legal sense, land cannot be appurtenant to land." (citing *Doane v. Broad St. Ass'n in Boston*, 6 Mass. 332, 333 (1810)). *Brown* cites to *Doane, a* Massachusetts Supreme Court partition case concerning whether a wharf and land beneath it could be appurtenant to land. That court's pronouncement of the maxim reveals that it is not an absolute:

> [I]t is an established maxim of law that land cannot pass as appurtenant to land, although it may pass as appurtenant to a messuage.

Doane 6 Mass. at 333. That court allowed the "flats, necessary for the use of the wharf, and usually occupied with it, [to] pass as appurtenant", without offending the maxim. Id. The *Doane* court stated that land "may pass as appurtenant to a ***messuage***". Id (emphasis added). "Messuage" means "a dwelling house together with the curtilage, including any outbuildings." BLACK'S LAW DICTIONARY 389 (7th ed. 1999). That term appears to describe Lots 1 and 2.

This discussion begs the question: Can land actually be an appurtenance? Black's Law Dictionary defines "appurtenance" as "[s]omething that belongs or is attached to something else; esp.,

something that is part of something else that is more important." BLACK'S LAW DICTIONARY 123 (10th ed. 2014). Black's defines "appurtenant" as "[a]nnexed to a more important thing." Id. Merriam-Webster defines "appurtenant" as "constituting a legal accompanionment" (Merriam-Webster Online Dictionary, (https://www.merriam-webster.com/dictionary/appurtenant (last accessed July 14, 2019)). Consistently, the WSBA Deskbook writes that land "may become appurtenant to other land ... by the acts and intentions of the parties." Deskbook, § 32.7(6).

Thus, the trustee's deed's legal description is defective notwithstanding its facial compliance with RCW 61.24.050(1). Put another way, McCormic obtained title to the northern half of the Portway via adverse possession in his capacity as owner of Lots 1 and 2. Because he did not previously divest that title, the nonjudicial foreclosure divested his ownership in the whole of his real property as a matter of law.

D. Conveyance of Title to a Bona Fide Purchaser Does Not Extinguish Title Acquired by Adverse Possession.

Under RCW 65.08.060(3), a "conveyance" includes "every written instrument by which any estate or interest in real property is created, transferred, mortgaged or assigned or by which the title

to any real property may be affected." In the *Mugaas* case, the court held that conveyance of a title to a bona fide purchaser did not extinguish title acquired by adverse possession. *Mugaas*, 33 Wn.2d at 432. The "'recording acts. . . . relate exclusively to written titles.'" *Mugaas*, 33 Wn.2d at 432 (quoting *Schall v. Williams Valley R.R. Co.*, 35 Pa. 191, 204, 1860 WL 8240). Therefore, certain interests in land are "beyond the ambit of the recording act." 18 Stoebuck & Weaver, Washington Practice: Real Estate: Transactions § 14.12, at 157 (2d ed. 2004). Where a transfer is by definition non-documentary, "there is no instrument to record, nothing upon which we can expect the recording act to operate." 18 Washington Practice, § 14.12, at 158.

Washington's 1965 Deed of Trust statute recognizes the after-acquired property doctrine that has long applied to mortgages:

> [T]he trustee's deed shall convey all of the right, title, and interest in the real and personal property sold at the trustee's sale **which the grantor had or had the power to convey at the time of the execution of the deed of trust, and such as the grantor may have thereafter acquired**.

RCW 61.24.050(1) (emphasis added). To examine "and such as the grantor may have thereafter acquired", the parties and the Court have each cited to the Washington Real Property Deskbook, WSBA,

(3d. ed. 1997) (the "Deskbook")). The Court quotes the Deskbook's statement that "after-acquired title concerns the vesting of title to property actually described in a deed, but which the grantor did not own at the time of conveyance". Opinion at 12 (citing Deskbook § 32.7(7). However, that quote's context reveals that it refers to conveyances. In its entirety, the sentence reads as follows:

> ***As previously mentioned***, after-acquired title concerns the vesting of title to property actually described in a deed, but which the grantor did not own at the time of conveyance.

Deskbook § 32.7(7) (emphasis added). Chapter 32 is the Deskbook's "conveyances" chapter, and the chapter's "previous mentions" of after-acquired property occur in the context of warranty deeds, bargain and sale deeds, and quit claim deeds. Deskbook § 32.3. Furthermore, these earlier discussions concern the warranties attached to each of these conveyances. As the Court notes, "[t]he doctrine is 'based on the premise that a grantor should not be allowed to dispute to warranties of ownership given in the deed.'" Opinion at 12 (quoting Deskbook § 32.7(7)). In the context of a conveyance's warranties, the deed's legal description defines and limits after-acquired title. However, the Deskbook goes on to discuss

the other side of after-acquired title, i.e. the matter of additional property not originally described in the conveyance, stating:

> The after-acquired title which flows to a grantee pursuant to RCW 64.04.070 includes any title or interest later acquired by the grantor, irrespective of how or when acquired. **This includes not only rights or expectancies that existed at the time the deed was given, and later matured, but also any title subsequently acquired by the grantor, even if acquired through an independent purchase transaction**. *Stevens v. Stevens*, 10 Wn. App. 493, 519 P.2d 269 (1974).

Deskbook, § 32.7(7) (emphasis added). In *Stevens v. Stevens,* former spouses litigated the effect of an after-acquired property clause included in a quitclaim deed conveyed executed between the spouses as part of their divorce settlement. The deed pertained to rental property on which the former spouses had resided, and for which the husband incorrectly believed they had an ownership interest. The trial court held that the clause was ineffective as it could only apply to expectancies that existed at the time of the deed's execution. Division II of the Court of Appeals eviscerated that analysis, writing:

> [A] clause in a quitclaim deed expressing an intention to convey after-acquired interests will have the effect of passing such interests to the grantee. RCW 64.04.070; *Brenner v. J.J. Brenner Oyster Co.* [48 Wn.2d 264, 292 P.2d 1052 (1956) (*aff'd on rehearing*, 50 Wn.2d 869, 314 P.2d 417 (1957)].

> The trial court in this case was of the opinion that such a clause operates only to pass those after-acquired interests traceable to inchoate rights or expectancies which existed at the time of the giving of the deed and which mature thereafter, or to such perfection of interest as the removal of preexisting encumbrances. Accordingly, the trial court concluded that title subsequently acquired in an independent purchase transaction would not pass to the grantee under the clause.
>
> This is an erroneous conclusion. Where an instrument has the effect of conveying after-acquired title, the general rule is that it will do so *irrespective* of how the subsequent title is acquired. R. Patton, *Land Titles* § 215 (2d ed. 1957); 3 *American Law of Property* § 15.21 (1952).

Stevens v. Stevens, 10 Wn. App. at 495-96 (emphasis in original). This, is the critical holding of *Stevens v. Stevens* cited in the WSBA Deskbook. Incidentally, the Court of Appeals upheld the trial court on other grounds. Id.

The McCormics acquired title to the northern half of the Portway via adverse possession, and McCormic obtained record title to that land via the 2014 deed exchange. Through no fault of the trustee, the trustee's deed fails to account for McCormic's title. That omission is not dispositive, because Petersen is the successor to McCormic's title. Whether quieting title is couched in terms of reforming the trustee's deed or whether it is simply confirming that title to the land passed to the adverse possessor despite its omission

from the chain of title (see *Gorman*, supra), the trial court did not err in quieting title in the adversely possessed strip.

E. The Power to Quiet Title in Real Property is a Superior Court's Equitable Power, Reviewed for Abuse of Discretion.

The superior courts have concurrent jurisdiction with the district courts in cases in equity and the superior courts have original jurisdiction in all cases at law which involve the title or possession of real property. Wash. Const. Art. IV §6. The Legislature authorizes superior courts to adjudicate quiet title and ejectment actions to determine competing claims to title. RCW 7.28.010.

> The plaintiff in such action shall set forth in his or her complaint the nature of his or her estate, claim, or title to the property, and the defendant may set up a legal or equitable defense to plaintiff's claims; and ***the superior title, whether legal or equitable, shall prevail***. The property shall be described with such certainty as to enable the possession thereof to be delivered if a recovery be had.

RCW 7.28.120 (emphasis provided). Petersen's claim is to McCormic's adversely possessed land, for which Petersen is McCormic's successor in interest. Whether the trial court acted to correct the trustee's deed or to simply quiet title in the northern half of the Portway under the succession of that title from McCormic to

Petersen, the trial court reached the correct conclusion in ruling upon the fate of the northern half of the Portway.

V. CONCLUSION

ADRIEN PETERSEN respectfully requests that this Court grant the relief identified in Part II of this Motion.

Dated this 29 day of July, 2019.

SANCHEZ, MITCHELL,
EASTMAN & CURE, PSC

By: _____
Neil R. Wachter
WSBA No. 23278
Attorneys for Respondent

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on July 29, 2019, I arranged for service of the foregoing Respondent's Motion for Reconsideration, to the court and to the parties to this action as follows:

Office of the Clerk Court of Appeals – Division II 950 Broadway, Suite 300 Tacoma, WA 98402	☐ ☐ ☐ ☒ ☐	Via Facsimile Via Messenger Via U.S. Mail Via E-File Via E-Mail
John W. Hempelmann **Ana-Maria Popp** 524 Second Avenue, Suite 500 Seattle, WA 98104-2323	☐ ☐ ☐ ☐ ☒	Via Facsimile Via Messenger Via U.S. Mail Via E-File Via E-Mail
Craig S. Sternberg Sternberg, Thomson Okrent & Scher, PLLC 520 Pike Street, Suite 2250 Seattle, WA 98101	☐ ☐ ☐ ☐ ☒	Via Facsimile Via Messenger Via U.S. Mail Via E-File Via E-Mail
Michael E. Gossler Montgomery Purdue Blankinship & Austin 701 5th Avenue, Suite 5500 Seattle, WA 98104-7096	☐ ☐ ☐ ☐ ☒	Via Facsimile Via Messenger Via U.S. Mail Via E-File Via E-Mail

Ian C. Cairns Smith GoodFriend, P.S. 1619 8th Avenue North Seattle, WA 98109	☐ ☐ ☐ ☐ ☒	Via Facsimile Via Messenger Via U.S. Mail Via E-File Via E-Mail

EXECUTED at Bremerton, Washington this 29th day of July, 2019.

JASMINE KING

SANCHEZ MITCHELL EASTMAN AND CURE, PSC

July 29, 2019 - 3:13 PM

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Appellate Court Case Title:	Adrien Petersen, Respondent v. Robert K. McCormic, Jr, Appellant
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Filing Petition for Review

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