NO. 93364-2

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

VAN NHU HUYNH,

Petitioner,

vs.

LEUNG HING LI,

Respondent.

Appeal from the Court of Appeals, Division I
of the State of Washington
Cause No. 73457-1-I

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner is Van Nhu Huynh (referred to herein as "Huynh"), the former wife of Respondent Leung Hing Li (referred to herein as "Li") in the 1980s, plaintiff in the underlying quiet title action, and respondent in the Court of Appeals.

II. COURT OF APPEALS DECISION

Petitioner seeks review of the Court of Appeals' opinion filed on April 25, 2016 (referred to herein as "Opinion"). A true and correct copy of the Opinion is provided as Appendix A.

III. ISSUES PRESENTED FOR REVIEW

1. In a quiet title case between cotenants where the cotenant in possession deprived the out-of-possession cotenant's all attributes of ownership by refusing the out-of-possession cotenant's request for money/ benefits from the Subject Properties and withholding income/expense information the out-of-possession cotenant knew he needed for his federal income tax returns, was the out-of-possession cotenant on sufficient notice of ouster for the running of the 10-year adverse possession statute of limitation?

2. May self-serving statements about one's subjective belief that contradict one's own testimony create a genuine issue of fact to defeat summary judgment?

3. Should this Court reexamine and update its over-100-year-old decision, *Graves v. Graves*, which predates the existence of the federal income tax and on which Li relied, in light of this Court's newer adverse possession rule overturning prior cases dating back to 1896 and the 16th Amendment to the U.S. Constitution authorizing Congress to establish the federal income tax system and impose the duty to file federal income tax returns?

4. As a matter of public policy, should this Court consider the adoption of the estoppel rule adopted in Li's home state of New York that prohibits a litigant from asserting positions in legal proceedings contrary to those taken in his/her income tax returns?

IV. STATEMENT OF THE CASE

A. Introduction and Procedural History

This quiet title action is between former spouses who were married and divorced in the 1980s and involves three "Subject Properties" in King County that Huynh contends the parties agreed belonged to Huynh when they divided up their assets and moved on with their separate lives and businesses since at least the 1990s. CP 1-6, 168. The parties acted accordingly since then, but did not execute any paperwork to correct the names on the titles. It is not disputed that since at least 1998, Huynh has had sole possession of Subject Properties and has treated said real estate as

her own, making numerous improvements to each property and reporting said real estate on her income tax return every year, whereas Li admittedly did nothing indicating he was a co-owner and did not report or acknowledge any such ownership on his income tax returns prepared every year with professional help. CP 9, 3, 14-15, 152, 29 (lines 2-8), 34 (lines 4-14). Because Li disputes the agreement, the inquiries and analysis for summary judgment purposes have focused on Li's version of events and testimony to ascertain whether the titles should be quieted in Huynh under the 10-year adverse possession statute of limitation as a matter of law, even when Li's version of events are accepted with all **"reasonable"** inferences made in light most favorable to Li.

During the proceedings below, Li only disputed the "hostility" element of adverse possession. The trial court granted summary judgment in favor of Huynh, as Li's own admissions clearly show he knew or should have known after 1998 and by at least 2000 that Huynh had ousted and excluded him from the Subject Properties, and he did nothing for more than the 10-year statute of limitation period. However, Division I of the Court of Appeal reversed the trial court's summary judgment because it does not deem the evidence of ouster sufficiently clear and convincing to sustain a summary judgment. In doing so, Division I allows irrelevant evidence and Li's self-serving contradictory statements about his

unreasonable subjective belief to create an issue of material fact, contrary to this Court's precedents on adverse possession analysis and Division III precedent on the standard for ouster. It also did not allow oral argument. Huynh's motion for reconsideration was denied, prompting this petition for review.

B. Factual Background

Huynh and Li were married in Washington in 1980 and divorced in 1987, and during the divorce proceeding, Li swore under oath to no real estate ownership. CP 7, 20-21. During their marriage, the parties started a produce business, Asia Discount Center, which sold and delivered produce to local markets and restaurants, but the business did not do well. CP 7, 1-2, 169. In 1986, the parties put most of their money and energy into and started a furniture importing business, United Imports. CP 7, 2, 168, 169.

After the divorce, due to the false hope of reconciliation given by Li, Huynh naively took title to the Subject Properties together with Li. CP 7-8, 2. Since at least 1990, Li and Huynh agreed that Li would own and run United Imports with his siblings (and they did), and Huynh would own and run Asia Discount Center with hers (and they did). CP 8, 2, 168, 169, 170. Li's name was removed from all the licenses and government papers for Asia Discount Center in the early 1990s. CP 8, 2. Since then, Huynh has not claimed any ownership interest in United Imports. CP 8, 2.

In 1993, Li brought back a live-in girlfriend to Huynh's home. Huynh founded and incorporated Asia Discount Center, Inc. to further distance herself from Li financially. CP 8, 2, 170. Li has never been a shareholder, officer or director of the corporation, nor has he ever worked for or had anything to do with the corporation. CP 8, 2-3, 170. The parties moved on with their separate businesses since then. CP 8, 2-3, 168.

In 1997, Li brought to the United States a new wife from China whom he had officially married earlier in China and then moved out of Washington State for good soon after. CP 8, 3.

The period from 1998 onward is the critical and dispositive time period for the purposes of the summary judgment. In order to view the evidence in light most favorable to Li, we will describe Li's testimony and alleged version of event.

Li claims he left Washington State to pursue business opportunities after 1998 and Huynh was managing the Subject Properties for him. Li testified specifically, however, he began handling his own financial affairs since 1997. CP 62, line 14. He also testified Huynh "controls all of [his] money, assets, and property, and she wouldn't let [him] put [his] hand on it."

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14 Q. How do you feel about the fact that Van Huynh has
15 taken control of these three properties?

A. What do you mean? I don't understand.
Q. Are you pleased by it?
A. She controls all of my money, assets, and property, and she wouldn't let me put my hand on it. This is not --
THE INTERPRETER: The interpreter needs to ask for clarification.
(Interpreter and witness converse.)
A. This is not normal.
Q. Do you feel like she's taken these properties from you?

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A. She is that type of person.
Q. Did she have your permission to take the properties?
A. No.

See CP 9, 31-32 (Li's Deposition, pp.73:14-74:3).[1]

Contrary to the Court of Appeal's belief that Li's admitted statements of hostility and ouster "encompass an unspecified time period," (see Opinion, p.9), the specific time frame was clarified to be unequivocally in 2000 and before in the record.

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Q. So the last time that you did anything to obtain any of the money or assets or properties that you claim you are owed was in 2000; is that correct?
A. She should have given all these things back to me a long time ago, but she wouldn't. And as soon as I bring it up, she just would ignore me completely.
MR. DAVIES: Would you read my question back, please.
(Reporter read back as requested.)
A. ***Yes, about right.*** And in 2012 I came again. First, I wanted to talk to her about this matter. And she said, "Don't talk about this with me. Talk to my attorney."
Q. That was in 2012?

[1] The numbers immediately following a colon in CP and RP herein refer to line numbers.

23 A. Yes.
24 Q. That was after you were served with the complaint in
25 this lawsuit?

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1 A. Yes.
2 Q. And then the only other previous conversation you
3 had with respect to retrieving your money, property, assets
4 was the 2000 telephone call?
5 A. ***We did talk about it before***. But as soon as we
6 started talking about money, she would just hang up. Or
7 sometimes she would avoid my phone calls. When she sees
8 that it's my number, she would just ignore it and pick up
9 the phone.

See CP 151-152, 162-163 (Li's deposition, pp.58:10-59:9) (emphasis added). When the court reporter read back the question clarifying the time frame to be 2000, Li unequivocally answered "yes, about right." Li clearly knew he was talking about 2000 as he distinguished it from a separate event in 2012 when he returned to Seattle in person. There is no dispute the parties had no communication about the properties from 2000 to 2011.

Also according to Li's version of events, 1997 was the last year for which he received income/expense information for the Subject Properties so that he could report the same on his income tax returns. See CP 47:23-28, 143:17-18. Li admittedly did not report any of the Subject Properties on his income tax returns since 1998.

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2 Q. Have you ever identified the fact that you owned
3 three pieces of property in Seattle, Washington on any tax
4 return since 1998?
5 A. No, because she was the one that filed those returns

6 for me.
7 Q. No. I said since 1998.
8 A. No, I didn't.

See CP 14, 152, 29 (Li's Deposition, p.66:2-8).

Li admittedly had an accountant to help him file his federal income tax return every year (CP 34, lines 4-14).

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4 Q. Can you tell me the last year you filed a federal
5 tax return?
6 A. You mean my personal or the company federal tax
7 return?
8 Q. An individual federal tax return.
9 A. 1040?
10 Q. Yes.
11 A. Every year. I did it also last year. I did it
12 every year.
13 Q. And you do it with the assistance of an accountant?
14 A. Yes.

See CP 14-15, 34 (Li's Deposition, p.99:4-14).

With professional help, it is unreasonable for the most ignorant to claim or believe he did not have to report what he claims to have owned after 1998, especially when his version of events states he did so for 1997.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. Argument Summary.

The Court of Appeals' Opinion fails to follow this Court's binding precedents which held "thought process" or "subject intent" evidence was no longer relevant in adverse possession cases in Washington, and fails to

follow Division III precedent which expressly dispensed with any actual written or oral notice to a cotenant and adopted a reasonable-person standard requiring only outward acts by the adverse possessor contrary to joint ownership a reasonable cotenant would know or discover.

The Opinion also contradicts CR 56 and established case law on summary judgment by using self-serving statements about one's subjective belief that contradict one's own testimony and making unreasonable inferences to create a genuine issue of fact, where the non-movant's version of events has already been used in the analysis and there is no need to assess the credibility of any witness. Doing so promotes unwarranted litigation and permits any litigant without a coherent version of events to defeat summary judgment by simply stating their subjective belief - no matter how unfounded, unqualified, or illogical that belief is.

Moreover, this Court's over-100-year-old decision, *Graves v. Graves*, 48 Wash. 664, 94 P. 481 (1908) on which Li has relied predates the existence of the federal income tax and should be reexamined and updated under the new adverse possession rule this Court delineated in *Chaplin v. Sanders*, 100 Wn.2d 853, 860-61, 676 P.2d 431 (1984) and reaffirmed in *Itt Rayonier v. Bell*, 112 Wn.2d 754, 760-61, 774 P.2d 6 (1989), overruling prior cases dating back to 1896, as well as in light of the 16th Amendment to the U.S. Constitution authorizing Congress to

establish the federal income tax system and impose the duty to file federal income tax returns. As a matter of public policy, this Court is urged to consider the adoption of the estoppel rule adopted in Li's home state of New York that prohibits a litigant from asserting positions in legal proceedings contrary to those taken in his/her income tax returns.

Given the serious misapplication of the law and the public policy considerations, Huynh asks this Court to grant review under RAP 13.4(b)(1), (2) and (4).

B. The Division I Opinion fails to follow this Court's binding precedents on adverse possession.

This Court thoroughly reexamined the "hostility/claim of right" element to clarify prior confusion in the case law, and concluded that it "requires only that the claimant treat the land as his own as against the world throughout the statutory period." *Chaplin v. Sanders*, 100 Wn.2d 853, 860-61, 676 P.2d 431 (1984). The nature of one's possession will be determined solely on the basis of the manner in which one treats the property and his/her subjective intent is no longer relevant. *Id.* at 861. One's subjective intent is no longer relevant. Recognizing the Court of Appeals misapplied *Chaplin* in a subsequent case, this Court "reaffirmed" the *Chaplin* rule overruling all cases dating back to 1896 that have considered "subjective intent." See *Itt Rayonier v. Bell*, 112 Wn.2d 754,

760-61, 774 P.2d 6 (1989). This Court stated "[t]he ultimate test is the exercise of dominion over the land in a manner consistent with actions a true owner would take. Id. at 759. Quoting Professor Stoebuck, this Court stated:

> . . . Adverse possession revolves around the character of possession, and it is difficult to see why a man's secret thoughts should have anything to do with it . . . Whatever the reason, the court could yet perform a service by doing away with any requirement of subjective intent, negative or affirmative. Since a man cannot by thoughts alone put himself in adverse possession, why should he be able to think himself out of it?

Id. at 761 (citing *Stoebuck, The Law of Adverse Possession in Washington*, 35 Wash. L. Rev. 53, 80 (1960)). The *Chaplin* rule has never been limited to only a certain type of adverse possession cases and applies to all adverse possession cases. Adverse possession between cotenants does not have different elements, but only higher burden of proof.

In the case at bar, the Court of Appeals is dismissive of *Chaplin* by stating in one simple sentence that "*Chaplin* does not involve an adverse possession claim between cotenants" without any further discussion. See Opinion, at p.8. It then went on to violate the *Chaplin* rule by considering evidence of Li's name on a bank account previously required by the bank and on some utility bill Huynh never paid attention to and making inferences about Huynh's subjective intent. These are not part of the

attributes of owning real estate. Using/possessing it, taking money/benefits from it and reporting it on one's income tax return are. There is also nothing in the record indicating Li knew any of such evidence prior to this litigation anyway. There is no logical basis to connect such non-ownership evidence to the dispositive issue of whether a reasonable person in Li's position knew or should have known he was ousted after 1998 and by 2000 when, according to his own version of events (i.e. in light most favorable to him), he was denied money/benefits of owning the Subject Properties as well as the information needed to report the same on his income tax returns.

C. The Division I Opinion fails to follow and conflicts with Division III's binding precedents on adverse possession.

Division III's precedent on cotenant adverse possession Huynh relied on states clearly although stronger evidence is required to show adverse possession by a tenant in common than by a stranger, the evidence need not differ in kind. *Nicholas v. Cousins*, 1 Wn. App. 133, 137, 459 P.2d 970 (1969). Therefore, there is no separate set of adverse possession elements for cotenants, but only higher burden of proof. Division III went on to state what is required and what is not:

> Actual verbal or written notice is not necessary to start the statute running in such a case. If there are outward acts of exclusive ownership by a tenant in possession, *of such a nature as to preclude the idea of a joint ownership*

> *brought home to the cotenant*, or *so open and public a character that a reasonable man would discover it*, it is sufficient.

Id. (emphasis added).

Division III in a later case affirmed the grant of summary judgment quieting title in the adverse possessor despite the presence of "unresolved issues" about good faith, alleged fraud involving a power of attorney, and the record owner's subjective lack of notice of adverse possession because the issues are not relevant. See *Doyle v. Hicks*, 78 Wn. App. 538, 542, 897 P.2d 420 (1995). "Adverse possession in this state focuses on the nature of the possession and not the thought process of the possessor or the record owner." *Id.* Although not a cotenant adverse possession case, *Doyle* is still instructive on what is a relevant and dispositive issue in adverse possession and what is not.

Division III's co-tenant adverse possession precedent, *Nicholas*, does not require a cotenant to notify the non-possession cotenant to start the running of the statute of limitation, but only the possessing cotenant's possession to preclude joint ownership such that a reasonable non-possessing cotenant would know. See *Nicholas*, *supra*. Division I did not discuss or apply the objective reasonable-person test in *Nicholas* to the case sub judice. It only cited the higher burden of proof and proceeded to use evidence on irrelevant issues and subjective belief to create an issue of

material fact. The only attributes of ownership (nature of possession) for an absentee owner here is using/taking money/benefits from the Subject Properties and reporting the same on the owner's income tax returns. Huynh did all of that and deprived Li of the same after 1998 and certainly by 2000. According to Li's version of events (i.e. in light most favorable to him), Li did none of that after 1998, and a reasonable person in Li's position would know because he claimed to have done that in 1997.

D. The Division I Opinion contradicts CR 56 and established case law on summary judgment.

Although a court should not resolve credibility issues by summary judgment, an issue of credibility is present only if the party opposing summary judgment comes forward with evidence which contradicts or impeaches the movant's evidence on a material issue. *Dunlap v. Wayne*, 105 Wn.2d 529, 536-37, 716 P.2d 842 (1986). A party may not preclude summary judgment by merely raising argument and inference on collateral matters:

> [T]he party opposing summary judgment must be able to point to some facts which may or will entitle him to judgment, or refute the proof of the moving party in some material portion, . . .

Howell v. Spokane & Inland Empire Blood Bank, 117 Wn.2d 619, 626-27, 818 P.2d 1056 (1991), citing *Amend v. Bell*, 89 Wn.2d 124, 129, 570 P.2d

138 (1977) where plaintiff did not raise an issue of credibility by arguing there were weaknesses in defendant's testimony.

Here, to give Li the benefit of the doubt in a summary judgment proceeding, Huynh used Li's own version of events and testimony to show that reasonable minds cannot differ on the dispositive issue of whether Li knew or should have known his ouster after 1998 and by 2000, and there is no need to assess anyone's credibility in a trial. As explained in Sections B and C above, the Court of Appeals misapprehended the binding rules and making inferences on collateral matters such as Li's name on a bank required bank account and some utility bill which have nothing to do with the attributes of a cotenant exercising dominion or rights of ownership over real estate and do not contradict Li's own testimony about being denied money/benefits and information for reporting his interest on income tax returns after 1998.

When a party has given clear answers to unambiguous deposition questions which negate the existence of any genuine issue of material fact, the party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony. *Klontz v. Puget Sound Power & Light Co.*, 90 Wn. App. 186, 192, 951 P.2d 280 (1998). Unreasonable inferences do not create a material issue of fact and summary judgment under CR 56 is appropriate. *Lynn v. Labor*

Ready, Inc., 136 Wn. App. 295, 310-11, 151 P.3d 201 (2006); *Marshall v. AC&S Inc.*, 56 Wn. App. 181, 184-85, 782 P.2d 1107 (1989).

In the case at bar, Li cannot create an issue of material fact by making self-serving statements such as he believed Huynh was helping him or managing the Subject Properties for him still in 2012, while he admittedly managed his own finances after 1997 and filed his own income tax returns with the help of professionals. It is manifestly unreasonable to infer that anyone in Li's shoes could believe Huynh was still helping him and managing anything for him after being deprived any money/benefits from the Subject Properties and information to file income tax returns for so long.

The nearly 30-year-old power of attorney no one has ever used or remembered for decades[2] is a red herring issue because it does not make what Huynh did after 1998 according to Li's version of event any less clear a notice of ouster to Li, nor does it change Li's admitted knowledge of what Huynh did by at least 2000. If Li did not believe the 2007 power of attorney was in effect, the evidence would be irrelevant. If Li believed it was in effect, then he would be under more of an obligation to act in 2000 when he clearly knew Huynh was not treating him as a co-owner. It will be in the clearly absurd territory for anyone to claim he/she can file a

[2] Li's execution of another power of attorney in 2000 to transfer title to an unrelated property (CP 93) shows no one considered the 1987 power of attorney to be still in effect.

federal income tax return for some assets in New York, while someone else files another one for the same person for assets in Seattle, all with professional help. Again, unreasonable inferences do not create a material issue of fact.

The trial court correctly observed the lack of genuine issue of material fact on the dispositive issue in this case. It is impossible for Li not to have known his alleged interest in the Subject Properties was deprived after 1998 according to Li's own version of events, as he had professional help in the preparation of his tax returns. There can be only two reasonable inferences from Li's lack of action of any kind to assert his interest in the Subject Properties after 1998: (1) Li knew he agreed that the Subject Properties belonged to Huynh all along as Huynh contended; or (2) Li did not agree the Subject Properties belonged to Huynh as Li contended, but he failed to take the necessary action for over 10 years. Summary judgment is proper under the objective facts presented by Li in his own version of events.

Unfortunately, the Court of Appeals turned a blind eye to Li's own admission of when he knew Huynh's exclusion of him as a co-owner. Doing so promotes unwarranted litigation and permits any litigant without a coherent version of events to defeat summary judgment by disputing collateral matters or their own statements or by simply stating their

subjective belief - no matter how unfounded, unqualified, or illogical that belief is.

E. This Court's guidance is long overdue to provide certainty and clarity of well-defined law in Washington on adverse possession between cotenants.

Li has relied primary on this Court's over-100-year-old decision, *Graves v. Graves*, 48 Wash. 664, 94 P. 481 (1908) which predates the existence of the federal income tax. Despite this Court's opinions in *Chaplin* and *Rayonier* and Division III's decision in *Nicholas*, the lower courts do not seem to understand this Court's newer rule as it applies to adverse possession between cotenants. To avoid divergent interpretations in such a context, this Court is urged to reexamine and update *Graves v. Graves* under the newer adverse possession rule this Court delineated in *Chaplin* and reaffirmed in *Rayonier*, overruling prior cases dating back to 1896, as well as in light of the 16th Amendment[3] to the U.S. Constitution authorizing Congress to establish the federal income tax system and impose the duty to file federal income tax returns. The court's guidance is long overdue so that Washington litigants can have certainty and clarity of well-defined law on adverse possession between cotenants.

[3] The 16th Amendment gave Congress the power to impose and collect income tax. It was proposed by the Sixty-first Congress on July 12, 1909, and was declared, in a proclamation of the Secretary of State, dated February 25, 1913, to have been ratified. U.S. Constitution Amendment 16, Explanatory Notes.

A related issue of substantial public interest is whether a litigant in Washington who knowingly fails to acknowledge for a decade income or ownership of property in his/her income tax returns is estopped from claiming ownership in said property. As a matter of public policy, this Court is urged to consider the adoption of the estoppel rule adopted in Li's home state of New York that prohibits a litigant from asserting positions in legal proceedings contrary to those taken in his/her income tax returns. See *Mahoney-Buntzman v. Buntzman*, 12 N.Y.3d 415, 881 N.Y.S.2d 369, 909 N.E.2d 62 (2009) (CP 146-48). Li's home state's highest court has said, "[w]e cannot, as a matter of policy, permit parties to assert positions in legal proceedings that are contrary to declarations made under the penalty of perjury on income tax returns." *Id.*; see also *Naghavi v. NY Life Ins.*, 688 N.Y.S.2d 530, 531, 260 A.D.2d 252 (1999) (CP 149).

VI. CONCLUSION

For the foregoing reasons, this Court is asked to accept review, reverse the Court of Appeals Division I's decision, and reinstate the summary judgment granted by the trial court.

Respectfully submitted this 20th day of June, 2016.

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CERTIFICATE OF SERVICE

I certify that, on this day, I caused to be served a true and correct copy of the forgoing document upon the following attorney of record:

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Petition for Review

Appendix

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

VAN NHU HUYNH, Respondent, v. LEUNG HING LI, Appellant.	DIVISION ONE No. 73457-1-I UNPUBLISHED OPINION FILED: April 25, 2016

DWYER, J. — To prevail on a claim of adverse possession against a cotenant, the claimant must show ouster, an unequivocal outward act of exclusive ownership. Ouster must be proved by clear and convincing evidence. On summary judgment, Van Nhu Huynh asserted that her possession of three properties co-owned with her former husband, Leung Hing Li, was hostile for the required 10-year period. But Hyunh did not set forth undisputed facts clearly and convincingly establishing ouster. Thus, entry of summary judgment was improper. Accordingly, we reverse.

I

In 1980, Van Nhu Huynh and Leung Hing Li married and began residing at 4431 Letitia Avenue S. in Seattle, a home Li owned before the marriage. During their marriage, they had two daughters and created two businesses.

In 1987, Huynh and Li divorced. They nevertheless continued to live together, operated their businesses, and jointly managed their assets. That year, Li gave Huynh a general power of attorney to handle his financial affairs when he was out of the country. The power of attorney was never revoked.

After their divorce, Huynh and Li engaged in three transactions relevant to this appeal. First, in 1988, for $178,000, they purchased property located at 1725 Victoria Avenue SW in Seattle, taking title as husband and wife. They used their joint business income to purchase the property.

Second, in 1991, they purchased property located at 2367 13th Avenue in Seattle, again using funds from their business and again taking title as husband and wife.

Third, in 1992, they received a loan to pay for the construction of a house on the Victoria Avenue property. They secured the loan by using the Letitia Avenue property, and placed Huynh's name on the title to that property with Li, as husband and wife.

In 1993, Li and Huynh moved into the new house on Victoria Avenue and began renting the Letitia property. The rental income was placed into a joint account and was used to pay property expenses.

In 1995, Li remarried. For a time, he continued to reside with Huynh. In 1997, he moved to New York to live with his new wife and her brother. Huynh claims that Li's move was prompted because Huynh refused to let him continue to live at their house and, additionally, prevented him from having access to their properties. Li claims that he left to pursue business opportunities.

In 1998, Li executed a special power of attorney, giving Huynh authority to sell their jointly owned real property adjacent to the Letitia Avenue parcel. They later divided the sale proceeds.

In April 1998, Huynh sent Li a breakdown of the property expenses for the Letitia Avenue and Victoria Avenue properties. The handwritten documents indicate that Huynh and Li each held a "50%" property interest.

From 2000 through 2011, Huynh and Li spoke between three and five times by telephone. According to Huynh, the parties discussed their children during these calls but never addressed ownership of the properties. Huynh stated that she told Li that she no longer wanted to converse with him and put an end to the calls. Li asserts that "[a]t no time during these telephone conversations did [Huynh] request that I transfer the Subject Properties to her or claim that the Subject Properties were hers and not mine." During this period, Li's name continued to appear on the utility accounts for the residential properties.

In a letter from counsel dated September 30, 2011, Huynh asked Li to quitclaim to her his interest in the Victoria Avenue, 13th Avenue, and Letitia Avenue properties. Li did not cooperate. In 2012, Huynh repeated her request.

On September 11, 2012, Huynh filed a complaint in King County Superior Court seeking to quiet title to the three properties. The trial date was continued several times.

On January 30, 2015, Huynh filed an amended motion for summary judgment alleging adverse possession. In response, Li asserted that, as a cotenant, he was entitled to an order of partition and an accounting.

On February 27, 2015, the court granted summary judgment. That same day, the court issued an order quieting title in the subject properties in favor of Huynh and dismissing with prejudice Li's claims for partition and an accounting.

On April 20, 2015, the court denied Li's motion for reconsideration.

Li appeals.

II

Li contends that the trial court erred by granting summary judgment based on Huynh's claim of adverse possession. This is so, he asserts, because a genuine issue of material fact exists on the question of whether Huynh's possession of the properties was hostile.

We review an order granting summary judgment de novo, and perform the same inquiry as the trial court. Owen v. Burlington N. & Santa Fe R.R. Co., 153 Wn.2d 780, 787, 108 P.3d 1220 (2005). On summary judgment, the moving party bears the initial burden of showing an absence of material fact. Young v. Key Pharm., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989). Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); Am. Express Centurion Bank v. Stratman, 172 Wn. App. 667, 673, 292 P.3d 128 (2012). A genuine issue of material fact exists where reasonable minds could differ regarding the facts controlling the outcome of the litigation. Parks v. Fink, 173

Wn. App. 366, 374, 293 P.3d 1275 (2013). We consider the evidence and all reasonable inferences in the light most favorable to Li, the nonmoving party. Stratman, 172 Wn. App. at 673.

To prevail on a claim of adverse possession, Huynh must demonstrate possession that was (1) open and notorious, (2) actual and uninterrupted, (3) exclusive, and (4) hostile for the statutory 10-year period. Chaplin v. Sanders, 100 Wn.2d 853, 857, 676 P.2d 431 (1984); RCW 4.16.020. The burden of establishing each element is on the party claiming to have adversely possessed the property. Anderson v. Hudak, 80 Wn. App. 398, 401-02, 907 P.2d 305 (1995). Li disputes only whether Huynh's possession of the properties was hostile.

It is undisputed that Li and Huynh held the subject properties as cotenants during the period relevant to this appeal. Generally, a cotenant claiming adverse possession against another cotenant must prove ouster. Thor v. McDearmid, 63 Wn. App. 193, 207, 817 P.2d 1380 (1991). Because cotenants are presumed to possess their property in common, the standard of proof for ouster is more stringent than for a common adverse possession claim. Nicholas v. Cousins, 1 Wn. App. 133, 137, 459 P.2d 970 (1969). Thus, to establish ouster, the cotenant must demonstrate by clear and convincing evidence an unequivocal "outward act" of "exclusive ownership by a tenant in possession, of such a nature as to preclude the idea of a joint ownership brought home to the cotenant." Nicholas, 1 Wn. App. at 137. In other words, there must be a "repudiation or disavowal of the relation of cotenancy between them . . . [consisting of] any act or conduct

signifying his intention to hold, occupy, and enjoy the premises exclusively." Shull v. Shepherd, 63 Wn.2d 503, 506, 387 P.2d 767 (1963) (quoting 1 AM. JUR. Adverse Possession § 54, at 824 (1959)). "Mere possession by one cotenant alone will not ripen into title by adverse possession, even though it be continued without interruption for the period of the statute of limitations." Shull, 63 Wn.2d at 505.

In her summary judgment pleadings, Huynh relied heavily on Li's deposition testimony to support the claim that her possession was hostile. For instance, Li expressed frustration that Huynh would not let him access the property:

> [Plaintiff's Counsel]: How do you feel about the fact that Van Huynh has taken control of these three properties?
> [Li]: What do you mean? I don't understand.
> [Plaintiff's Counsel]: Are you pleased by it?
> [Li]: She controls all of my money, assets, and property, and she wouldn't let me put my hand on it. This is not—This is not normal.

Li also expressed dismay at Huynh's unresponsiveness:

> [Plaintiff's Counsel]: So the last time that you did anything to obtain any of the money or assets or properties that you claim you are owed was in 2000; is that correct?
> [Li]: She should have given all these things back to me a long time ago, but she wouldn't. And as soon as I bring it up, she just would ignore me completely.

Li also stated that he did not give Huynh permission to take the properties:

> [Plaintiff's Counsel]: Do you feel like she's taken these properties from you?
> [Li]: She is that type of person.
> [Plaintiff's Counsel]: Did she have your permission to take the properties?
> [Li]: No.

Li contends that his deposition statements are insufficient to establish ouster. To the contrary, he claims that the evidence supports a reasonable inference that the possession was not hostile because (1) he left voluntarily in 1997 to go to New York, (2) Li and Huynh sold jointly owned property after he left and shared the proceeds, (3) Huynh deposited rental income from the properties into a jointly owned bank account, (4) the utility bills continued to reflect both of their names, (5) Huynh sent Li a property expense breakdown a year after he left for New York, (6) Huynh failed to notify him of her intent to claim the properties as her own until 2011 when she asked him to execute quitclaim deeds, and (7) Li stated in his deposition that he believed Huynh was "helping" him with his property until she filed the lawsuit in 2012.

In support of his contention, Li relies principally on Graves v. Graves, 48 Wash. 664, 94 P. 481 (1908). In that case, a husband and wife held joint title to real property. The couple separated and for more than 10 years the wife asserted no interest in the property while the husband remained in possession, collected rents, and paid taxes. The husband alleged that his possession, rent collection, and payment of taxes supported a claim for adverse possession. Our Supreme Court disagreed, reasoning that such actions were consistent with a cotenant's right of possession:

> The mere receipt and retention by one cotentant in possession of all the rents and profits does not of itself constitute an adverse possession, and will not ripen into title as against the others, though continued for the statutory period.

Graves, 48 Wash. at 670 (quoting 1 Cyc. Adverse Possession 1076-77 (1901)). This is so, the court explained, because possession by a cotentant is presumed to be for the benefit of all owners. Graves, 48 Wash. at 669.

Huynh attempts to distinguish Graves on the basis that in Graves there was no "outward act of exclusive ownership by the adverse claimants that would put the non-possessing cotenants on notice." Br. of Resp't at 13. Yet beyond implying that there was such an outward act here, Huynh omits discussion of ouster from her briefing.

Instead, she argues that "[t]he way [Huynh] treated the Subject Properties since 1998 put Li on notice." Br. of Resp't at 16. She relies on Nicholas and Chaplin for the proposition that the hostility element of adverse possession merely requires the claimant to "treat the land as his own as against the world throughout the statutory period." Chaplin, 100 Wn.2d at 860-61. But Chaplin did not involve an adverse possession claim between cotenants. And in Nicholas, the court held that there must be "outward acts of exclusive ownership by a tenant in possession, of such a nature as to preclude the idea of joint ownership," and explained that "[s]tronger evidence is required to show adverse possession by a tenant in common than by a stranger, but the evidence need not differ in kind." Nicholas, 1 Wn. App. at 137. As between cotenants, an adverse possession claim still requires "clear, unequivocal, unmistakable or convincing evidence, not just substantial evidence" to support a finding of ouster against a cotenant. Thor, 63 Wn. App. at 207.

Thus, on this issue, Huynh's argument that her collection of rents, exclusivity of possession, management of the properties, and payment of taxes establish that her possession of the property was hostile as to Li rests on a false premise. These facts do not show hostility because the acts asserted are entirely consistent with her rights as a cotenant of the property. She was entitled to act in this way and her decision to do so was not in derogation of Li's rights in the property.

The evidence Huynh put forth falls far short of meeting the clear and convincing evidence standard that was her burden. For instance, she dismisses Li's assertion that he was not kicked out of the house, but voluntarily left, as "so obviously irrelevant/immaterial to any dispositive issue that they require no explanation." Br. of Resp't at 15. But this is the very action she relied on to establish ouster in her summary judgment motion ("After being ousted from the Subject Properties by [Huynh] in 1997, Li did not return to the State of Washington until 2012."). Notwithstanding her dismissiveness, we view the evidence in the light most favorable to Li.

Similarly, Huynh focuses on deposition statements by Li expressing his frustration with Huynh for denying him access to the property. But these statements encompass an unspecified time period and are at best ambiguous as to when Li's frustration with Huynh began. In fact, during his deposition Li claimed that until Huynh filed the 2012 lawsuit, he "still thought [Huynh] was helping me."

Considering all of the evidence in the light most favorable to Li, there is a genuine question of material fact regarding whether ouster occurred. For example, although Huynh claimed that she ousted Li from the properties in 1997, she sent him an expense breakdown a year later that reflected equal ownership, she continued to deposit rents into a joint account, and she maintained utility accounts in both of their names. These actions all occurred after the supposed ouster occurred. In addition, Huynh and Li both agree that their conversations between 2000 and 2011 involved no discussion of the properties. Finally, Huynh's 2011 request that Li quitclaim his interest in the properties implies recognition on her part that he, in fact, had such an interest to convey. Viewed most favorably to Li, this evidence raises a reasonable inference that Huynh's possession of the properties was not hostile.

Huynh failed to meet her burden of showing that no genuine issue of material fact exists on the question of whether her possession was hostile to Li during the statutory period.[1]

III

Given our resolution of the preceding issue, we also reverse the trial court's dismissal of Li's counterclaim for partition and an accounting. As indicated above, a cotenant's exclusive possession of the shared property is insufficient to trigger the statute of limitations on property claims, in the absence

[1] Huynh claims that Li should be estopped from asserting ownership in the properties because he did not claim them on his tax return, citing Mahoney-Buntzman v. Buntzman, 12 N.Y.3d 415, 909 N.E.2d 62, 881 N.Y.S.2d 369 (2009). That marital dissolution case involved the characterization of funds from a stock sale as community or separate property, not a claim of adverse possession of real property. Her claim is unpersuasive.

of an ouster. Shull, 63 Wn.2d at 505; McKnight v. Basilides, 19 Wn.2d 391, 400, 143 P.2d 307 (1943). Thus, the question of whether ouster occurred is also critical to whether Li's claims are time barred under RCW 4.16.020 and RCW 4.16.040.

Likewise, given our resolution we need not address Li's argument that the court erred in denying his motion to continue the summary judgment hearing.

Reversed and remanded.

We concur: