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Supreme Court No. 85202-2

07008-9  
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IN THE WASHINGTON STATE SUPREME COURT

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IN THE MATTER OF THE PETITION OF THE CITY OF  
WOODINVILLE, a Washington optional code, non-charter  
municipal corporation, TO ACQUIRE BY CONDEMNATION  
CERTAIN REAL PROPERTY FOR PUBLIC USE AS  
AUTHORIZED BY ORDINANCE NO. 449 OF SAID CITY

Condemnor/Respondent,

v.

HOLLYWOOD VINEYARDS LIMITED PARTNERSHIP, a  
Washington limited partnership.

Condemnee/Appellant,

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REPLY BRIEF OF APPELLANT

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ORIGINAL

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## I. INTRODUCTION

Appellant Hollywood Vineyards Limited Partnership, a Washington limited partnership ("Hollywood"), offers their reply to the City of Woodinville's Response Brief.

## II. ARGUMENT

### A. THE CONDITIONAL CR 2A SETTLEMENT AGREEMENT IS NOT A QUALIFYING OFFER AS A MATTER OF LAW

The City does not cite any authority that a conditional settlement agreement constitutes a qualifying offer within the meaning of RCW 8.25.070. Rather, it states at Page 15 of its brief:

... thirty days prior to trial, the City had made an unconditional offer, which HVLP accepted subject to the condition that MJR Development grant an easement.

The City is attempting to claim that an unconditional offer was made and is thus agreeing with Hollywood's point that RCW 8.25.070 envisions only unconditional offers.<sup>1</sup>

The City's further claim that the CR 2A Settlement Agreement was an offer in effect on June 1, 2010 "because it had no expiration date and because it was not revoked by the City's " March 2010 Offer" is incorrect. Response Brief, pp. 16-17. The City focuses on the following language:

This offer is intended as a 30 day pre-trial offer and should be considered as an optional means

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<sup>1</sup> The City's repeated references to what they remember as discussions in mediation are clear violations of the Mediation Act, RCW 7.07.010 *et seq.* and are not properly considered by this Court. RCW 7.07.030; RCW 5.60.070. The use of the CR 2A Settlement Agreement does not constitute a waiver of these provisions. RCW 7.07.040.

to settlement in addition to the conditioned settlement reached in mediation.

CP 278-279. Revocation of an offer is not limited to an express statement. Actions of a party can act as a revocation.

RESTATEMENT SECOND OF CONTRACTS, §42, Comment C (a revocation after acceptance “may have effect depending on its terms, as a failure of condition discharging the offeree’s duty of performance”).

Here, the fact that MJR did not (and has not) granted an easement within a reasonable time constituted a failure of the condition stated in the CR 2A Settlement Agreement. That failure also constituted a revocation of the offer as a matter of law as at no time did the City ever express a willingness to extend an offer to settle or honor the other provisions of the CR 2A Settlement Agreement without MJR’s participation. The City’s motion seeking to force Hollywood into further negotiations on the matter proves the point. CP 2842-2854.

Further the express language of the March 2010 Offer “should be considered as an optional means to settlement in addition to the conditioned settlement reached in mediation” disproves the City’s position.

The term “optional” is defined by Merriam-Webster’s online dictionary ([www.m-w.com](http://www.m-w.com)) as being something “involving an option; not compulsory.” The term “addition” is defined as follows:

- 1: a part added (as to a building or residential section)
- 2: the result of adding: INCREASE
- 3: the act or process of adding; ...

[www.m-w.com](http://www.m-w.com). Thus, it is clear from the plain language of the March 2010 Offer that it is adding something not contained within the CR 2A Settlement Agreement, *i.e.*, that the March 2010 Offer is an offer within the meaning of RCW 8.25.070 and the CR 2A Settlement Agreement is not (the statute is not mentioned in the CR 2A Settlement Agreement). The manifest intention of the City was that the CR 2A Settlement Agreement was not a qualifying offer by the express language of the March 2010 Offer.

**B. WASHINGTON LAW HAS LONG RECOGNIZED THE UNFAIRNESS OF “JUST COMPENSATION”**

The City contends Hollywood has argued that a statutory basis for fees is a constitutional right. Response Brief, pp. 18. The City has misstated Hollywood’s argument.

Hollywood cited to *State v. Roth*, 78 Wn.2d 711, 479 P.2d 55 (1971), for the proposition that Washington law recognizes that the concept of just compensation can sometimes result in an inequity to property owners suffering a condemnation action. Appellant’s Brief, pp. 19-26. This Court noted in *Roth* that the enactment of RCW 8.25.070 in 1967 was: “The legislature’s remedy to attain a measure of equality between just compensation and the

condemnee's net compensation." *Roth*, at 712. The City does not address *Roth* in its brief.

In support of its argument, the City cites *Petersen v. Port of Seattle*, 94 Wn.2d 479, 618 P.2d 67 (1980). There, property owners near SeaTac International Airport filed an action in inverse condemnation based on the take-off and landing patterns of the aircrafts. The Port contended that it had acquired avigation easements by prescription.

On February 27, 1978, several days of hearings began on the Port's claim. On March 10, 1978, the Port made a settlement offer which was refused. The trial court rejected the Port's claims on May 30, 1978. A trial on just compensation was scheduled for August 7, 1978. The trial did not occur but rather a judgment on agreed facts was entered on October 18, 1978. That judgment did not exceed the March 1978 settlement offer by 10 percent or more as described by RCW 8.25.075. 94 Wn.2d at 481-482.

The *Peterson* trial court denied the property owner's request for attorneys fees. That decision was reversed by this Court.

First, as to the point that litigation expenses can easily eclipse just compensation in an eminent domain proceeding, this Court in *Petersen* supports Hollywood's argument and specifically stated:

The legislature has recognized that awards in eminent domain proceedings, though constitutional, may fall short of complete compensation because of litigation

expenses. Consequently, it has enacted laws designed to encourage settlement and limit extended litigation expense. *State v. Roth*, 78 Wn.2d 711, 479 P.2d 55 (1971).

*Petersen*, 94 Wn.2d at 487.

Second, in reversing the trial court's denial of attorneys fees, this court stated:

It is our view that the February 27 proceeding was the first portion of a bifurcated trial. ... The Port's written offer was not made 30 days before the start of the trial on February 27, and it is therefore liable for attorney and expert witness fees under RCW 8.25.075.

*Id.* at 489.

*Petersen* support's Hollywood's claim as a matter of law as the same is true here, no offer under RCW 8.25.070 was in effect on June 1, 2010 thirty days before trial.

**C. THE CITY'S CALL TO REVERSE *EASTHEY* WILL NOT SOLVE ITS PROBLEM**

At Page 20 of its Response Brief, the City argues that *Central Puget Sound Regional Transit Authority v. Eastey*, 135 Wn. App. 446, 144 P.3d 322 (2006) should be reversed as it has misinterpreted this Court's opinion in *State v. Costich*, 152 Wn.2d 463, 98 P.3d 795 (2004). The City states:

Nowhere in the opinion [*Costich*] does it mandate the offer be open on the 30<sup>th</sup> day prior to trial.

RCW 8.25.070 is the source of this requirement. Again, the statute states:

- (1) Except as otherwise provided in subsection (3) of this section, if a trial is held for the fixing of the amount of compensation to be awarded to the

owner or party having an interest in the property being condemned, the court shall award the condemnee reasonable attorney's fees and reasonable expert witness fees in the event of any of the following:

- (a) If condemnor fails to make any written offer in settlement to condemnee at least thirty days prior to commencement of said trial; or
- (b) If the judgment awarded as a result of the trial exceeds by ten percent or more the highest written offer in settlement submitted to those condemnees appearing in the action by condemnor in effect thirty days before the trial.

Here the trial court denied Hollywood's request for fees claiming that the jury award had not exceeded the CR 2A Settlement Agreement by more than 10%. CP 2510-2512. Thus, RCW 8.25.070(1)(b) is at issue and it clearly states that the measuring "written offer in settlement" for the "10% Rule" is that which is "in effect thirty days before the trial."

Hollywood contends that there was no "written offer in settlement" in effect 30 days before trial even under the most liberal calculation of that date as offered in the Appellant's Brief at page 10 and footnote 12 and 30 (*i.e.* June 1, 2010). Both the September 2009 Offer and the March 2010 Offer had expired according to their express terms. CP 0130;0341-0342. The CR 2A Settlement

Agreement was conditioned on the grant of an easement by an adjoining property owner which grant still has not occurred.

This contingency was a condition precedent to the formation of the CR 2A Settlement Agreement. Without it no Agreement was in place and thus, no 30 day offer existed. 25 WASHINGTON PRACTICE § 8:3 discusses *Conditions precedent* ("Where there is a condition precedent to the formation of a contract, the contract itself does not arise unless and until the condition occurs."). The "failure to perform a condition precedent will discharge the duties of the parties to a contract." *Quinn v. Cherry Lane Auto Plaza, Inc.* 153 Wn. App. 710, 721, 225 P.3d 266 (2009). In *CHG Intern. Inc. v. Robin Lee, Inc.* 35 Wn. App. 512, 667 P.2d 1127(1983), the court stated:

[Where] a condition precedent to the contract was neither performed nor excused within the time required, both parties' contractual duties were discharged.

*Id.* at 515.

The fact that both parties' contractual duties could be discharged in the event a condition of an agreement is not met is the very reason RCW 8.25.070 did not envision conditional agreements to constitute 30 day offers. 30 day offers are in place to promote settlement and allow the condemnee to properly gauge the risks both emotionally and financially in going to trial. If there is a condition in a thirty day offer dependent upon a third party there is

no way for the condemnee to access their risks. This is fundamentally unfair for the condemnee and is not the purpose of RCW 8.25.070. Having the settlement process rely on the actions of a third party is not consistent with the intent of the legislature.

Moreover, RCW 8.25.070 envisions a process which ends the litigation and the issues therein immediately upon mere acceptance by the condemnee. Here, that could not and has not happened given the condition precedent.

**D. HOLLYWOOD'S FEES ARE APPROPRIATE**

In its Response Brief the City complains about the Clerk's Papers designated by Hollywood contending that this matter involves a narrow issue of law. The City appears to support Hollywood's claims for fees by acknowledging the complicated lawsuit this matter became.

As is shown by the record, the City refused to agree on even the simplest of points. For example, Hollywood was required to obtain a court order establishing the proper valuation date as the City would not stipulate despite the fact that its same arguments were already rejected earlier by another judge in the King County Superior Court. CP 2561-2584.

Further, the City completely changed its appraisal approach a mere three weeks before trial. This matter has been a hard fought case as shown by the voluminous record. Below is a mere

snapshot of the litigious nature of this suit, and the hours of time spent to defend, bring various motions and try the case:

<b>Date</b>	<b>Action</b>
7/21/09	Respondent Hollywood Vineyards' Motion to Establish Valuation Date and Subjoined Declaration of Catherine C. Clark (CP 2561-2584)
10/2/09	Motion to Dismiss Action or Exclude City's Evidence for Failure to Comply with Scheduling Order (CP 0268-0273)
10/2/09	Motion to Invalidate City's 30 Day Offer ( CP 0086-0100)
12/31/09	Motion to Compel Respondent to Participate in Good Faith Negotiation of an Easement Strictly Complying with Provision No. 5 of the Settlement Agreement Dated October 5, 2009 and For Sanctions and Proposed Order (CP 2842-2924)
6/10/10	Respondents Hollywood Vineyards Limited Partnership's Motion for Order to Acknowledge Respondent's Right to Attorney Fees, Expert Witness Fees and Costs with attached Motion to Invalidate 30 Day Offer and Declaration of Catherine C. Clark (CP 2510-2512)
6/16/10	Petitioner City of Woodinville's Motion for Trial Continuance and to Compel Respondent to Participate in Good Faith Negotiation of an Easement Strictly Complying with Provision No. 5 of the Settlement Agreement and for Sanctions; Note for Motion; Declaration of Greg Rubstello (CP 2842-2854)
6/21/10	Hollywood Vineyards Motion to View Property CP 1135-1142
6/24/10	Motion to Exclude Witnesses and Exhibits Not Included on the City of Woodinville's LR 16 Statement (CP 1233-1246)
7/15/10	Motion for Attorney's Fees Expert Witness Fees and Costs (CP 1545-1615)
8/18/10	Hollywood Vineyards Additional Briefing on Motion for Entry of Decree of Appropriation; Certificate of Service

At least 50% of Hollywood's attorneys fees and 33% of its expert witness fees were incurred after June 1, 2010.<sup>2</sup> Hollywood made every effort to resolve several of the legal issues posed by this appeal in a series of motions prior to trial (which itself was a 6 day affair).<sup>3</sup> The trial court considered, but never ruled on many of these motions and trial was held in spite of these issues remaining.

The City contends that the amount of fees should be limited by the Jury's award but does not cite any legal authority to support such a contention.<sup>4</sup> The City did not at the trial court, and does not in this Court, contest the hourly rate of Hollywood's counsel, the time involved or address any of the other lodestar factors set forth in *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 859 P.2d 1210 (1993). CP1550.

Rather, it simply contends that the request is too much given the just compensation award. The amount in dispute does not create an absolute limit on fees but is a factor to consider. *Id.* at

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<sup>2</sup> Prior to June 1, 2010, Hollywood incurred a total of \$169,844.88, in attorney fees, \$88,304.95 of which was incurred with Ms. Clark's office. After June 1, 2010, Hollywood incurred an additional \$139,056.60 in attorneys fees at the trial court level. CP 1552. For expert witness fees, prior to June 1, 2010, Hollywood incurred \$38,518.66 in expert fees, and after June 1, 2010, it incurred an additional \$10,912.50 or a 30% increase thereafter.

<sup>3</sup> Hollywood has also been involved in two separate matters as a result of the Project, the MJR matter where it has sought to acquire a prescriptive easement and the matter against the City where it seeks to quiet title to property acquired by adverse possession prior to the City's acquisition of title.

<sup>4</sup> The Court should thus decline to consider the City's position. *Public Utilities Dist. No. 1 of Grays Harbor v. Crea*, 88 Wn. App. 390, 396, 945 P.2d 722 (1997).

150. Fee requests can be reduced where the request “grossly exceeds” the amount in controversy. *Id.*

Hollywood sought recovery for \$1,425,000 for the taking and incurred \$292,470.68 in attorneys fees, \$6,060.48 in out of pocket expenses, and \$112,976.60 in expert witness fees (CP 1555). As is shown by the Report of Proceedings, Hollywood was not allowed to present any legal argument on its claim for the lost access right even though it was allowed to present a damages analysis for it—a curious position. That portion of the claim amounted to \$1,140,000 of their claim.<sup>5</sup> Here, the attorney fees and expert witness fees requested does not exceed the amount sought by Hollywood but is 29% of it. *Compare* CP 1853-2055 with the \$1,425,000 request of Hollywood. Such a percentage is well below the generally accepted contingent fee percentage of 33%.

The fact that the jury eventually awarded \$215,000 in just compensation to Hollywood does not limit its claim for fees and costs.

**E. THE COURT OF APPEALS HAS ISSUED A  
PUBLISHED DECISION IN *GORMAN V. CITY OF  
WOODINVILLE***

In one of the related cases referenced in the Appellant’s Brief at pages 15-16, Division One of the Court of Appeals has issued a published opinion in *Gorman v. City of Woodinville*, --P.3d-

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<sup>5</sup> Supplemental Clerk’s Papers, Trial Exhibit 301.

---, 2011 WL 989415, Wn. App. Div. 1, March 21, 2011. A copy of that opinion is attached hereto as Appendix A.

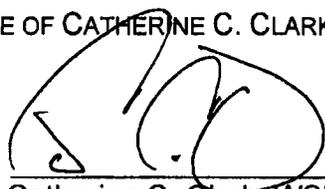
### III. CONCLUSION

Again, for the above stated reasons and those given in the original appellant brief, the trial court should be reversed.

Hollywood should be awarded its fees and costs at the trial court and in this Court as well.

Dated this 28<sup>th</sup> day of March, 2011.

THE LAW OFFICE OF CATHERINE C. CLARK PLLC

By: 

Catherine C. Clark, WSBA 21231

Melody Staubitz, WSBA 40871

Attorneys for Hollywood Vineyards

# APPENDIX A

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

JAMES GORMAN IV, as General Partner of HOLLYWOOD VINEYARDS LIMITED PARTNERSHIP,	)	No. 63053-9-1
	)	
Appellant,	)	
	)	
v.	)	
CITY OF WOODINVILLE,	)	PUBLISHED OPINION
	)	
Respondent.	)	FILED: March 21, 2011

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ELLINGTON, J. — The government is protected by statute against claims of adverse possession. The statute does not protect private landowners, even if they later sell to the government. Here, James Gorman claims he acquired ownership by adverse possession before the government purchased the land. If so, his claim is not barred. We reverse and remand for determination of the validity of his claim of title by adverse possession to property recently acquired by the City of Woodinville.

BACKGROUND

The City of Woodinville (City) acquired record title to Tract Y for a road improvement project. James Gorman IV, as General Partner of Hollywood Vineyards Limited Partnership (Gorman), filed an action to quiet title to Tract Y, alleging he had acquired vested title by adverse possession before the land was conveyed to the City.

The City moved to dismiss under CR 12(b)(6), arguing Gorman's claim was barred by RCW 4.16.160, which provides that "no claim of right *predicated upon the lapse of time* shall ever be asserted against the state."<sup>1</sup> The City asserted Gorman's claim was predicated upon a lapse of time and therefore barred. The trial court agreed and dismissed.

Gorman contends the 10-year statute of limitations ran while the property was in private hands and his quiet title action is not barred by RCW 4.16.160. We agree and reverse.

#### DISCUSSION

Dismissal under CR 12(b)(6) is appropriate only if the complaint alleges no facts that would justify recovery.<sup>2</sup> The plaintiff's allegations and any reasonable inferences are accepted as true.<sup>3</sup> Our review is de novo.<sup>4</sup>

The doctrine of adverse possession permits acquisition of legal title to private land without the owner's consent where the claimant possesses the property for at least 10 consecutive years and can prove the other requirements of the doctrine.<sup>5</sup> Adverse possession is thus partly dependent upon the passage of a statute of limitations. Under

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<sup>1</sup> (Emphasis added.)

<sup>2</sup> Reid v. Pierce Cnty., 136 Wn.2d 195, 200-01, 961 P.2d 333 (1998); Orwick v. City of Seattle, 103 Wn.2d 249, 254, 692 P.2d 793 (1984).

<sup>3</sup> Reid, 136 Wn.2d at 201.

<sup>4</sup> Id.

<sup>5</sup> RCW 4.16.020. Successful adverse possession in Washington requires 10 years of possession that is (1) actual; (2) open and notorious; (3) hostile; (4) continuous; and (5) exclusive. ITT Rayonier, Inc. v. Bell, 112 Wn.2d 754, 757, 774 P.2d 6 (1989).

No. 63053-9-1/3

RCW 4.16.160, claims predicated upon lapse of time may not be asserted against the government, so adverse possession does not run against the government.<sup>6</sup>

The question here is whether vested title acquired by adverse possession against a *private* owner can be asserted after the record owner attempts to convey the property to the government.

The City asserts such claims are unambiguously prohibited by the statute because they are predicated upon lapse of time.<sup>7</sup> The City points to Commercial Waterway District No. 1 v. Permanente Cement Company,<sup>8</sup> where the plaintiff claimed to have adversely possessed property while the water district owned it. Not surprisingly, the court rejected the claim, holding that cities, acting in a governmental capacity, are exempt from the 10-year statute of limitations for adverse possession.<sup>9</sup> But this holding is not germane to the question here because unlike the waterway district, the City did not own the property when Gorman's title allegedly vested.

The City's interpretation of the statute disregards traditional principles of adverse possession. Title acquired by an adverse possessor, although not recorded, is valid

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<sup>6</sup> Edmonds v. Williams, 54 Wn. App. 632, 634, 774 P.2d 1241 (1989) (citing Commercial Waterway Dist. No. 1 of King Cnty. v. Permanente Cement Co., 61 Wn.2d 509, 512, 379 P.2d 178 (1963)).

<sup>7</sup> Municipalities acting in a governmental capacity constitute "the state" under RCW 4.16.160. Commercial Waterway, 61 Wn.2d at 512. The City is a Washington municipal corporation.

<sup>8</sup> 61 Wn.2d 509, 510–11, 379 P.2d 178 (1963).

<sup>9</sup> Id. at 512–13; see also Town of West Seattle v. West Seattle Land & Improvement Co., 38 Wash. 359, 363–64, 80 P. 549 (1905) (party could not adversely possess public roadway).

No. 63053-9-1/4

and enforceable.<sup>10</sup> Once an adverse possessor has fulfilled the conditions of the doctrine, title to the property vests in his favor.<sup>11</sup> The adverse possessor need not record or sue to preserve his rights in the land.<sup>12</sup> Rather, the law is clear that title is acquired upon passage of the 10-year period.<sup>13</sup>

The City contends these rules apply only to private parties. But the underlying claim here involved only private parties.

The City also points out that no case has addressed precisely these facts. But no case has abandoned settled analysis in similar circumstances. For example, City of Benton City v. Adrian involved a claim of a prescriptive easement for drainage onto city property, an easement that cannot be acquired if the property is held by a municipal corporation in its governmental capacity.<sup>14</sup> Adrian contended, however, that the claimed easement was perfected before the city acquired the property. The court held Adrian had failed to prove the elements of adverse possession against the previous owner.<sup>15</sup> The court gave no indication that, if established by the evidence, such a claim might be

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<sup>10</sup> Mugaas v. Smith, 33 Wn.2d 429, 431, 206 P.2d 332 (1949). To rule otherwise, the court said, would be to require an adverse possessor to “keep his flag flying for ever [sic], and the statute [would] cease[] to be a statute of *limitations*.” Id. at 433 (quoting Schall v. Williams Valley R. Co., 35 Pa. 191, 204, 11 Casey 191 (1860)).

<sup>11</sup> Bowden-Gazzam Co. v. Hogan, 22 Wn.2d 27, 39, 154 P.2d 285 (1944) (quoting Wheeler v. Stone, 1 Cush. 313, 55 Mass. 313 (1848)).

<sup>12</sup> Halverson v. City of Bellevue, 41 Wn. App. 457, 460, 704 P.2d 1232 (1985).

<sup>13</sup> Id. (“The law is clear that title is acquired by adverse possession upon passage of the 10-year period. The quiet title action merely confirmed that title to the land had passed to Halverson by 1974.” (citations omitted)).

<sup>14</sup> 50 Wn. App. 330, 336, 748 P.2d 679 (1988) (citing Commercial Waterway, 61 Wn.2d at 512).

<sup>15</sup> Id. at 337.

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barred.

In short, Washington cases support Gorman's claim, and the City offers no persuasive reason their principles should not apply.

The City also contends that the policy behind RCW 4.16.160 supports a bar against claims like Gorman's. We disagree.

Government immunity from statutes of limitation protects the public from suffering for the negligence of its representatives, and allows the state to allocate its resources to uses other than vigilance about inchoate claims.<sup>16</sup> It also protects the public from the costs of legal fees, awards, and insurance coverage that accompany lawsuits against the government.<sup>17</sup> These purposes are served only where the land is in public ownership at the time the claim arises. Permitting Gorman's claim implicates none of the policies underlying the statute.

Further, Gorman's quiet title action is predicated not upon a lapse of time but upon proof of vested title. The fact that, at trial, he would need to prove the elements of adverse possession, including passage of the statute of limitations against the former owner, does not mean his quiet title action is predicated upon the lapse of time as to the City.

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<sup>16</sup> Bellevue Sch. Dist. v. Brazier Constr. Co., 103 Wn.2d 111, 114, 691 P.2d 178 (1984) (quoting United States v. Thompson, 98 U.S. 486, 489–90, 8 Otto 486, 25 L. Ed. 194 (1878)); see also Guaranty Trust Co. of New York v. United States, 304 U.S. 126, 141, 58 S. Ct. 785, 82 L. Ed. 1224 (1938); 17 WILLIAM B. STOEBUCK, JOHN W. WEAVER, WASHINGTON PRACTICE: REAL ESTATE: PROPERTY LAW § 8.1, at 515 (2d ed. 2004 & Supp. 2010).

<sup>17</sup> See LAWS OF 1986, ch. 305, § 100 (preamble); Bellevue Sch. Dist. v. Brazier Constr. Co., 100 Wn.2d 776, 783, 691 P.2d 178 (1984).

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If Gorman had valid title before the City purchased the property, we think he has it still. We reverse and remand for trial.<sup>18</sup>

WE CONCUR:

Appelwhite, J.

Evans, J.

Cox, J.

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<sup>18</sup> Given our disposition, we need not reach the arguments concerning fees and costs except to point out that deposition costs are awardable only insofar as the depositions are used at trial. Kiewitt-Grice v. State, 77 Wn. App. 867, 874, 895 P.2d 6 (1995) (fees for deposition transcripts not used at trial not awardable under RCW 4.84.010); Platts v. Arney, 46 Wn.2d 122, 128-29, 278 P.2d 657 (1955) (fees for depositions taken for discovery but not used at trial not awardable under RCW 4.48.090). The City's argument that Kiewitt-Grice does not apply here because the City's cost award did not include transcription fees is unpersuasive.

DECLARATION OF SERVICE

On said day below I sent a true and accurate copy of: Reply Brief of Appellant in Supreme Court Cause No. 85202-2 to the following party by Messenger hand delivery:

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2100 Westlake Ctr Tower  
1601 Fifth Ave.  
Seattle, WA 98101  
Attorney for City of Woodinville

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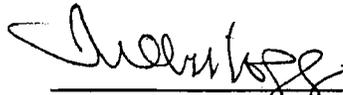
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: March 28, 2010, at Seattle, Washington.



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Melissa Rogge, Legal Assistant to  
Catherine C. Clark, WSBA 21231  
Melody Staubitz, WSBA 40871  
Attorneys for Hollywood Vineyards