

COURT OF APPEALS  
DIVISION II

CO 1001-4 FILED: 17

STATE OF WASHINGTON  
DEPUTY CLERK  
*[Signature]*

39509-6-II

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

JERRY RIDDELL and LILLIAN  
RIDDELL, husband and wife,

Appellants,

vs.

ZACHARY M. MONTGOMERY  
and SARAH A. MONTGOMERY,  
husband and wife,

Respondents.

Court of Appeals No. 39509-6-II

Mason County Superior Court  
Cause No. 06-2-00463-2

APPEAL FROM THE SUPERIOR COURT OF  
THE STATE OF WASHINGTON  
FOR MASON COUNTY  
THE HONORABLE TONY SHELDON, JUDGE

---

REPLY BRIEF OF APPELLANTS

---

Don W. Taylor, WSBA #4134  
Of Owens Davies Fristoe Taylor & Schultz, P.S.  
Attorneys for Appellants

Office Address:  
Owens Davies Fristoe Taylor & Schultz, P.S.  
1115 West Bay Drive NW  
Suite 302  
Olympia, WA 98502-4668  
Telephone: (360) 943-8320  
Facsimile: (360) 943-6150

## TABLE OF CONTENTS

I.	PRELIMINARY STATEMENT .....	1
II.	ASSIGNMENTS OF ERROR .....	2
III.	RES JUDICATA.....	2-6
IV.	ATTORNEY'S FEES .....	6

## TABLE OF AUTHORITIES

### TABLE OF CASES

<i>Knuth v. Beneficial Wash., Inc.</i> 107 Wn.App. 727, 31 P.3d. 694 (2001) .....	2, 3
<i>Kuhlmann v. Thomas</i> 75 Wn.App. 115, 119-120 879 P.2d. 365 (1995) .....	3
<i>Meder v. CCME Corp.</i> 7 Wn.App. 801, 502 P.2d. 1252 (1972) .....	4
<i>Seattle First Nat'l Bank v. Kawachi</i> 91 Wn.2d 223, 588 P.2d. 725 (1978).....	5

I.

**PRELIMINARY STATEMENT**

This is an appeal from the Superior Court of the State of Washington for Mason County, which on May 4, 2009 entered an Order Granting Montgomery's Motion for Summary Judgment. CP 36-39. The Order Granting Summary Judgment dismissed the Riddells' action to quiet title to the real estate described in the Complaint. The dismissal was based upon the doctrine of res judicata. On May 8, 2009, Riddell served and filed a Notice of Appeal to this court. CP 29-35.

After the Notice of Appeal was filed, the matter of whether or not Montgomery should receive an award of attorney's fees was argued before the Honorable Toni Sheldon. She ruled in Montgomery's favor. The Mason County Superior Court had authority to act on the claim for attorney's fees of Montgomery. Riddell desires to seek review of the trial court's decision on attorney's fees and litigation expenses in this Appeal and is not required to file a separate Notice of Appeal. RAP 7.2(i).

## II.

### ASSIGNMENT OF ERRORS

Because of the post judgment proceedings regarding attorney's fees, Riddell amends the Assignment of Errors to read as follows:

1. Riddell assigns as error to the entry by the Superior Court for Mason County of an Order Granting Summary Judgment, Dismissing Riddell's Action and Quieting Title to the Tidelands in Montgomery. CP 36-39.

2. Riddell assigns as error the granting of the attorney's fees to Montgomery in the post judgment proceedings.

## III.

### RES JUDICATA

The rules with respect to Res Judicata are set forth in Knuth v. Beneficial Wash., Inc., 107 Wn.App. 727, 31 P.3d 694 (2001). The court states in part as follows:

“. . . A prior judgment has preclusive effect when the party moving for summary judgment in the successive proceeding proves that the two actions are identical in four respects: (1) persons and parties, (2) cause of action, (3) subject matter, and (4) the quality of the persons for or against whom the claim is made.”

Knuth v. Beneficial Wash., Inc., supra at p. 731.

In discussing the issue (2) cause of action, the Knuth court further stated as follows:

[6] Knuth maintains that the causes of actions are not the same. To determine whether or not the causes of action are the same, courts examine the following criteria: (1) whether the second action **would impair rights or interests established in the prior judgment**, (2) **whether the two actions deal substantially with the same evidence**, (3) whether the two suits involve an alleged infringement of the same right, and (4) whether the two suits arise out of the same transactional nucleus of facts. *Kuhlman*, 78 Wn.App. at 122.”  
**(Emphasis ours)**

Knuth v. Beneficial Wash., Inc., supra at p. 732 citing Kuhlmann v. Thomas, 75 Wn.App. 115, 119-120 879 P.2d. 365 (1995).

The prosecution of the case of Riddell v. Montgomery does not impair any rights or interest established in the judgment entered in Riddell v. Canham. Additionally, the two actions do not deal substantially with the same evidence and the two actions do not involve any infringement on the same right. Accordingly, the trial court incorrectly applied the Doctrine of Res Judicata and should be reversed.

In further discussing the issue of Res Judicata, the court in Meder v. CCME Corp., 7 Wn.App. 801, 502 P.2d 1252 (1972), states as follows:

"[4,5] In concerning itself with the problem of what makes for identity of a cause of action, *Curtiss v. Crooks*, 190 Wash. 43, 53, 66 P.2d 1140 (1937), held that if it is doubtful whether a second suit is for the same cause of action as the first, a proper test is to consider whether the same evidence would sustain both. If the same evidence would sustain both, the two actions are considered the same; and the judgment in the former is a bar to the subsequent action although the two actions are different in form. If, however, different proofs would be required to sustain the two actions, a judgment in the one is no bar to the other. A second test laid out in *Curtiss v. Crooks, supra*, is: was the matter in issue, adjudicated upon, or necessarily involved in, the determination of the former action? A judgment in a former action concludes only those matters that were in issue, actually litigated in, or necessarily involved in, the determination.

Courts are always concerned, however, that an independent cause of action be not precluded by some prior action. . . "

Meder v. CCME Corp, supra, page 806.

In considering whether the same evidence would sustain a judgment in the two actions of the case under appeal, the answer is

no. As indicated earlier, the evidence required to prove the adverse possession claims of the septic and drain field area of the real estate which lays to the south of the State Highway would not sustain a judgment for the tidelands and vice versa.

The court in Seattle First Nat'l Bank v. Kawachi, 91 Wn.2d 223, 588 P.2d 725 (1978) stated as follows in discussing Res Judicata:

"[1] While it is often said that a judgment is res judicata of every matter which could and should have been litigated mean that a plaintiff must join every cause of action which is joinable when he brings a suit against a given defendant. CR 18(a) permits a joinder of claims. It does not require such joinder. And the rule is universal that a judgment upon one cause of action does not bar suit upon another cause which is independent of the cause which was adjudicated. 50 C.J.A. *Judgments* § 668 (1947); 46 Am. Jur. 2d *Judgments* § 404 (1969). A judgment is res judicata as to every question which was properly a part of the matter in controversy, but it does not bar litigation of claims which were not in fact adjudicated."

In all of the cases cited by the respondent in his brief pertaining to res judicata, the second case impaired the rights and interests that were established in the judgment entered in the first case. The cases also involved tracts of real estate which joined

each other without any boundaries separating them. A review of the cases revealed that the evidence offered in the first case was essentially the same as the evidence in the second case.

In the present case, the evidence pertaining to the land lying south of SR 106 is completely different from the evidence pertaining to the land lying north of SR 106. Each are separate tracts. Each are subject to different rules in determining their boundaries.

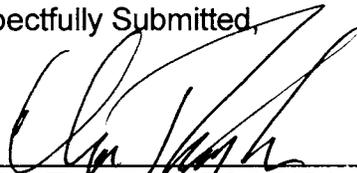
**IV.**

**ATTORNEYS FEES**

With the reversal of the judgment of the trial court, the judgment for attorneys fees and costs should be reversed and vacated and this matter referred to the trial court for a trial on the merits.

DATED: November 3, 2009.

Respectfully Submitted,



---

Don W. Taylor, WSBA #4134  
Of Owens Davies, Fristoe  
Taylor & Schultz, P.S.  
Attorneys for Appellants Riddell

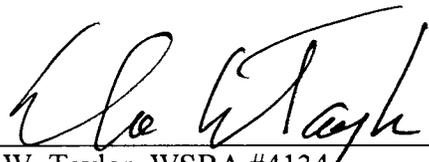


Christina Mehling, Esq.  
VSI Law Group, PLLC  
3600 Port of Tacoma Road  
Suite 311  
Tacoma, WA 98424

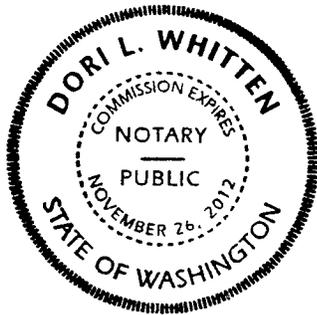
Mr. and Mrs. Jerry Riddell  
61 E. Skylark Court  
Allyn, WA 98524

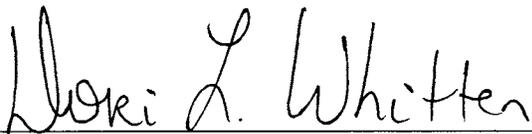
3. On said date, I caused said envelopes, with a copy of this Affidavit and a copy of the Reply Brief of Appellants enclosed therein to be deposited into the United States mail at the Olympia Post Office, Olympia, Washington, first-class postage prepaid.

4. I am informed, believe and therefore state there is regular mail service between the Olympia Post Office and the address above-stated and accordingly, I obtained service by mail upon Christina Mehling, Esq.

  
\_\_\_\_\_  
Don W. Taylor, WSBA #4134

SUBSCRIBED AND SWORN TO before me on November 3, 2009, by Don W. Taylor.



  
\_\_\_\_\_  
NOTARY PUBLIC in and for the State of  
Washington residing at Racey  
My commission expires 11-26-2012