

TABLE OF CONTENTS

A. Assignment of Error and Issues 1
Assignment of Error
No. 1 1
Issues Pertaining to Assignment of Error
No. 1 1
No. 2 2
No. 3 2
No. 4 2
No. 5 2
No. 6 2
No. 7 2

B. Statement of the Case 3
1. Factual Background 3
2. Summary Judgment 7

C. Argument 8
1. Standard of Review 8
a. Review is de novo 8
b. Burden 8
c. Resolution of Doubts 9
d. Construction of Facts 9
2. Estoppel in Pais: The Sole Basis for Granting
Summary in Judgment 9
a. Plaintiffs Owned the Disputed Strip by
June, 1995 10
b. Estoppel in Pais 12
i. Estoppel in Pais Is Not Favored 12
ii. The Elements of Estoppel in Pais 13
iii. *Dorward v. ILWU-PMA Pension Fund* 14
iv. *Alcorn Trailer City v. Blazer* 16
v. *Thomas v. Harlan* 17
3. Can Estoppel Be Established By Silence? 19
a. No Boundary Dispute Cases 19
b. Knowledge is a Prerequisite 21
c. No Estoppel Where Both Parties Have
Knowledge 22
d. “Unclean Hands” 25
e. Delay in Filing Suit 27
f. Knowledge Defeats Defendant’s Claim of
Estoppel 29

D. Conclusion 31

TABLE OF AUTHORITIES

Cases

<i>Blanck v. Pioneer Mining Co.</i> , 93 Wash. 2d, 159 P. 1077 (1916).....	2, 20, 32
<i>Chaplin v. Sanders</i> , 100 Wash. 2d 853, 676 P.2d 431 (1984).....	10
<i>Codd v. Westchester Fire Ins. Co.</i> , 14 Wash. 2d 600, 128 P.2d 968 (1942)	20
<i>Dorward v. ILWU-PMA Pension Plan</i> , 75 Wash. 2d 478, 452 P.2d 258 (1969)	1, 10, 13, 14, 16
<i>El Cerito, Inc. v. Ryndak</i> , 60 Wash. 2d 847, 376 P.2d 528 (1962).....	5, 12, 21, 31
<i>Faubion v. Elder</i> , 49 Wash. 2d 300, 301 P.2d 153 (1956)	12
<i>Geoghegan v. Dever</i> , 30 Wash. 2d 877, 194 P.2d 397 (1948)	2, 32
<i>Halverson v. Bellevue</i> , 41 Wash. App. 457704 P.2d 1232 (1985).....	26
<i>Happy Bunch v. Grandview N.</i> , 142 Wash. App. 81, 173 P.3d 959 (2007).....	10
<i>Income Investors Inc. v. Shelton</i> , 3 Wash. 2d 599, 101 P.2d 973 (1940).....	2, 32
<i>Leonard v. Wn. Employers, Inc.</i> , 77 Wash. 2d 271, 461 P.2d 538 (1969).....	23
<i>Lybert v. Grant County</i> , 141 Wash. 2d 29, 1 P.3d 1124 (2000)	23
<i>Marriage of Barber</i> , 106 Wash. App 390, 23 P.2d 1106 (2001).....	13
<i>Morin v. Harrell</i> , 161 Wash. 2d 226, 164 P.2d 372 (2007).....	8
<i>Niven v. MacDonald</i> , 72 Wash. 2d 93, 431 P.2d 724 (1967)	26
<i>Roy v. Cunningham</i> , 46 Wash. App. 409, 731 P.2d 526 (1986)....	27, 28, 29
<i>Seattle v. P.B. Investment</i> , 11 Wash. App. 653, 524 P.2d 419 (1974).....	25
<i>Strand v. State</i> , 16 Wash. 2d 107, 132 P.2d 1011 (1943).....	21, 31
<i>Waldrip v. Olympia Oyster Co.</i> , 40 Wash. 2d 469, 244 P.2d 864 (1952).....	22
<i>Westlake View Condo v. Sixth Ave View</i> , 146 Wash. App. 760, 193 P.2d 161 (2008)	9

Statutes

R.C.W. 58.17.165	30
------------------------	----

Other Authorities

31 C.J.S. “Estoppel”, Sec. 103.....	21
<i>Real Estate Property Law</i> , “Sec. 8.23 Estoppel (in Pais)”, 17 Washington Practice, Second Edition.....	19

NOTE

When this action was begun, Plaintiffs consisted of Robert and Karen Nickell, husband and wife. Unfortunately, Bob Nickell died of lung cancer in August of this year, 2010. For the convenience of reading this brief, the Plaintiffs will continue to be designated in the plural to avoid the potential for confusion by separating their identities midway through the case.

A. ASSIGNMENT OF ERROR AND ISSUES

Assignment of Error

Plaintiffs assert that the trial court committed reversible error in the following particulars:

1. By granting summary judgment in favor of the Defendant on the basis that Plaintiffs were stopped (estoppel in pais) when Plaintiffs remained silent after learning that there existed a boundary dispute between the parties.

Issues Pertaining to Assignment of Error

1. Is the equitable doctrine of estoppel in pais, that requires “an admission, statement, or act” *Dorward v. ILWU-PMA Pension Plan*, 75 Wash. 2d 478, 452 P.2d 258 (1969) proved when Plaintiffs made no “admission, statement or act”, but remained silent after learning of the boundary dispute?

2. Does Defendant's failure to show that Plaintiffs' silence must have operated as a fraud, must have intended to mislead, and itself must have actually misled as set forth in *Blanck v. Pioneer Mining Co.*, 93 Wash. 2d 159, 1077 P.2d 1077 (1916) preclude summary judgment based on estoppels in pais?

3. Where Defendant failed to provide any evidence of "reliance" on its part, did the trial court commit error in granting summary judgment without such evidence?

4. Can estoppel be established when it is shown that "the facts are known to both parties, or both have the same means of ascertaining the truth," *Geoghegan v. Dever*, 30 Wash. 2d 877, 194 P.2d 397 (1948)?

5. Can estoppel be established where a party has "unclean hands", as the facts and inferences in case establish? *Income Investors Inc. v. Shelton*, 3 Wash. 2d 599, 101 P.2d 973 (1940).

6. Is the knowledge of the facts of adverse possession as well as the knowledge of the unclean hands of a developer imputed to subsequent purchasers of property in his development?

7. Are Defendant homeowners charged with recognizing the existence of a potential adverse possession claim to the same extent as any other purchaser of property?

B. STATEMENT OF THE CASE

1. FACTUAL BACKGROUND

The case before the Court involves a dispute between adjoining property owners in rural Pierce County in the Gig Harbor suburb of Arletta. At issue is the ownership of a strip of land approximately 18.5 feet in width running the entire length of the 800-foot north-to-south common boundary line between the parties' respective properties. Plaintiffs are claiming ownership of the disputed strip of land (hereinafter, "disputed strip") by adverse possession.

Plaintiffs purchased their property from their predecessors in title, the Ecklers, on March 31, 1989 by means of a statutory warranty deed (Declaration of Karen Nickell, CP 93). They moved onto the property the following day, April 1, 1989 (Id.). They have continuously resided on that property from that day to the present (Id.).

When the Nickells took possession of the property in April, 1989, there existed extensive landscaping which had been installed by the Ecklers (Declaration of Karen Nickell, CP 84). The Eckler landscaping extended across the disputed strip. It consisted of a well-maintained stretch of lawn and numerous shrubs, including a hedge of photinia plants (Id.).

Beyond said strip to the east, lay the property now owned by Defendant Southview Homeowners Association. At the time Plaintiffs moved onto their land, the adjoining property (Defendant's land) consisted of timber and brush. A dense thicket of blackberry bushes ran along the eastern edge of the disputed strip creating a clearly defined line of demarcation between the two parcels (Declaration of Karen Nickell, CP 84). This line of demarcation is plainly visible in various aerial photographs of the property taken by the Washington State Department of Transportation (D.O.T) from 1985 through 2001 (Ex A through D, Declaration of George Kelley, CP 105-118). The photographs clearly demonstrate continuous maintenance of the disputed strip as lawn and landscaping over a 16 year period, 1985 through 2001, which exceeds the ten-year statutory period of possession required by the law of adverse possession.

Since the date of taking possession of their property in April 1989, the Nickells openly and continuously maintained the disputed strip of land as their own, planting trees and shrubs, and mowing and maintaining their lawn. When the photinia hedge died in 1998, they replaced it with a line of arborvitae trees which have since grown to a full-sized hedge (18 feet tall). Additionally, Plaintiffs installed an underground sprinkling system to provide water to the disputed strip. (Declaration of Karen Nickell, CP 84).

Beginning in 1993, Defendant's predecessors in interest, Thomas and Carol Greetham, applied for a preliminary plat to subdivide the Defendant's land, under Pierce County Planning Department number SPR4-93 (Ex E, Declaration of George Kelley, CP 119-128). The Greethams were placed on notice of Plaintiffs' use of the disputed parcel by virtue of their own survey undertaken in 1993, pursuant to that application (Ex F, Declaration of George Kelley, CP 129-133). For the next 11 years, Defendant's predecessors in interest obtained annual extensions of their preliminary plat without any physical incursion onto the disputed strip. Throughout all these years, Plaintiffs continued to maintain the strip as their own, believing it to be part of their deeded land (Declaration of Karen Nickell, CP 85-86).

At no time from 1989 to 2005 did the Greethams nor any other person acting on behalf of the owners of the adjacent property enter upon the disputed strip or undertake any affirmative act of ownership. Nor was any attempt made during said period to exclude the Plaintiffs from the disputed strip nor object to their possession and maintenance (Id.).

By June, 1995, title to the disputed strip passed to Plaintiffs by operation of the law of adverse possession, *El Cerito, Inc. v. Ryndak*, 60 Wash. 2d 847, 376 P.2d 528 (1962).

Though the aforesaid initial proposed development survey conducted by the Greethams located the corner posts of the common boundary between the parties' holdings, no survey markers were ever placed on the disputed strip maintained by the Plaintiffs (Declaration of Karen Nickell, CP 85; Declaration of surveyor Jerold O'Hare, CP 100). Plaintiffs had no idea that there was a conflict between the surveyed line and the line they had maintained as the boundary line since moving onto the property (Id.). Defendant acknowledges this lack of knowledge on Plaintiffs' part (Defendant's Reply Memorandum, citing this as an "undisputed fact", CP 174).

The final plat of the Defendant's land was approved on July 15, 2005 (CP 51-62). By this time, the Greethams had sold their interest in the development to another developer, Randy Chopp. Mr. Chopp began developing the lots immediately after the granting of the final plat approval. Of particular interest is a reserve septic system which he constructed for one of the lots. Mr. Chopp entered onto the disputed strip and began to excavate a segment of the subject septic drain field on Plaintiffs' land (Declaration of Karen Nickell, CP 85). He removed a portion of Plaintiffs' lawn and informed Plaintiffs that the area belonged to the development (Id.). This marked the very first time Plaintiffs became aware that there was a boundary issue with respect to the disputed strip.

The portion of the drain field which Chopp created ended up encroaching on Plaintiffs' land just a few inches (Survey of Jerold O'Hare, Ex A, CP 102). No other drain fields encroach upon the disputed strip¹.

The Nickells repaired the damage to their lawn from the Chopp incursion and thereafter continued to maintain the entire disputed strip as their own, which they have done to this day.

Three years later, in April, 2008, a neighbor (a member of Defendant Association) came onto Plaintiffs' land and informed them that the Association's greenbelt extended to and included the arborvitae hedge that had been planted and cultivated by Plaintiffs, as well as numerous mature trees (Declaration of Karen Nickell, CP 85). When negotiations regarding a resolution of the issue failed to achieve a settlement, Plaintiffs brought this action to quiet title in their name (Id.).

2. SUMMARY JUDGMENT

The Defendant filed a Motion for Summary Judgment Dismissing Plaintiffs' Claims (CP 11-12). Its motion was premised upon two bases:

a. That the element of hostility was not present during the ten-year period of adverse possession because the Defendant's

¹ Throughout these proceedings, counsel for Defendant has continuously claimed that two reserve drain fields were constructed upon the disputed strip (Declaration of Annette Simmons, CP 24; RP 9). Her own Exhibit G to her affidavit shows that this is not true (CP 72-76).

property was “vacant land”, and hence, a presumption of permission was present throughout that period, applying the “vacant land” rule from the law of prescriptive easement;

b. That Plaintiffs are estopped from contesting Defendant’s ownership of the disputed parcel because they did not object to the designation of the parcel as the proposed “greenbelt” to the development during the platting process.

The matter was heard before the Honorable Frank E. Cuthbertson on July 30, 2010. Judge Cuthbertson ruled in Southview’s favor citing only the estoppel argument as the basis for his decision (CP 187-188). The Court ruled that Plaintiffs’ “silence” during the platting process constituted an estoppel justifying the forfeiture of their property to Defendant.

Plaintiffs have appealed that ruling (CP 189-190).

C. ARGUMENT

1. STANDARD OF REVIEW

a. **Review is de novo:** When reviewing an order of summary judgment, the Court of Appeals engages in the same inquiry as the trial court *Morin v. Harrell*, 161 Wash. 2d 226, 164 P.2d 372 (2007).

b. **Burden:** The burden is on the moving party to demonstrate that there is no genuine issue of material fact, and that it is

entitled to judgment as a matter of law *Westlake View Condo v. Sixth Ave View*, 146 Wash. App. 760, 193 P.2d 161 (2008).

c. Resolution of Doubts: Any doubts as to the existence of a genuine issue of material fact are to be resolved against the moving party.

d. Construction of Facts: All facts submitted and all reasonable inferences therefrom are to be construed in the light most favorable to the non-moving party. *Westlake, supra*.

2. ESTOPPEL IN PAIS: The Sole Basis for Granting Summary Judgment

As noted above, the Defendant sought summary judgment based upon two theories: that the “vacant land” rule from the law of prescriptive easements should be applied to an adverse possession case, and that Plaintiffs are estopped from claiming ownership of the disputed parcel because they did not object to its inclusion in the plat of the Defendant’s development during the time that the said development was before the Pierce County Planning Department. The trial court granted summary judgment based solely upon the second claim, estoppel in pais:

THE COURT: I am going to grant defendant’s motion for summary judgment. I believe that there’s clear and convincing evidence in this case that the doctrine of estoppel in pais applies. The Dorward, Harlan, and Alcorn cases support the contention that *silence by the property*

owner is sufficient if it induces reliance. In this case, it induced reliance on the part of Chopp and the developers of the adjacent property as well as other county officials who granted the plat, and so I am going to grant summary judgment on that basis. (RP 24, Emphasis added)

This ruling of the Court not only misstates the holdings of the very cases it cites as authority, *Dorward v. ILWU-PMA Pension Plan*, 75 Wash. 2d 478, 452 P.2d 258 (1969); *Thomas v. Harlan*, 27 Wash. 2d 512, 178 P.2d 965 (1947) and *Alcorn Trailer City v. Blazer*, 18 Wash. App. 782, 572 P.2d 15 (1977), but it improperly applies the law of the doctrine of estoppel in pais.

a. Plaintiffs Owned the Disputed Strip by June, 1995

As a starting point, it is important to recognize that the Nickells acquired full and complete title to the disputed strip by June of 1995. In the landmark case of *Chaplin v. Sanders*, 100 Wash. 2d 853, 676 P.2d 431 (1984), the Supreme Court removed the elements of “claim of right made in good faith” from the requirements needed to establish a claim for adverse possession. *Happy Bunch v. Grandview N.*, 142 Wash. App. 81, 173 P.3d 959 (2007) recites the present requirements for establishing a claim of adverse possession at page 89:

To establish a claim of adverse possession, the claimant’s possession must be proved to be (1) exclusive, (2) actual and uninterrupted, (3) open and notorious, and (4) hostile.

ITT Rayonier, Inc. v. Bell, 112 Wash. 2d 754, 757, 774 P.2d 6 (1989). Each of the necessary elements must exist for 10 years. R.C.W. 4.16.020; *ITT Rayonier*, 112 Wash. 2d at 757. The party claiming adverse possession has the burden of proof as to each element. *ITT Rayonier*, 112 Wash. 2d at 757. “A claimant can satisfy the open and notorious element by showing either (1) that the title owner had actual notice of the adverse use throughout the statutory period or (2) that the claimant used the land such that any reasonable person would have thought he owned it.” *Riley v. Andres*, 107 Wash. App. 391, 396, 27 P.3d 618 (2001). Hostility requires “that the claimant treat the land as his own against the world throughout the statutory period.” *Chaplin v. Sanders*, 100 Wash. 2d 853, 860-61, 676 P.2d 431 (1984).

In the instant case, Plaintiffs established that they satisfied each of these elements: they exercised exclusive and uninterrupted control of the disputed land continuously for more than the ten years required by statute, their use was unquestionably open and notorious for all to see, and, pursuant to *Chaplin*, they treated the land as “[their] own against the world”. At no point prior to 2005 was their use of the land challenged, nor was any effort made by Southview’s predecessors in interest to enter onto the disputed parcel and exercise control over any portion of it (Declaration of Karen Nickell, CP 83-86).

The D.O.T. photographs (Ex A through D, Declaration of George Kelley, CP 105-118) demonstrated that the disputed strip was continuously maintained by Plaintiffs and their predecessors in interest, the Ecklers, from 1985 onward. Plaintiffs are entitled to “tack” the

Ecklers' possession to their own in establishing their adverse possession. *Faubion v. Elder*, 49 Wash. 2d 300, 301 P.2d 153 (1956). As such, full title ripened in the Plaintiffs no later than June, 1995 (ten years after the first D.O.T. photograph was taken).

When real property has been held by adverse possession for 10 years, **such possession ripens into an original title**. Title so acquired by the adverse possessor cannot be divested by acts other than those required where title was acquired by deed. *Mugaas v. Smith, supra, McInnis v. Day Labor Co.*, 102 Wash. 38, 172 P.2d 844 (1918). The person so acquiring this title can convey it to another without having had the title quieted in him prior to the conveyance. (Emphasis added)

El Cerrito, Inc. v. Ryndak, 60 Wash. 2d 847, 376 P.2d 528 (1962) at page 555.

In this case, Plaintiffs' title to the disputed land has been "divested" by the ruling of the trial court: that Plaintiffs lost their title by virtue of their "silence" during the platting process of the adjoining parcel.

b. Estoppel in Pais

i. Estoppel in Pais Is Not Favored: It is worth noting at the outset that the doctrine of estoppel in pais is not favored in the law:

Courts do not favor equitable estoppel, and the party asserting it must prove every element with clear, cogent and convincing evidence.

Marriage of Barber, 106 Wash. App 390, 23 P.2d 1106 (2001). This is particularly so where a party seeks to divest another party of his title to real estate. As the Defendant's own case authority, *Thomas v. Harlan*, *supra*, states at page 518:

Title to real property is a most valuable right which will not be disturbed by estoppel unless the evidence is clear and convincing.

ii. The Elements of Estoppel in Pais: The Defendant is charged with establishing each of the elements of estoppel in pais by clear, cogent and convincing evidence:

To constitute estoppel *in pais*, three things must occur: (1) An admission, statement, or act inconsistent with the claim afterwards asserted; (2) action by the other party on the faith of such admission, statement, or act; and (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement, or act.

Dorward v. ILWU-PMA Pension Plan, *supra*, at p. 484.

In the instant case, the Defendant offered no proof of any kind that Plaintiffs ever made any admission or statement, or did **any act of any kind** which caused injury to the Defendant. Nor did the Defendant put forth **any evidence at all that anyone relied upon the actions of the Plaintiffs**. Far from establishing an estoppel by "clear, cogent and convincing evidence", the trial court granted summary judgment without a

shred of evidence on two of the three elements needed to establish a claim for estoppel.

Instead of requiring clear, cogent and convincing proof of any acts or statements made by the Plaintiffs, the trial court ruled that estoppel could be imposed upon them by virtue of **their silence**. The court based its ruling upon its belief that the cases of *Dorward v. ILWU, supra*, *Thomas v. Harlan, supra*, and *Alcorn Trailer, supra* stand for the proposition that silence is sufficient to create an estoppel in pais. An examination of those three cases demonstrates that none of them support such a rule of law. Indeed, a close review of the decisions shows that the cases in fact support the Plaintiffs' claim.

iii. *Dorward v. ILWU-PMA Pension Fund:* In its Reply Brief to the trial court, Defendant characterizes the *Dorward* case as standing for the proposition that “estoppel in pais may be implied from the silence of a person charged with a duty to speak” (Reply Brief at p. 11, CP 184). This is a total misrepresentation of the *Dorward* ruling. There is not a single word in that decision which discusses the proposition that “silence” can create an estoppel.

In *Dorward*, a longshoreman was employed in New York for ten years before moving to Seattle to engage in the same occupation. He continued to work for an additional 15 years as a longshoreman in this

state. After coming to Seattle, his union negotiated a pension program with the defendant pension plan trustees. The trustees negligently certified Dorward's ten years in New York as qualifying under the trust, when in fact they did not. Further, the trustees were charged with an affirmative duty to check everyone's years of qualification and notify any employee who did not qualify by mail of any rejected years. The trustees failed to so notify Dorward regarding his ten New York years. Dorward retired, and the trustees attempted to deny coverage for the ten years. Dorward sued, claiming estoppel.

The Supreme Court found that the trustees were estopped by virtue of “**actions** of the ILWU-PMA trustees in administering the plan.” *Dorward*, at page 488 (Emphasis added). The “actions” found by the Court were: 1) their negligence in accepting the ten years into the plan in the first place, and, 2) their failure to write Dorward a formal letter rejecting the New York years, as required by the Plan. There is not a single word in the decision discussing the proposition that the trustees' silence was a basis for estoppel. The word “silence” does not even appear in the decision. The Defendant's assertion in this case that *Dorward* stands for the proposition that silence can operate to create an estoppel was a misrepresentation to the Court. That the Court embraced *Dorward* as a basis for supporting that proposition is reversible error.

iv. *Alcorn Trailer City v. Blazer, supra:*

Similarly, the Defendant pointed to the case of *Alcorn Trailer City v. Blazer, supra*, as standing for the same proposition: “In *Alcorn*, the persuasive evidence of estoppel in pais was the defendant’s failure to protest when she had the opportunity and the resulting presumption by others **that her silence constituted consent.**” (Defendant’s Reply Brief at pages 10-11, CP 183-184) (Emphasis added).

As was the case with the *Dorward* decision, the *Alcorn* case does not discuss the issue of silence as creating an estoppel. In *Alcorn*, the defendant had leased property to the plaintiff for a number of years. When the lease expired, the defendant directed her attorney to prepare a new lease. The new lease contained a requirement that the plaintiff carry his own fire insurance (which he had not been required to do under the old lease). The plaintiff struck out this clause and returned it to the defendant. The defendant did not inform plaintiff that she refused to accept the deletion of the insurance clause, **but she went on to accept rent checks from the plaintiff.** The building burned down the following month. The plaintiff sued to recover the insurance proceeds under a policy which the defendant had purchased. The plaintiff claimed that defendant was estopped to claim that the policy was not for the benefit of both parties.

The Court of Appeals held that there were grounds for estoppel. It did not base this decision upon “silence” as Defendant asserts in this case. “Silence” as a basis for the estoppel is not discussed anywhere in the decision. Instead, it was the **act of the defendant in cashing the rent checks** that gave rise to the estoppel, *Alcorn*, at page 788. Had “silence” been the basis of imposing an estoppel, it is certain that the Court of Appeals would have discussed it directly, since it would have established a major departure from the traditional requirements (a statement or an affirmative act) for imposing an estoppel in pais.

Again, the trial court in the instant case relied upon *Alcorn* for the proposition that estoppel can be established by silence on the part of a party seeking relief. Its reliance was reversible error.

v. *Thomas v. Harlan, supra*: The most damaging case for Defendant is *Harlan*. Far from supporting its contention that silence can create an estoppel, the exact opposite was established in that case.

In *Harlan*, Harlan’s predecessor in interest, Mrs. Cline, constructed a fence across what she believed to be the northern boundary of her property. In fact, the fence was twenty feet short of the true boundary. Some years later, Farris erected a garage on the disputed twenty-foot strip. Mrs. Cline did not object to the construction of the garage. Thereafter,

plaintiff sought to obtain the strip, claiming that estoppel applied to the facts of the case. The trial court found for the plaintiff, stating its reason at page 517:

“ . . . when Farris commenced the erection of his garage in 1938 or early in 1939, she [Mrs. Cline] **stood by and permitted its erection without any complaint;**” (Emphasis added).

The Supreme Court focused on this claim of estoppel, based upon the fact that “Mrs. Cline allowed Ferris to build a garage on the strip . . .”, *Id.* The Court rejected the claim of estoppel at page 518. It was clearly confronted with the exact proposition advanced by Defendant in the instant case, that an estoppel arises if one property owner observes a neighbor constructing an improvement on his land, and he says nothing about it. Defendant’s words are virtually interchangeable with those of the plaintiff in *Harlan*:

. . . The Nickells heard, without objection, the developer describe the property as his own and command authority to eliminate the Nickells’ landscaping. The Nickells watched, without a word, as the septic drain fields for homes were constructed in the green belt. (Memorandum for Summary Judgment, page 8, CP 21)

Defendant claims that the Plaintiffs stood by and watched as the developer, Mr. Chopp, invaded their land and constructed a drain field on it, just as Mrs. Cline stood by and watched Mr. Ferris construct a garage on her land. Incredibly, it cites the *Harlan* decision as holding that, under such a fact pattern, such silence operates to create an estoppel, when in

fact the *Harlan* court ruled exactly the opposite. Mrs. Cline was not held to be estopped for standing by in silence while Ferris built his garage on her land. Yet Defendant asked the trial court to stand the *Harlan* ruling on its head--that it embraced a position that it clearly rejected. The trial court agreed, and joined Defendant by ruling that *Harlan* stood for the proposition that silence in such instance establishes an estoppel. In doing, the Court in this case committed reversible error.

3. CAN ESTOPPEL BE ESTABLISHED BY SILENCE?

a. **No Boundary Dispute Cases:** Professor Stoebuck states in *Real Estate Property Law*, "Sec. 8.23 Estoppel (in Pais)", 17 Washington Practice, Second Edition at pages 549-550:

Estoppel is a doctrine that crops up in a number areas of law. In some contexts the person who makes the representation will be estopped only if he knew it was false or if he had superior knowledge of the facts represented than the other person. **With boundary adjustments, it is clear that the neighbor who is estopped must make some kind of "representation" to the other neighbor** that indicates the boundary is where it is not or that induces or invites the neighbor to make improvements over the true line.

. . . . **It would be a dubious proposition to say that one neighbor is estopped simply by saying or doing nothing** There should have to be some **affirmative action**, whether verbal or otherwise, by the party estopped. (Emphasis added)

As Professor Stoebuck states, there are no Washington cases that apply silence as an estoppel to real estate boundary disputes. There are a few

cases outside of the law of real estate that do allow silence to create an estoppel. A review of those cases indicates that they would not apply to the facts in our present lawsuit.

In *Codd v. Westchester Fire Ins. Co.*, 14 Wash. 2d 600, 128 P.2d 968 (1942), the plaintiff had purchased fire insurance on his lumber mill. The fire insurance company decided to cancel the policy and returned it to plaintiff's insurance broker. The broker did not return the premium nor retrieve the policy as required by statute. The plaintiff knew the policy had been cancelled, but chose to remain silent regarding the return of the policy. The mill burned down. The plaintiff sued on the policy, and the insurance company defended, claiming that the plaintiff's silence operated as an estoppel, barring him from recovery.

The Supreme Court rejected this argument. It stated at pages 606-607, citing *Blanck v. Pioneer Mining Co.*, 93 Wash. 26, 159 P. 1077 (1916):

“Full knowledge of the facts is essential to create an estoppel by silence or acquiescence [citing cases]. . . . Mere silence, without positive acts, to effect an estoppel **must have operated as a fraud, must have intended to mislead, and itself must have actually misled.** The party keeping silent must have known, or had reasonable grounds for believing, that the other party would rely and act upon his silence. The burden of showing these things rests upon the party invoking the estoppel.” (Emphasis added)

Defendant offered no evidence of any kind which demonstrated that Plaintiffs “intended” to perpetrate a fraud or deliberately mislead anyone. Nor did it offer evidence of any kind that anyone was misled by its silence. Indeed no evidence of reliance was ever produced in the summary judgment proceeding in the Court below.

b. Knowledge is a Prerequisite: It is important to note that Plaintiffs did not know prior to 2005 that a boundary dispute existed. They believed that they owned the property in question (as indeed they did after 1995 under *El Cerito, supra*). They continued to treat the land as their own, unaware that a survey had established the 18-foot disputed strip. The issue of their lack of knowledge bears directly upon the law of estoppel.

31 C.J.S. “Estoppel”, Sec. 103, cites the general rule related to the requirement of knowledge at page 446:

The concept of estoppel contemplates that the party who is estopped knows the truth of the matter and misleads the other party. Thus, it is generally indispensable to the doctrine of equitable estoppel that the person claimed to be estopped has had full knowledge of the real facts at the time of his or her representation, concealment or other conduct relating thereto and alleged to constitute the basis of the estoppel. In other words, **a required element of equitable estoppel is that the party against whom the estoppel is alleged must have had knowledge at the time the representations were made that the representation were untrue.** (Emphasis added)

Cited with approval in *Strand v. State*, 16 Wash. 2d 107, 132 P.2d 1011 (1943).

In the case of *Waldrip v. Olympia Oyster Co.*, 40 Wash. 2d 469, 244 P.2d 864 (1952), the plaintiff was the widow of the president of the defendant, Olympia Oyster Company. For forty years, the company had paid taxes on a parcel of real estate that was in her husband's name. When he died in 1929, she inherited the land, but was unaware that she owned it. The company continued to pay the taxes. In 1949, she learned that she was the owner, and the company sought to obtain the land by estoppel, claiming that she had remained silent all through the years as to her ownership.

The Supreme Court rejected this argument at page 476, stating:

. . . The fact is, however, that she had no knowledge that she owned the land or that the record title stood in the name of her deceased husband. Should we assume, as appellant argues we should do, that she was chargeable with knowledge of the state of the record title, appellant was also so chargeable. **Where the parties have equal means of knowledge there can be no estoppel in favor of either.** (Emphasis added)

c. No Estoppel Where Both Parties Have Knowledge: This last quoted provision of the *Waldrip* decision has a direct bearing upon the case before the Court. It is clear that Plaintiffs had no idea that their land was within the surveyed boundaries of the proposed development. As such, no act of theirs can constitute an estoppel (no

knowledge, no estoppel). To avoid this consequence, the Defendant points to the incursion of Randy Chopp as placing the Plaintiffs on notice of the boundary dispute. But what is missing in their claim of estoppel is recognition of the fact that **Randy Chopp had the same information as the Nickells.**

In *Leonard v. Wn. Employers, Inc.*, 77 Wash. 2d 271, 461 P.2d 538 (1969) the Court states the rule at page 280:

Not all who rely upon another's conduct or statements may raise an estoppel. Rather, it is only those who have a *right to rely* upon such acts or representations .

..
In order to create an estoppel it is necessary that:
"The party claiming to have been influenced by the conduct or declarations of another to his injury, was himself not only destitute of knowledge of the state of facts, but was also destitute of any convenient and available means of acquiring such knowledge; **and where the facts are known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel.**"
Wencher v. Dorchester, 83 Wash. 118, 145 P. 197 (1915).

See also, *Lybert v. Grant County*, 141 Wash. 2d 29, 1 P.3d 1124 (2000), where the Court states at page 35:

Where both parties can determine the law and have knowledge of the underlying facts, estoppel cannot lie.

Here the developer, Randy Chopp, entered upon the Nickells' land and asserted that the development owned the area where he was about to excavate a portion of the septic drain field. He proceeded to dig up the

Nickells' lawn in order to accomplish this task. As the developer of the project next door, he must have had knowledge of where the surveyed line was, since a survey is a requirement of all such developments. But Southview argues that this event was sufficient to inform plaintiffs that a boundary line dispute existed, and they had a duty to act, but chose instead to remain silent. Missing from their analysis is the very clear fact that Mr. Chopp possessed the same exact knowledge. Indeed, as the project developer, he had an affirmative duty to notify Pierce County of the issue. This is especially so in light of the rule applicable to persons possessing "special knowledge":

Special knowledge or skill by the party asserting estoppel should be considered in determining the reasonableness of whether or not to apply the doctrine. *Burkey v. Baker*, 6 Wash. App. 243, 492 P.2d 563 (1971); *Fitzgerald v. Neves*, 15 Wash. App. 421, 550 P.2d 52 (1976).

Mr. Chopp was the developer. He clearly understood the implications of the Nickells' maintenance of the disputed strip. He must have recognized that if their claim of adverse possession were known, his development was at risk of losing lots due to the loss of the greenbelt. It was he who remained silent. For Southview to come into court and claim that the Nickells should be estopped because they didn't know what to do is to sweep the acts of Mr. Chopp with all his superior knowledge under the judicial carpet.

This is a summary judgment proceeding. All facts **and inferences** are to be construed in the light most favorable to the Plaintiffs. There can be no question but that Mr. Chopp possessed the same or more information as did the Nickells regarding the status of the ownership of the disputed strip. As such, estoppel cannot be asserted by Defendant in this case.

d. “Unclean Hands”

Estoppel is an equitable doctrine and is governed by the rules of equity. “He who seeks equity must do equity.” *Seattle v. P.B. Investment*, 11 Wash. App. 653, 524 P.2d 419 (1974).

The issue with respect to Mr. Chopp’s knowledge raises very clear inferences from the record. The development had been under way for nearly 12 years by the time Mr. Chopp entered upon the Nickells’ land. A survey had been undertaken when the development was commenced, but strangely, no mention was made of the obvious existence of the Nickells’ adverse use of the land (see the Declaration of surveyor Jerold O’Hare to the effect that such information is usually noted on a survey). Additionally, no centerline stakes were ever placed on the portion of the land maintained by the Nickells which would have given them notice of the boundary dispute. For 12 years, the developers remained silent, though they must have been aware of the Plaintiffs’ use of the disputed strip

(“One is charged with seeing that which is there to be seen.” *Niven v. MacDonald*, 72 Wash. 2d 93, 431 P.2d 724 (1967)).

Their reason for remaining silent is found in the final plat approval, and the opinion of Hearing Examiner Causseaux. He noted the case of *Halverson v. Bellevue*, 41 Wash. App. 457704 P.2d 1232 (1985) to the effect that where a claim for adverse possession is known, a city or county is prohibited from approving a final plat until the issue is resolved. It was this ruling that likely influenced the developers in our case to remain silent as to the Nickells’ potential claim for adverse possession. Their entire development was at risk if the true facts were laid before the Hearing Examiner.

The fact that the developers were aware or should have been aware of the potential of an adverse possession claim by Plaintiffs, and that the developers allowed the plat process to continue to completion, raises serious issues with respect to Defendant’s position in this case. At the very least, an issue of fact exists as to whether the developers deliberately withheld this vital information from the Hearing Examiner. If they did so, as it must be presumed in this case that they did, then they are guilty of improper conduct.

It is a well-known maxim that a person who comes into an equity court must come with clean hands. . . .

Equity will not interfere on behalf of a party whose conduct in connection with the subject matter or transaction in litigation has been unconscientious, unjust, or marked by the want of good faith, and will not afford him a remedy. *Income Investors Inc. v. Shelton*, 3 Wash. 2d 599, 101 P.2d 973 (1940) at page 602.

Further, the acts of Chopp and the other developers are binding upon their successors in interest:

This maxim [the “clean hands” doctrine] applies not only to the participants in the transaction involved, but also to parties claiming through or under them.

30A C.J.S. “Equity” Sec. 118 at page 390.

e. Delay in Filing Suit: Defendant asserts that estoppel should lie because the Nickells did not take immediate action when Chopp first entered upon their land. The case of *Roy v. Cunningham*, 46 Wash. App. 409, 731 P.2d 526 (1986) is directly on point on this issue.

In *Roy*, an old fence line was 47 feet too far to the east of the property line between properties owned by Roy and several neighbors. One of the neighbors, Meyers, removed the fence along his portion of the property line and placed a new one on the true surveyed line. Roy sent Meyers a letter demanding that he restore the old fence line within 10 days or he would file suit. Meyers did not restore the fence, and Roy did not follow through on his threat to sue.

Two years later, Meyers' neighbors to the north took down their portion of the old fence. It was another full year before Roy sued all neighbors to quiet title to the old fence line under a claim of adverse possession. Like Defendant in this case, Meyers defended, claiming Roy was estopped because he had failed to follow through on his threat to sue, and in reliance thereon, Meyers had improved and sold the lot to the neighbor to the north.

The Court of Appeals resolved this claim at page 416:

It can reasonably be concluded that the Roys did not deem a lawsuit necessary until after September 1982 when the Cunninghams, who were purchasing the northernmost parcel on contract, also removed their fence to the true boundary line. Bearing in mind the period of time during which a person may legally bring a lawsuit after a cause of action arises regarding real property, **failure to sue immediately after an assertion of a possessory interest in land does not amount to a representation that a claim has been abandoned.** Moreover, the Meyers' subsequent improvement and conveyance despite actual notice of Roys' claim were undertaken without requisite "right to rely". Estoppel was therefore not established.

In the instant case, Chopp came onto Plaintiffs' land in 2005, presumably after the plat had been approved (because he would not have been allowed to construct septic systems before plat approval). His incursion ended up being only a few inches onto the Nickells' land. However, it was not until 2008, when a neighbor announced that the Nickells' landscaping belonged to them that they took action (by filing this lawsuit that same year). The

Plaintiffs were unaware up to that point that the claimed boundary line extended as far as it did.

The Nickells had ten years in which to file suit to prevent Southview's adverse possession of the disputed strip from ripening to full title. Under the *Roy* decision, they were fully within their right in waiting until 2008 to file this action. As in the *Roy* case, estoppel does not lie in this lawsuit.

f. Knowledge Defeats Defendant's Claim of Estoppel: As noted above, Defendant is charged with the same knowledge as that of its predecessors in interest. Yet counsel for Defendant has repeatedly sought to characterize the present homeowners who comprise the Defendant Association as "11 innocent homeowners" ("Conclusion", Defendant's Reply Brief, page 13, CP 186). This is apparently premised upon the supposition that had Plaintiffs made their claim for adverse possession known to the County, the homeowners would at the very least been able to decide if they wished to purchase their homes or not.

This argument fails for several reasons.

i. The Nickells did not know of the boundary issue until **after** the plat had been approved. The final plat was issued on July 15, 2005. Chopp could not have legally begun excavation of the septic system that informed the Nickells of the issue until after the plat had

been approved. Since the plat had been approved, they would not have been able to stop the approval process by raising the adverse possession issue.

ii. Even if the Nickells had raised the issue in 2005 **before** the final plat was approved, it would not have prevented the plat from being approved. All that would have happened is that their claim for possible adverse possession would have been noted on the final plat. It is worth noting that another neighbor had been actively pressing a claim for adverse possession for years before the final plat was approved. All that was done in that case was that his claim ended up being noted on the final plat (see Final Plat Approval of Hearing Examiner Causseaux, page 9, CP 51-62), per the requirement of R.C.W. 58.17.165.

Southview is apparently arguing that it has been injured by virtue of the fact that the plat did not contain such a notation. But that ignores the fact that the use of the disputed strip by Plaintiffs was done in a continuous, open and notorious manner for each of the homeowners to see. They can claim no better position than any purchaser of land who is charged with recognizing that an abutting landowner is maintaining a portion of the land they seek to buy. If the homeowners were permitted to turn a blind eye to such obvious use of their land, then the entire doctrine of adverse possession would be rendered meaningless. They cannot be

heard to claim that the absence of a notation in the final plat somehow relieves them of the responsibility of seeing that which was there to be seen: that an abutting landowner is mowing their lawn.

“In order to create an estoppel it is necessary that:

“The party claiming to have been influenced by the conduct or declarations of another to his injury, was himself not only destitute of knowledge of the state of facts, **but was also destitute of any convenient and available means of acquiring such knowledge, and where the facts are known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel.**”

Geoghegan v. Dever, 30 Wash. 2d 877, 893, 194 P.2d 397 (1948). (Italics in the original, bold added)

D. CONCLUSION

Plaintiffs Bob and Karen Nickell have maintained the disputed strip from the very day they moved onto their property in April 1989 to the present. By June of 1995, they obtained full title to that land by adverse possession, *El Cerrito, Inc. v. Ryndak, supra*. As such, their title to said land “cannot be divested by acts other than those required where title was acquired by deed.” *Id* at page 555.

The Nickells had no idea that there was a boundary dispute regarding the disputed strip until the developer entered onto their land after the final plat had been approved. There can be no estoppel prior to that point because knowledge on their part is an indispensable element of estoppel in pais, *Strand v. State, supra*. After the Chopp incursion,

Plaintiffs cannot be estopped to claim their rights to the land because Chopp possessed the same knowledge as did the Plaintiffs regarding the status of the property:

“where the facts are known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel.”

Geoghegan v. Dever, supra.

Defendant is charged with the same knowledge as Chopp. *Id.*

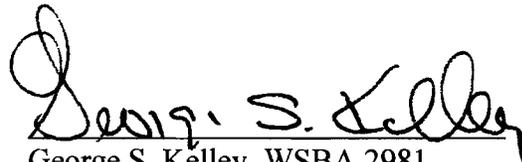
Plaintiffs cannot be held to have created an estoppel by virtue of their silence because such silence “must have operated as a fraud, must have intended to mislead, and itself must have actually misled.” *Blanck v. Pioneer Mining Co., supra.* It was Defendant’s burden to establish such facts. Far from doing so, Defendant offered no proof of any “statement or act” of Plaintiffs, nor any proof that it “relied” on any statement or act of the Nickells.

Further, viewing the facts most favorably to Plaintiffs, together with all reasonable inferences flowing from those facts, Chopp’s actions must be characterized as having “unclean hands”, and hence, estoppel will not lie. *Income Investors Inc. v. Shelton, supra.* Chopp’s unclean hands are imputed to Defendant who received its titles through him, 30A C.J.S. “Equity” Sec. 118 at page 390.

The individual members of Defendant Association cannot claim Plaintiff is estopped to claim title to the strip, since they have had access to the knowledge of Plaintiffs' claims for adverse possession by virtue of the continuous, open and notorious use that the Nickells have made of the disputed strip for over a quarter century.

The Nickells have no intention of requiring any substantive change in the status quo of the disputed strip. They intend to maintain it as a "greenbelt" per the designation of the plat. What they seek is that the title be quieted in their name so that they can maintain the land as their own, and prevent any of the neighboring homeowners from coming onto the property and cutting down trees or shrubbery in order to enhance their view of Puget Sound.

Respectfully submitted this 7th day of January 2011.

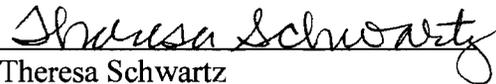


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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on January 7, 2011 I caused service of the foregoing pleading via U.S. mail on:

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Theresa Schwartz

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