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DIVISION II
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STATE OF WASHINGTON
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No. 41128-8
COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ROBERT NICKELL and KAREN NICKELL,

Appellants,

v.

SOUTHVIEW HOMEOWNERS ASSOCIATION,

Respondent.

APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Frank E. Cuthbertson
Cause No. 08-2-15199-4

REPLY BRIEF OF APPELLANTS

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I. RE: CLAIM THAT PLAINTIFFS HAVE LOST TITLE TO THEIR LAND:

It is apparent from a reading of Respondent Southview Homeowners Association's Response Brief that it has failed to grasp a fundamental principal of the doctrine of adverse possession: that title to a disputed parcel of land ripens into fee simple title upon the tenth anniversary of the adverse possession. Southview states at page 12:

If the Nickells had filed a claim for adverse possession in 1995 and proved facts sufficient to support their claim, title could have been quieted in them then. They would have appeared on title as owners of the land. But they did not.

And, at pages 16-17:

Southview is not asserting estoppel to take land titled to the Nickells Rather, Southview is defending its record title and attempting to prevent the Nickells from taking its land.

What the Association fails to understand is that as of June of 1995, the Nickells became the owners of the disputed strip in fee simple absolute. As such, their ownership cannot be divested except by acts sufficient to convey title of that land to another.

The case of *El Cerrito, Inc. v. Ryndak*, 60 Wash. 2d 847, 376 P.2d 528 (1962) identifies the law on this issue at page 555:

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).
(Emphasis added)

For the purpose of this summary judgment review, the following fact is to be regarded as true: that by the end of June, 1995, the Nickells obtained fee simple title to the disputed strip. After that date, the land belonged to them, and not to Southview or its predecessors in interest. The fact that the Nickells did not pursue a quiet title action until 2008 does not alter this fact.

The case of *Mugaas v. Smith*, 33 Wash. 2d 429 (1949) which is cited with approval in *El Cerrito, supra*, is directly in point. In *Mugaas*, the plaintiff had adversely possessed a parcel of land (due to an erroneously placed fence line) for sufficient time so that, by 1910, she had obtained title to it. After 1910, the fence deteriorated to such an extent so that, by 1928, no sign of it remained on the property. In 1941, the Defendants purchased their land which included the disputed parcel within its legal description. They built their home on the disputed parcel. Mrs. Mugaas brought a quiet title action to affirm her ownership in the land. The courts held that she had obtained full title in 1910, and even though she had never quieted title to it before 1949, she still remained the legal owner. The Supreme Court stated that Mrs. Mugaas was “not required to keep her flag [of adverse possession] flying for ever”, citing language

from a Pennsylvania case, *Schall v. Williams Valley R. Co.*, 35 Pa. 191, 204.

The *Mugaas* decision is directly in point here. Mrs. Mugaas waited 39 years to bring her action to quiet title, yet the delay did not alter her ownership of the land in question. In the present case, the Nickells acquired full title to the disputed strip in 1995. It is of no consequence that they did not bring their action until 2008--the land still belonged to them. This raises a critical point for this review: title acquired by adverse possession is identical to title by deed--it cannot be transferred by any means except by a normal transfer of title.

Title so acquired by the adverse possessor cannot be divested by acts other than those required where title was acquired by deed. *El Cerrito, supra*.

“It is elementary that where title has become fully vested by [adverse possession], it cannot be divested by **parol abandonment or relinquishment or by the verbal declarations [of the adverse possessor], nor by any other act short of what would be required in a case where his title was by deed.**” *Mugaas, supra* at 431, quoting *Towles v. Hammilton*, 94 Neb. 588, 143 N.W. 935. (Emphasis added)

Southview has completely lost sight of this rule of law. Instead, it seeks to convince this Court that title should now be removed from the Nickells under a flurry of varying rationales, none of which constitute a **legal basis** for transferring ownership in the land to Southview.

A. Southview’s “Surrender Doctrine”:

Throughout its brief, Southview urges the Court to adopt a new rule of title forfeiture, repeatedly asserting¹ that the Nickells “*surrendered* control of the land”, as though there exists some “Surrender Doctrine” by which a person could be divested of his or her property by failing to immediately object to an incursion onto his or her land. No such doctrine exists, and it remains incumbent upon Southview to come forward with a **legal basis** for its assertion that Nickells have forfeited title to their land.²

¹ Brief, page 10: “. . . the Nickells’ act of surrendering the land to the developer . . .”; Brief, page 13: “. . . the Nickells’ surrender of the land was monumentally significant.”; and “. . . the Nickells’ surrender of the land at that moment. . .”; and “they surrendered control to him . . .”; Brief, page 14: “When the Nickells surrendered the land to Chopp, they also surrendered the land to the jurisdiction of Pierce County . . .” and “. . . when the Nickells surrendered the land to Mr. Chopp, they also surrendered it to Pierce County’s jurisdiction . . .”; and “the Nickells deceived Mr. Chopp and Pierce County by surrendering control of the land . . .”; Brief, page 15: “. . . because the Nickells surrendered control of the disputed strip . . .”; Brief, page 17: “Thereafter, they *surrendered* control of the land to Mr. Chopp.”; and “. . . their additional act of submission and surrender”; and “Their acts of submission and surrender . . .”; and “The evidence of surrender is clear . . .”; Brief, page 18: “The evidence supporting the Nickells’ surrender of the land to Mr. Chopp . . .”; Brief, page 19: “. . . the Nickells willfully and intentionally surrendered the land to the control of the developer . . .”; Brief, page 20: “. . . the Nickells silently surrendered control of the land . . .”; and “Their surrender and failure to disclose . . .” Brief, page 21: “each relied on Nickells’ surrender . . .” brief, page 25: “. . . the Nickells’ concealment of fact and surrender of the land.”; Brief, page 31: “When septic systems were installed on the disputed strip, the Nickells surrendered.”

² It is difficult to understand Southview’s repeated assertion that the Nickells “surrendered” title to their land by not objecting immediately to Chopp’s incursion. Chopp was on the land for a single day. Thereafter, the Nickells repaired the damage he had done to their lawn and went on to treat the land as their own (by mowing, fertilizing, trimming the shrubbery, watering, planting trees, etc.). Chopp was on the land in 2005. Thereafter, the Nickells continued to maintain it for the next six years. If the Nickells are deemed to have “surrendered the land” by not objecting to Chopp’s incursion, then Southview must be deemed to have surrendered it back by not contesting the Nickells’ continued possession and management of it for the past six years.

B. The Greenbelt Statute, R.C.W. 36.70A.165:

Southview's next attempt to extinguish title to Nickells' land comes in the form of R.C.W. 36.70A.165 which provides that land within a dedicated greenbelt cannot be acquired by adverse possession. This assertion fails for several reasons:

1. Statute is not retroactive: The statute in question was not enacted until 1997, two full years after Nickells had acquired title to their land. The case of *Miebach v. Colasurdo*, 102 Wash. 2d 170, 685 P.2d 1074 (1984) states the relevant rule applicable to this circumstance at page 180:

When a retroactive application is not expressly provided for in a statute, as here, generally, it should not be judicially implied. *Everett v. State*, 99 Wash. 2d 264, 270, 661 P.2d 588 (1983). Statutes generally operate prospectively unless remedial in nature. A statute is remedial when it relates to practice, procedure or remedies **and does not affect a substantive or vested right.** *Johnston v. Beneficial Management Corp. of Am.* 85 Wash. 2d 637, 641, 538 P.2d 510 (1975). (Emphasis added)

In the instant case, title to the land in question **was vested** in Nickells two years before the statute was adopted. Since the statute cannot be retroactively applied, it cannot affect the ownership of their land.

2. The greenbelt did not come into existence for another eight years: The statute prohibits taking a greenbelt by adverse possession. But in this case, Nickells had already obtained the land in

question. It simply cannot be said that they were claiming adverse possession of an existing greenbelt--their adverse possession had come to an end ten full years before the greenbelt ever came into existence.

C. There are only a limited number of ways a person can be lawfully divested of his or her title to real estate:

1. By Deed: Clearly, Nickells have never deeded any portion of the disputed strip to anyone;

2. By Act of Lawful Authority: Title may pass by sheriff's sale, bankruptcy decree, foreclosure or eminent domain. None of those is present in this case.

3. By "Boundary Adjustment Doctrines": *Lamm v. McTighe*, 78 Wash. 2d 587, 591, 434 P.2d 565 (1967) identifies the ways in which title to land may be lost in a boundary dispute:

Boundaries between adjoining properties, at odds with the true boundary as revealed by subsequent survey, may be established, under appropriate circumstances, through the following doctrines, all of which have been recognized in this state: (1) Adverse possession [citing cases]; (2) parol agreement of the adjoining landowners [citing cases]; (3) estoppel in pais [citing cases]; (4) location by a common grantor [citing cases]; and/or mutual recognition and acquiescence in a definite line by the interested parties for a long period of time.

These will be examined in order of elimination:

a. By Adverse Possession: The one and only time anyone ever entered on to the disputed strip was on the day Chopp dug up Nickells' lawn. That was just three years before Nickells brought this action. Clearly, adverse possession does not exist in this case (Chopp's possession lasted for a single day, so it was not "continuous"; Nickells have continued to maintain the strip, so it was not "exclusive"; and, the ten year statute has yet to run). Accordingly, Nickells have not lost their title to the land by way of adverse possession.

b. Parol Agreement of the Adjoining Landowners: *Johnston v. Monahan*, 2 Wash. App. 452, 469 P.2d 930 (1970) identifies the minimum requirements of this doctrine at page 457:

(1) There must be a bona fide dispute between two coterminous property owners as to where their common boundary lies upon the ground or else both parties must be uncertain as to the true location of such boundary; (2) the owners must arrive at an express meeting of the minds to permanently resolve the dispute or uncertainty by recognizing a definite and specific line as the true and unconditional location of the boundary; (3) they must in some fashion physically designate that permanent boundary determination on the ground; and (4) they must take possession of their property by such occupancy or improvements as would reasonably give constructive notice of the location of such boundary to their successors in interest.

Clearly, every element of Parol Agreement is missing in the present case.

There has never been a meeting of the minds between the parties as to

anything, let alone an agreed upon common boundary, and there is no monument in place to memorialize such an agreement.

c. Location by a Common Grantor: There is no common grantor in this case, nor any line designated by such a grantor. This doctrine does not apply.

d. Estoppel in Pais: This leaves estoppel in pais as the only possible basis by which Southview can claim that Nickells have lost title to their land. But, as was extensively demonstrated in Appellants' opening brief, estoppel in pais fails in this case for numerous reasons:

(1) Silence: In the court below, Southview claimed that Nickells were estopped because they stood silent and did not object when Mr. Chopp entered their land and dug a drain field in a portion of their lawn. It convinced the trial judge that the cases of *Dorward v. ILWU-PMA Pension Plan*, 75 Wash. 2d 478, 452 P.2d 258 (1969), *Alcorn Trailer City v. Blazer*, 18 Wash. App. 782, 572 P.2d 15 (1977), and *Thomas v. Harlan*, 27 Wash. 2d 512, 178 P.2d 965 (1947) stood for the proposition that estoppel in pais could be based solely upon the silence of the party sought to be estopped. The trial court adopted this assertion and ruled for summary judgment based upon that interpretation of those three cases. In Nickells' opening brief, it was demonstrated that

those cases **had nothing to do with the issue of silence as an estoppel,** and in fact that **the cases supported Nickells' claim to the disputed strip.** They also demonstrated that in order for silence to operate as an estoppel,

“it must have operated as a fraud, must have been intended to mislead, and itself must have actually misled.” *Blanck v. Pioneer Mining Co.*, 93 Wash. 26, 159 P.2d 1007 (1916). (Emphasis added)

(2) **Southview's New Interpretation of the *Dorward, Alcorn and Thomas* Cases:** Having had its “silence” assertion thoroughly discredited, Southview now seeks to put a new spin of the trio of cases. Instead of asserting that the cases stand for the proposition that silence can create an estoppel, Southview now asserts that the cases stand for the proposition that estoppel can be “implied” from the Nickells' non-action. What is missing from this analysis is the same thing that was missing before: that estoppel requires “an admission, statement or act” on the part of the Nickells, none of which exist in this case. The Association continues to ignore the facts of its own cited cases: that it was *the act* of cashing the check in *Alcorn* that established the estoppel, and *the act* of not registering the hours of the plaintiff and not sending him a notice as required by contract in *Dorward* that established the estoppel. In

the case before the Court, there was no “act” of any kind to create an estoppel.

(3) **Knowledge:** Southview must show that the Nickells knew of the existence of a boundary dispute, *Waldrip v. Olympia Oyster Co.*, 40 Wash. 2d 469, 244 P.2d 864 (1952). The evidence in this case is unequivocal, the Nickells had no idea there was a boundary issue until 2005, a full ten years after they had taken title by adverse possession.

(4) **Chopp Knew of the Adverse Claim of the Nickells:** Most fatal to Southview’s claim of estoppel is the rule that:

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

Leonard v. Wn. Employers, Inc., 77 Wash. 2d 271, 461 P.2d 538 (1969) at 280, citing *Wencher v. Dorchester*, 83 Wash. 118, 145 P.2d 197 (1915).

In its Response Brief, Southview attempts to gloss over the glaring fact of Chopp’s knowledge with self-contradictory positions: They state at page 12:

It must be presumed that Mr. Chopp, whenever he bought the property, could not see the use being made of the disputed strip [Brief Footnote 1: The thickness of the vegetation is supported by the record.]

But then, at pages 13-14, the following is stated:

Although Mr. Chopp seemed to know the landscaping belonged to the Nickells, there is no evidence indicating knowledge on his part as to how long the Nickells maintained that landscaping or that the Nickells may possess an adverse possession claim.

Southview's claim in this regard is simply ludicrous. It would have this Court believe that Mr. Chopp, a professional real estate developer, drove his bulldozer (ostensibly through an impenetrable wall of blackberries) onto a well-manicured lawn, announced to the Nickells that their lawn and landscaping belonged to him, and yet he did not realize that there existed a possible claim for adverse possession. How, it must be asked, did the extensive landscaping come into existence? Did it just spontaneously appear from the thicket of blackberries?

When a purchaser has notice of facts sufficient to put an ordinarily prudent person on inquiry, the purchaser is on notice of all defects in title or equitable rights of others that the inquiry would have uncovered.

M.K.K.I., Inc. v. Krueger, 135 Wash. App. 647, 661, 145 P.3d 411 (2006) citing *Miebach v. Colasurdo*, 102 Wash. 2d 170, 175-6, 685 P.2d 1074 (1984).

Fortunately, the Court of Appeals need not make a factual determination on this point. This is a summary judgment action. Nickells are entitled to have all facts and **all inferences** construed in a light most

favorable to them. The clear inference from this evidence is that Chopp immediately recognized that the Nickells possessed a formidable claim for adverse possession. This knowledge on his part prevents him, and those seeking title through him, from asserting estoppel in pais.

The above-quoted statement from *M.K.K.I.*, *supra*, applies with equal force to the individual homeowners of Respondent Association. Each of them is charged with seeing that which was there to be seen--that a neighbor was mowing their greenbelt. That placed each of them on inquiry that there existed a possible adverse possession claim. If the homeowners were permitted to turn a blind eye to such "open and obvious" use of their land by a neighbor, then the entire doctrine of adverse possession would be rendered meaningless. But again, this is a review of a summary judgment action. The inference of knowledge on the part of the homeowners is to be construed in the Nickells' favor. Such knowledge defeats Southview's claim of estoppel in pais.

D. Southview's Position Has the Effect of Converting a Land-Use Process Into An Act of Eminent Domain:

It is the entire thrust of Southview's case that because the Nickells did not raise their claim on the disputed strip during the platting process, their title to their land was forfeited when the Hearing Examiner approved the plat. This is palpably false. All that would have happened if the

Nickells had brought their claim to the attention of the Hearing Examiner is that it would have been noted on the final plat. That is all. Southview's assertion that the Nickells could have stopped the final plat from being issued ("if any person claimed an interest in the platted land, *the County could not approve the plat application . . .*" Resp. Brief, p.2) is simply false. By claiming that the Nickells' failure to act should somehow operate to divest them of their title to their own land is to vest in the hearings process a power it does not have: to condemn private property. There is no statute, ordinance or case law that invests the hearings process with such extraordinary authority.

E. Southview Did Not Submit Any Evidence:

Estoppel in pais requires proof by "clear, cogent and convincing" evidence of each of its elements. Nowhere in Southview's summary judgment submission is there to be found a single affidavit or declaration from anyone asserting that they relied upon anything the Nickells did, or that anyone relied on the absence of a notation in the plat regarding the disputed strip. All that was presented to the trial court **were statements of counsel** to the effect that Chopp, the County and the homeowners all relied on the Nickells' failure to call attention to their claim. What is clear, cogent and convincing is that Southview's summary judgment submittal was missing an essential element: evidence.

II. “THE VACANT LANDS DOCTRINE”:

In the court below, the trial judge granted summary judgment based upon one theory only: that the Nickells were estopped by their silence from claiming title to their land. Confronted with the inherent weakness of that position on appeal, Southview now asks the Court to approve its summary judgment upon a completely separate basis: that the “vacant lands doctrine” from the law of prescriptive easements should be transported into the law of adverse possession--that Nickells’ claim of adverse possession should be denied because of the *presumption* of permissive use found in that doctrine prevents them from acquiring title.

A. *N.W. Cities Gas Co. v. Western Fuel Co.*, 13 Wash. 2d 75, 123 P.2d 75 (1942): “The Vacant Lands Doctrine”

Southview is asking the Court to rule that a provision in the law of prescriptive easements, the “Vacant Lands Doctrine”, should be applied to the law of adverse possession. The thrust of the doctrine is that *prescriptive use* of an undeveloped parcel of land is *presumed* to be by permission *unless demonstrated to be adverse*. This attempt fails for several reasons: 1) the underlying rationale (that prescriptive use is sporadic) does not hold up where the use made of the land involves permanent improvements; 2) the “Vacant Lands” presumption is overcome by evidence of open and notorious use; 3) Southview’s land was

involved in *active development*, and cannot be considered vacant land; and
4) Southview's predecessors in interest had actual, if not imputed knowledge of the Nickells' use.

1. Vacant Lands Rationale Not Applicable: There is a critical distinction between prescriptive use and adverse possession which applies directly to the applicability of the vacant lands doctrine: prescriptive use is sporadic and leaves no permanent evidence of its existence. By contrast, adverse possession leaves *permanent evidence* of its existence on the ground. A person who owns "wild, unoccupied prairie lands" (a description of an example of vacant lands found in *N.W. Cities* at page 86) may not be aware of occasional trespass upon those lands. Hence, this was the rationale for creating the vacant lands rule. But this is not the case where someone has entered upon the land, planted and maintained a lawn and landscaping, installed an underground watering system and kept a wall of blackberries at bay over a course of decades. There may be many areas where the underlying rationales for prescriptive easements and adverse possession make them interchangeable, but that is not the case in this instance.

2. Presumption Is Overcome in this Case:
Southview's reliance on *N.W. Cities, supra*, is without merit: a close

reading of the case demonstrates that *it rejects the claims being made by Southview* in the present action.

While the court in *N.W. Cities* did lay down the principle that one who seeks to assert a prescriptive easement across undeveloped land is presumed to have entered the land with permission, this rule only creates a **presumption**. The Court went on to make it very clear that such presumption can be overcome by evidence of adverse and hostile use:

. . . the principle which we now adopt, is that such prescriptive rights **may be obtained when the facts and circumstances are such as to show that the user was adverse and hostile to the rights of the owner . . .** (*N.W. Cities, supra* at 87, emphasis added)

In other words, the presumption of permission can be overcome by evidence of adverse and hostile use. In *N.W. Cities*, that is exactly what happened. The Court found that the adverse claimant had made out a case for prescriptive easement despite the presumption that his initial use was permissive. Southview would have this Court adopt the Vacant Lands presumption as a rule of law in adverse possession cases, then apply it as though it were a **conclusive presumption**, sufficient in and of itself to justify a grant of summary judgment. It asks the Court to turn a blind eye to the overwhelming evidence of adverse possession by the Nickells, evidence which must be considered “in a light most favorable” to them, *Bader v. State*, 43 Wash. App. 223, 225, 716 P.2d 925 (1986), and which

evidence thoroughly overcomes any presumption engendered in the Vacant Lands Doctrine.

3. Land Was Not “Undeveloped”: It can hardly be claimed that the land in question was “vacant, open, unenclosed and unimproved”, *N.W. Cities* at 85-6. From 1993 onward, the land in question was involved in the process of having a high-density plat approved for 13 homes. In pursuance of that plat, Southview’s predecessors in interest commissioned a survey of the land in question, a survey which normal practices would have specifically identified the existence of the Nickells’ extensive landscaping. This is hardly an instance of “wild, unoccupied prairie lands”, but rather a suburban environment where multi-million dollar homes were being constructed on a regular basis throughout the area.

4. Knowledge Again Defeats Southview’s Claims:

. . . if use of another’s land is open, notorious and adverse, the law **presumes knowledge or notice in so far as the owner is concerned. Of course, if the owner knew of the adverse user, no further proof as to notice is required.** (Emphasis added) *Hovila v. Bartek*, 48 Wash. 2d 238, 241-2, 292 P.2d 877 (1956).

Southview readily admits that the survey was performed in 1993, and that, twelve years later, Chopp entered onto Nickells’ land and recognized the fact that they had been maintaining extensive landscaping on the disputed

parcel. Just as was the case with estoppel in pais, such knowledge defeats their claims under the Vacant land Doctrine as well.

5. Southview's Citation to Additional Cases Defeats

Its Claim to Summary Judgment: Southview directs the Court's attention to numerous cases wherein *N.W. Cities* has been cited with approval in subsequent appellate decisions involving adverse possession. This is apparently in an effort to convince the Court that the Vacant Lands Doctrine should be adopted as a principle in the law of adverse possession, and not just restricted to the law of proscriptive easements. But the citations in question **have nothing to do with the Vacant Lands Doctrine**. Instead, each time *N.W. Cities* is cited in the cases identified by Southview, it is for the principle that a determination of whether a use is permissive or adverse **is a question of fact**³. It would have this Court affirm a summary judgment based upon authority which says that such determination is to be reserved for the trier of fact.

³ *Miller v. Anderson*, 91 Wash. App. 822, 828, 964 P.2d 365 (1998): "Whether use is adverse or permissive is a question of fact."; *Peeples v. Port of Bellingham*, 21 Wash. App. 821, 824, 588 P.2d 757 (1978): "Whether actions are open, notorious and hostile is a question of fact to be decided by the trier of fact."; *Hunt v. Matthews*, 8 Wash. App. 233, 237, 505 P.2d 819 (1973): "Whether actions are open, notorious and hostile is a question of fact to be decided by the trier of fact."; *Diel v. Beekman*, 7 Wash. App. 139, 150, 499 P.2d 37 (1972): "Whether the element of possession is adverse or permissive has specifically been held to be a question of fact."; and, *Spear v. Basagno*, 3 Wash. App. 689, 690, 477 P.2d 197 (1984): "Whether use is adverse or permissive is a question of fact."

III. *Proctor v. Hunnington*:

Southview raises the recent Supreme Court decision of *Proctor v. Hunnington*, 169 Wash. 2d 491, 238 P.3d 1117 (2010) for the proposition that the Association should be relieved of the harsh consequences of “rote enforcement of real estate doctrine”, Resp. Brief at page 25. It asks this Court to adopt the *Proctor* test (identified as the “liability rule”) for imposition of equitable relief on its behalf:

[A] mandatory injunction can be withheld as oppressive when, . . . it appears that: (1) the encroacher did not simply take a calculated risk, act in bad faith, or negligently, willfully or indifferently locate the encroaching structure; (2) the damage to the landowner was slight and the benefit of removal equally small; (3) there was ample room for a structure suitable for the area and no real limitation on the property’s future use; (4) it is impractical to move the structure as built; and (5) there is enormous disparity in resulting hardships.

Proctor, at 500.

Southview’s flight to the safety of *Proctor* fails for several reasons:

1. *Proctor* is a case regarding **ejectment**. The Nickells have not requested ejectment in this case--they seek simply to have title to their land quieted in their name. In this regard, the Supreme Court specifically noted that its decision in *Proctor* did not involve the issues in this case: “The adverse possession and estoppel claims are not before us on review.”

Footnote 2, page 495.

2. The acts of Mr. Chopp constitute a violation of the first requirement of the *Proctor* test: It can hardly be said that Chopp did not “take a calculated risk, act in bad faith, or negligently, willfully, or indifferently” pursue the plat in the face of obvious knowledge of the Nickells’ claim. Again, this is a summary judgment review. Such inferences regarding Chopp’s actions are to be presumed in a light most favorable to the Nickells.

3. Assuming that equitable as opposed to legal and evidentiary principles govern this appeal, the Court might consider the following:

a. Plaintiff widow seeks to have title quieted in her name so that she can continue to use the land for which she and her husband have cared for a quarter of a century. She seeks to prevent the homeowners association or any of its members from coming onto this land and cutting down her trees in order to enhance their views of Puget Sound. She seeks to prevent the members of the homeowners association from coming onto to her land to dispose of their landscaping waste. She seeks to prevent the members of the homeowners association from interfering in any way with her continued maintenance of the land in the manner she and her husband have for the past two decades.

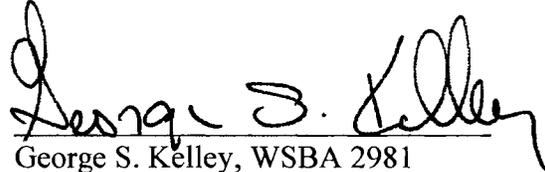
b. Mrs. Nickell will allow a judicial decree imposing a “greenbelt easement” on the disputed strip so that there is no impact upon the homeowners association from her title ownership. Under such an easement, Southview’s concerns regarding any future development of the strip will be assuaged. Such easement, of course, will have to be purchased from Mrs. Nickell as per the requirements of the *Proctor* decision. The trial court, upon rehearing of this matter, can be vested with suitable equity jurisdiction to accomplish these tasks, including the determination of appropriate compensation to be made to Mrs. Nickell.

CONCLUSION

Southview’s sole basis for attacking the Nickells’ title to the disputed strip lies in the law of estoppel in pais. As has been shown herein, and in Appellants’ Opening Brief, such a claim cannot be made by way of summary judgment. The trial court’s decision must be reversed.

If equity is found to govern this appeal, Mrs. Nickell is not opposing the imposition of a greenbelt easement to resolve this matter, so long as title and right of possession are vested in her, and suitable compensation is paid for the impact on her title.

Respectfully submitted this 11th day of March, 2011.

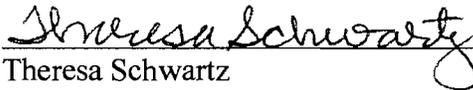
A handwritten signature in black ink that reads "George S. Kelley". The signature is written in a cursive style with a horizontal line underneath the name.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on March 11, 2011 I caused service of the foregoing pleading via U.S. mail on:

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Theresa Schwartz

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