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COURT OF APPEALS  
DIVISION II

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Case No. 49669-1-II

STATE OF WASHINGTON

BY

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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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ROBERT E. TUTTLE, JR.,

*Appellant,*

v.

ESTATE OF ANITA D. TUTTLE, Patricia Hicklin, Personal  
Representative; TUTTLE FAMILY LIMITED PARTNERSHIP, Eric  
Anderson, General Partner; PATRICIA HICKLIN and SYDNEY  
HICKLIN, SR., husband and wife; ROBERT E. TUTTLE SR.  
TESTAMENTARY TRUST u/w/d/ 11/17/1993, Patricia Hicklin,  
Co-Trustee,

*Respondents,*

and

ROBERT E. TUTTLE SR. TESTAMENTARY TRUST u/w/d/ 11/17/1993,  
Doreen Hunt, Co-Trustee,

*Defendant.*

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**APPELLANT'S REPLY BRIEF**

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Below, Robert Tuttle, Jr. (“Robert”) replies to the briefs of Respondents’ Estate of Anita D. Tuttle (“Estate”) and Hicklin’s and Patricia Hicklin, in her various capacities (“Hicklin”).

### **Discussion**

#### **I. Argument in Response to Estate’s Brief.**

##### **A. The Estate failed to argue justiciability in the trial court.**

The Estate argues for the first time on appeal that there are no justiciable controversy between Robert and the Estate because it concedes it has no interest in Robert’s claim of title. This is not a position taken by the Estate in the trial court. To the contrary, the Estate resisted Robert’s title claim in its Answer with statements that it; “admits disputed property was a part of a larger property with legal description according to page 2 of Creditor’s Claim, but is without sufficient knowledge to admit or deny Robert E. Tuttle, Jr.’s acquisition or ownership, and therefor denies;” “denies agreement to purchase and hold property for Plaintiff’s benefit;” “denies actual, open, notorious, continuous, and exclusive possession of the disputed property;” “denies Plaintiff was not made aware of superior claims to ownership in the property;” “denies Plaintiff has a legal claim to the property and denies establishment of the legal theories articulated on page 4 of Creditor’s Claim.” CP 283-86.

In its motion for summary judgment, the Estate identified the

issue as “whether Robert Jr. can ‘provide sufficient evidence to support his equitable claims to title of the real property in question?’” CP 267, ¶ 7.

Clearly, the Estate saw Robert’s title claim as an issue in which it claimed an interest. To this end, the Estate argued, one by one, against each of Robert’s legal theories supporting his title claim. CP 275-80. It argued that Robert could not establish a prima facie case of adverse possession (CP 275); that the court should not allow his claim of title based upon constructive trust (CP 276); or resulting trust (CP 277); and that he could not establish title through implied partnership or joint venture (CP 278).

The Estate, in its Motion for Summary Judgment, also claimed there were “equitable defenses” to Robert’s title claims, including the argument that, “[t]he doctrine of laches prevents Robert, Jr. from raising a claim to title of the property in question.” CP 279, 281. At no point, however, did the Estate ever argue that Robert’s title claim was not justiciable. Contrary to its suggestion on appeal, the Estate actively involved itself in the defense of Robert’s title claims. When Robert challenged the Estate’s standing to argue against his title claims in his Summary Judgment Brief (CP 239, 242-243), the Estate sought to clarify its position in its Rebuttal Brief (CP 178) by stating it had “limited standing.” It stated:

To clarify the Estate’s standing with regard to the disputed property, the Estate of Anita D. Tuttle has standing, but that standing is limited. The Estate concedes that it has no standing

to bring motion regarding the disputed ownership claims between Robert Jr. and the Tuttle FLP. However, each of the legal theories alleged by Robert, Jr. implicitly or explicitly implies that Anita D. Tuttle did not have sufficient right, title, or interest in the disputed property to transfer it into the Tuttle FLP in the year 2000.

CP 179.

The Estate argues on appeal that “there is no justiciable claim between Robert and the Estate because both parties agree that the Estate is not a proper party to Robert’s Property claim.” Estate’s Br. at 12-13. This new argument is based upon a new concession that was never made by the Estate in the trial court, *i.e.* that it has no interest or standing whatsoever, to contest Robert’s title claim. Even after Robert challenged the Estate’s standing on the title issue in his summary judgment response (CP 172-73), the Estate, in its Rebuttal Brief (CP 178), continued to argue that it did have standing with regard to Robert’s title claims, under its theory of “limited standing.” *See* Estate’s Rebuttal Brief, CP 178, at 180 where it argued:

The Estate prays that the court read its motion regarding Robert, Jr.’s claim to the disputed property as a motion to dismiss all claims against the Estate that it did not have right, title, or interest in the disputed property in order to transfer the property to the Tuttle FLP. The Estate claims no standing with regard to any claims Robert Jr. may have against the FLP.

CP 180. In response, Robert stated that he had not made a claim of this nature against the Estate, but wanted to preserve his claim for attorney’s

fees in having to respond to the Estate's opposition to his title claim. As stated by Robert in his Reply:

In order to justify the extensive amount of time required by Robert Jr. to defend this claim, the Estate now argues, for the first time, that Robert's claim of title is implicitly against the estate because it implies wrongdoing by Anita in transferring title to Robert's property into the limited partnership. *No such claim against the Estate was made by Robert, either in prior pleadings or in his summary judgment response.* The Estate's attempt to redefine it motion in its rebuttal brief should not be permitted to defeat a claim for attorney's fees by Robert as a result of this claim.

CP 173 (emphasis added).

The Estate again argues on appeal, disingenuously, that Robert "still refused/failed to dismiss the Estate from that claim" (referring to the title claim). Estate's Br. at 13. Given Robert's clarification in the trial court that he was not and never had made his quiet title claim against the Estate, the argument on appeal that he should have dismissed this non-existent claim, is without merit. Moreover, if the Estate was still concerned that such a claim was being made, it could have asked Robert to dismiss the claim; or proposed a stipulation, or filed its own motion to dismiss the claim. At no point did the Estate do so. The Estate implies in its appellate brief that it had requested Robert to dismiss the Estate from his title claim and he refused to do so. That is not true. Robert did, however, preserve his right to seek attorney's fees from the Estate for having to respond to the

Estate's arguments against his title claim. CP 327-28. As repeated by Robert in response to the Estate's request for attorney's fees in the trial court:

The Estate argues that Robert should have "dismissed the Estate" from his title claim. Robert never brought his title claim against the Estate and there is no indication in any of the pleadings that he did so. Since it was determined that record title to the property that Robert claimed was in the name of the FLP, it was the FLP that was named as the party defendant to this claim. The Estate was also in the same lawsuit but those claims were related to other matters set forth in his creditor's claim. Contrary to the suggestion by the Estate in footnote 1 at page 8 of its Motion For Award of Attorney's Fees, (that Robert had wrongly alleged that the Estate held the title to the property he claimed), Robert's Creditor's Claim, which was incorporated by reference in his Complaint, specifically states at page 3 that title to the property at issue in his claim "is apparently now held in the name of the Tuttle Family Limited Partnership." Moreover, paragraph 2.1 of Robert's Complaint, filed November 6, 2013, specifically states, "Legal title to said real property described in the Creditor's claim currently resides in the Tuttle Family Limited Partnership by virtue of conveyance from Anita D. Tuttle." Ironically, it was the Estate that chose to insert itself into the title claim (and incurred the expense of doing so) when it made various arguments against Robert's title claim in its Motion for Summary Judgment filed October [15], 2015. *See Motion for Summary Judgment pages 13-19.* [CP 275-81.] It pursued these arguments further in subsequent pleadings although it now claims it had no interest in the same. Only now, when it seeks to extricate itself from this lawsuit which it previously chose to defend, does it admit that it never had standing on this issue in the first place. *See Estate's Response to Plaintiff's Motion for Reconsideration filed March 14, 2016, pages 2-3.* [CP 391-92.] Any attorney's fees incurred by the Estate in briefing and arguing against Robert's title claims should not be considered in an award of fees, not only because this claim was not being made against the estate but because the Court did not rely upon the Estate's

arguments in reaching its decision.

CP 327-328.

**B. There remains a justiciable claim between Robert and the Estate with respect to the trial court's award of attorney's fees to the Estate and Robert's claim for attorney's fees in responding to the Estate's defense of his title claims.**

As set forth above, Robert preserved his claim for attorney's fees against the Estate for time spent in responding to the Estate's defense of his title claim. At the same time, the Estate sought attorney's fees against Robert for time it spent in addressing Robert's title claim. On appeal, Robert requests the Appellate Court to overturn the trial court's dismissal of Robert's title claims based on res judicata. Assuming the Court agrees, the trial court's award of attorney's fees must be set aside and revisited in the trial court. Robert's request for an award of attorney's fees against the Estate, with respect to his title claims, remains a justiciable issue, still to be resolved in the trial court.

**C. The Estate's argument in support of the trial court's application of res judicata and/or intervention requirements as a bar to Robert's title claims is unpersuasive.**

Initially, it must be reiterated that the Estate, in its summary judgment motion, never claimed that res judicata principles or intervention requirements precluded Robert from pursuing his title claims based upon the dismissal of the FLP's 2014 case. (CP 268-69). The res judicata arguments were made only with respect to the fiduciary, conversion and

mismanagement claims against the Estate. It is undisputed that Robert's title claim was never a part of the 2014 litigation.

The crux of the Estate's argument on appeal with regard to the trial court's dismissal of Robert's title claim is that "Robert should have joined that lawsuit [referring to the 2014 FLP lawsuit] and litigated his claim through the exercise of reasonable diligence." Estate's Br. at 16. On appeal, the Estate attempts to defend the trial court's res judicata ruling by claiming "the subject matter and causes of action . . . were virtually identical." Estate's Br. at 17. But that is not correct with regard to Robert's title claim, because the FLP's action had nothing to do with Robert's title. Nevertheless, the Estate argues that Robert had knowledge of the FLP's conversion claim. Robert was never named a party or served with a copy of the 2014 lawsuit, but even if Robert had been served with a copy of the FLP's complaint, there was no indication that the FLP's conversion claim somehow related to Robert's property. *See Complaint in 2014 case*, CP 315-20. The Complaint refers only to the family farm "consisting of about 300 acres." CP 317. There is no identification or singling out of Robert's property as a subject of the FLP lawsuit in any manner.

Without citation of authority, the Estate repeats the trial court's conclusion that "Robert should have raised the Property claim in the 2014 litigation." *See Estate's Br.* at 18. The Estate argues that Robert's title

claim “overlapped” the FLP’s claim for mismanagement of the FLP leading to the conclusion that Robert should have intervened in the 2014 case. But his title claim was already the subject of his 2013 lawsuit. Moreover, even if he had been served a copy, the FLP’s complaint never identified Robert’s property as a subject in that lawsuit. CP 315-20. Contrary to the Estate’s argument, Robert had no obligation to “intervene” in the FLP’s lawsuit in order to assert this title claim, which was already the subject of his existing lawsuit. As pointed out in Robert’s opening brief, the specific language of CR 13(a) states a pleader (even one already involved in an existing lawsuit) need not state a claim that is the subject of an already pending action.

Finally, the Estate misapplies *res judicata*’s requirement of “privity” between parties in order for the failure to raise a claim to constitute a bar to that claim in another action. *See* Estate Br. at 15-16. Robert and the FLP were never in privity with respect to Robert’s title claim because Robert’s title claim was against the FLP.

## **II. Argument in Response to Hicklin’s Brief.**

### **A. Introduction**

Respondents Patricia Hicklin and Sidney Hicklin, husband and wife, and Patricia Hicklin, as co-trustee of the Robert E. Tuttle, Sr. Testamentary Trust, have responded to this appeal through a brief filed by

their attorney, Shane Seaman. For ease of reference in this Reply Brief, Robert will refer to these Respondents collectively as “Hicklin” as the issues on appeal only involve the actions of Patricia and Sidney Hicklin, individually, as well as actions by Patricia Hicklin on behalf of the Tuttle Family Limited Partnership (“FLP”) under the purported authority of a power of attorney from Anita Tuttle. They do involve actions taken by Patricia Hicklin as Trustee.

**B. Summary of Claims Subject to Appeal.**

As indicated in his opening brief, the primary focus of Robert’s appeal is the dismissal of Robert’s title claim under the theory of res judicata. A secondary issue is the preservation of Robert’s claim that the Hicklins, without authority, were involved in the 2010-2011 logging of his property and are liable for damages as a result. The Brief of the Respondents Hicklin addresses many issues outside this appeal, including issues that were not addressed by the trial court and were not previously raised by the parties either in the trial court or in this appeal. It should be noted that this matter is presently before the appellate court because of the trial judge’s CR 54(b) certification that the dismissal was a final resolution of Robert’s claims against the Estate (CP 90-91; 96-102); and against the Hicklins and the Trust (CP 92-95; 96-102). There still remains other claims pending in the trial court including claims between the co-trustees

with regard to mismanagement of the trust.

**C. Robert's Title Claim.**

Although Robert's title claim is against the FLP, the Hicklins (like the Estate) argued against it in the trial court and attempt to do so again on appeal. With regard to Robert's claim of title, the arguments made by the Hicklins on appeal demonstrate a misunderstanding of the legal principles applicable to Robert's title claim. Although Hicklin acknowledges the various legal theories advanced by Robert in support of its title claim, *i.e.* adverse possession, constructive trust, resulting trust, parol agreement, implied partnership, joint venture, estoppel, and unjust enrichment (Hicklin Br. at 11), Hicklin concludes that these theories cannot be applied because Robert "conceded in his complaint that this property was owned by the FLP." *Id.* It appears that the Hicklins are arguing that record title automatically prevails over equitable claims of title. Under the doctrine of adverse possession, however, when property has been held in a manner consistent with the elements of adverse possession for a period of 10 years, such possession ripens into original title. *See El Cerrito, Inc. v. Ryndak*, 60 Wn.2d 847, 855, 376 P.2d 528 (1962). That is true whether or not title has been formally quieted in the possessor. *Id.* Moreover, any subsequent conveyance of the property is subject to the adverse title claim. The same would be true with respect to

Robert's theories of constructive or resulting trust *and other equitable causes of action*. See 17 Wash Prac. § 11.3m, at 5-6 (2004).

The Hicklins argue that Robert did not provide sufficient factual support for his title arguments to survive summary judgment dismissal. To the contrary, Robert submitted substantial evidence in support of his title claim in his 54 page summary judgment declaration, including not only his own testimony about the historical use, occupation, care and maintenance of the property, but testimony supporting an agreement and understanding between him and his parents with regard to the intended ownership of the property. See *Declaration of Robert E. Tuttle, Jr.*, CP 185-238.

Hicklin argues that the trial court “determined that the FLP alleged the same causes of action against the Defendants” as Robert was alleging. Hicklin Br. at 17. That is simply not the case with respect to Robert's title claim. In the trial court's “Findings of Fact and Conclusions of Law” entered under CR 54(b) the Court recognizes the contrary in Finding 21 which states:

21. In its suit, the FLP alleged the same causes of action against the Defendants as were raised in Robert Jr.'s claim under this litigation. *The only distinction between the claims made in the two separate lawsuits is that Robert Jr. made an additional claim against the Estate to quiet title in a parcel of real property once titled in the name of the deceased, Anita D. Tuttle.*

Findings of Fact and Conclusions of Law, at 4 (CP 99) (emphasis added).

As to the actual basis for the trial court's ruling, the trial court concluded that Robert "should have" intervened to assert his title claims in the FLP case and his failure to do so prevented him from pursuing those claims in his own previously filed lawsuit. It is that ruling that forms the crux for this appeal.

**D. Robert's "trespass" claim.**

Hicklin argues, at page 6 of 40 of its brief, that Robert did not properly bring his claims against the Hicklins involving the wrongful logging of his property in 2010-2011. Contrary to this argument, these claims were, in fact, before the trial court in Robert's Motion to Amend Complaint. CP 157-65. The trial court did not rule on this motion before entering its order dismissing all of Robert's claims based on res judicata, including the dismissal of his "trespass" and wrongful logging claims. Robert challenges this dismissal on appeal. See Appellant's Opening Br. at 27-28; *see also* CP 154-56. Robert provided the trial court with documentation for this claim. *See Declaration of Robert E. Tuttle, Jr.*, CP 185 at CP 190-91; *Motion and Declaration to Amend Complaint*, CP 157-165; and *Memorandum in Support of Motion to Amend Complaint*, CP 154-156.<sup>1</sup> Robert's evidence shows that Patricia Hicklin began signing

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<sup>1</sup> Because of his dismissal on the basis of res judicata, the trial court never considered this evidence or ruled on Robert's motion to amend. On remand, the trial court should be required to do so.

legal documents for her mother, Anita Tuttle, in 2010, when she signed Anita's personal tax return for her, purportedly under a power of attorney to do so. CP 191. She did the same in 2011 and 2012. *Id.* In 2010, DNR received an application for a cutting permit for the logging of the property to which Robert claims title. The application identified Patricia's husband, Sidney Hicklin, as the "contact person" for the logging. CP 190-91; Exhibit D, CP 214-20. The logging occurred in 2011. CP 190-91. In 2011, DNR issued a "Notice to Comply" due to failure to carry out the re-seeding requirements that were part of the permit. CP 191, 223, Exhibit E. The landowner was listed as "Anita Tuttle" (not the FLP which actually held title to the property). The 'Conference Note' documenting the re-seeding agreement was signed by "Patti Hicklin," with the notation "power of attorney." CP 191, 226. At the time, title to the property was held in the name of the FLP. If Anita Tuttle was no longer able to conduct the affairs of the FLP as general partner, Patricia Hicklin did not have the authority to act on her behalf as general partner. That is because the FLP Agreement designates Eric Anderson as the successor general partner in the event of disability of Anita. CP 316, para 3.3. The evidence supports a claim that Hicklin wrongfully participated in the logging of Robert's property in 2010-2011.<sup>2</sup>

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<sup>2</sup> The trial court's dismissal of this claim as part of its global dismissal of all of Robert's claims, on the basis of *res judicata*, cannot stand and

**E. Trial Court's Award of Attorney's Fees to Hicklin.**

Based upon Robert's arguments on appeal, the trial court's award of attorneys fees to *Hicklin* cannot stand and must be set aside and remanded to the trial court for reconsideration in light of the appellate court's ruling.

**Conclusion**

Robert has made every effort to narrow the scope of this appeal to three issues: (1) a challenge to the trial court's dismissal of his title claims; (2) a challenge to the dismissal of his claim for damages for the 2010-2011 logging of his property; and (3) a challenge to the trial court's award of attorney's fees in relation to the rulings Robert seeks to have reversed on appeal. Applying the appropriate standards applicable to a motion for summary judgment, and viewing the evidence in a light most favorable to Robert, the dismissal of Robert's title claim and his claim for damages for the wrongful logging of his property must be reversed together with the award of attorney's fees incident to these dismissals. The Court should remand the case for further consideration in the trial court in light of the Court's rulings on appeal and consider an award of attorneys fees to Robert on appeal.

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should be vacated on appeal with remand to the trial court for further proceedings in regard to this claim.

Respectfully submitted this 5<sup>th</sup> day of April, 2017,

*Attorneys for Appellant-Plaintiff Robert E. Tuttle, Jr.*



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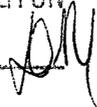
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**Certificate of Service**

STATE OF WASHINGTON

I certify that on April 5, 2017, I sent a copy of the foregoing document by mail to:

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