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Court of Appeals
Division II
State of Washington
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No. 51357-9

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ADRIEN PETERSEN,

Respondent,

vs.

ROBERT K. MCCORMIC, JR., a married man as his separate estate,
as to defenses to Plaintiff's complaint to quiet title and First
Counterclaim (Quiet Title),

Appellant,

and WILLIAM OMAITS, a single man, as the successor in interest
to ROBERT K. MCCORMIC, JR. as to Counterclaims 2, 3 and 4
(Trespass, Ejectment and Waste or Injury to Land),

Counterclaim Defendant.

APPEAL FROM THE SUPERIOR COURT
FOR KITSAP COUNTY
THE HONORABLE KEVIN HULL

BRIEF OF APPELLANT

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I. INTRODUCTION

The trustee of a deed of trust can only sell – and a purchaser can only buy – the property encumbered by the deed of trust as set forth in its legal description. The trial court violated that black letter law by granting respondent Adrien Petersen ownership of property that was not encumbered by the deed of trust executed by appellant Robert McCormic.

None of Petersen's legal theories provide an exception to the statute of frauds and the fundamental rule that the purchaser of a trustee's deed acquires only the property described in the deed of trust. McCormic and his lender did not make a mutual mistake in the deed of trust's legal description – McCormic informed the lender he claimed ownership over the disputed property, and the lender made an informed decision not to encumber it. Nor could Petersen's judicial estoppel theory, based on the false claim McCormic disavowed ownership of the disputed property in a separate lawsuit, establish Petersen's ownership over that property.

This Court should reverse the trial court's decision, which awarded Petersen property for which he did not pay, and remand for entry of an order quieting title of the disputed property in McCormic, its rightful owner.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in entering its October 4, 2017, Order Denying Defendant Robert K. McCormic's Motion for Summary Judgment. (CP 520-22)
2. The trial court erred in entering its October 4, 2017, Order Granting Plaintiff's Motion for Summary Judgment. (CP 517-19)
3. The trial court erred in entering its November 1, 2017, Judgment and Order Quieting Title and Order Quashing Lis Pendens. (CP 636-39)

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Could the trustee convey title to property that was deliberately not described in McCormic's deed of trust?
2. Did the trial court err in reforming the deed of trust on the basis of "mutual mistake" where McCormic informed his lender prior to executing the deed of trust that he claimed ownership over the disputed property and provided the lender with its legal description, and the lender then prepared and executed a deed of trust with a legal description excluding the disputed property?
3. Can the doctrine of judicial estoppel vest title of the disputed property in Petersen where McCormic never disavowed

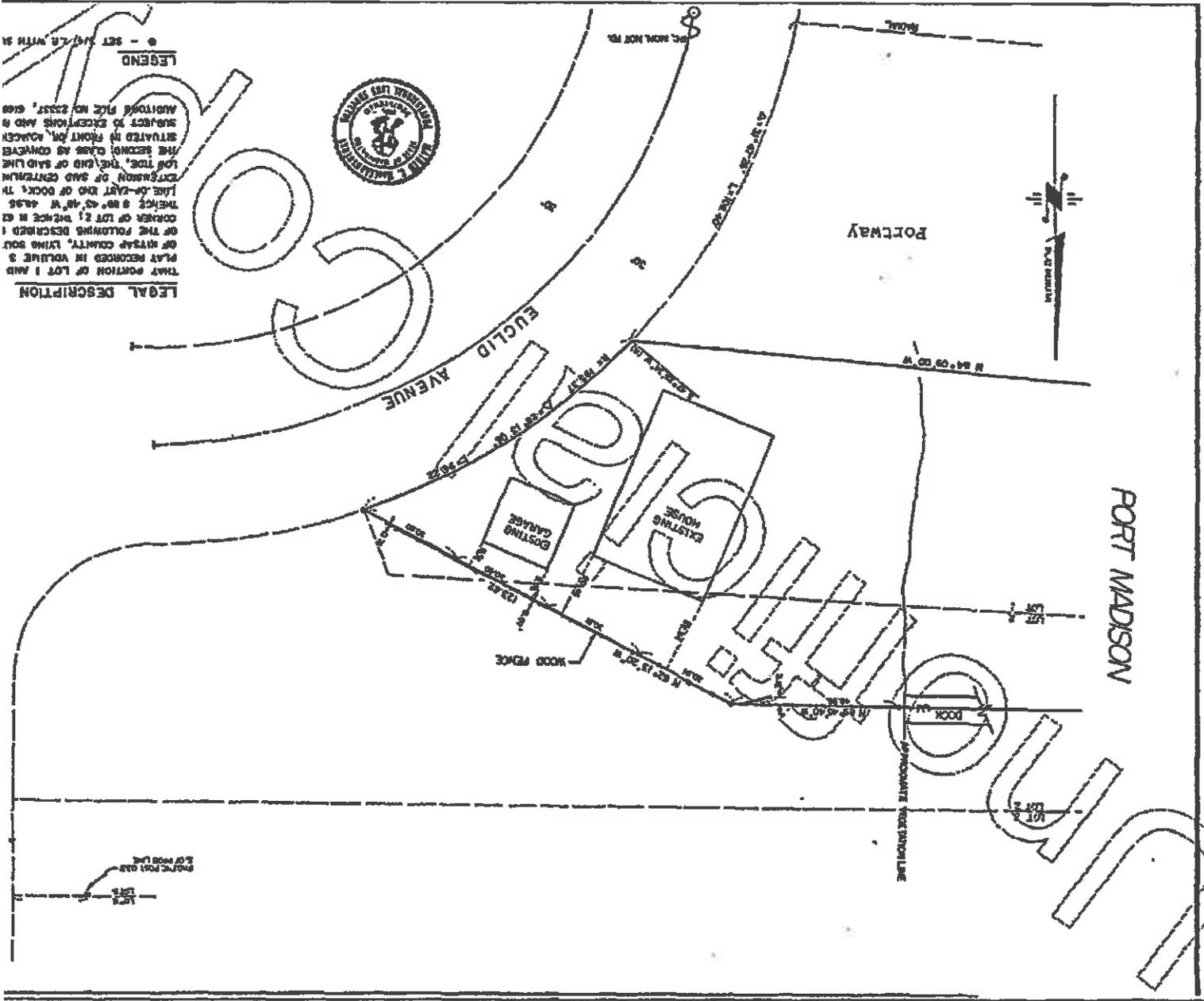
ownership of the property to a court, but instead allegedly failed to disclose his ownership to one of his creditors?

IV. STATEMENT OF THE CASE

A. In 1974 Robert McCormic purchased property on Bainbridge Island, where he lived for the next 42 years.

On April 18, 1974, Robert McCormic purchased his waterfront home, consisting of Lots 1 and 2 in the Plat of Port Madison, at 15920 Euclid Ave. NE, on Bainbridge Island. (CP 46, 51, 53) Abutting McCormic's property to the south is a separate parcel of property titled "portway" in the Plat of Port Madison. (CP 51, 342) The portway is a 100-foot wide piece of property bounded on the east by Euclid Ave, and on the west by Port Madison Bay. (CP 51, 342) Since purchasing his property in 1974, McCormic has consistently maintained the entirety of the portway, including planting, landscaping, and mowing. (CP 342) As reflected in the map, reproduced below¹, to the south of the portway is another parcel of property owned by the Port Madison Water Company, a homeowner's association for Port Madison residents. (CP 342)

¹ The map is a cropped reproduction of the map at CP 400 with the word "Portway" added to the south of Lots 1 and 2.



LEGAL DESCRIPTION
 THAT PORTION OF LOT 1 AND
 PLAT RECORDED IN VOLUME 3
 OF WASHP COUNTY, TEXAS BUT
 OF THE FOLLOWING DESCRIBED:
 CORNER OF LOT 2; BEARING N 62°
 30' 45" W 43.65'
 LINE OF EAST END OF DOCK; IN
 EXTENSION OF SAID CENTERLINE
 LOT LINE, THE END OF SAID LINE
 BEING IN FRONT OF DOCK; AND IS
 SUBJECT TO EASEMENTS AND IS
 ADDITIONAL FILE NO. 23237, 2188



LEGEND
 ● - SET 1/4\"/>

B. In 2006 McCormic obtained a loan, and though he informed his lender that he claimed ownership over half the portway property and provided the lender its legal description, the lender excluded it from the deed of trust's legal description.

In 1994, McCormic executed two deeds of trusts that contained legal descriptions encumbering Lots 1 and 2, but not the portway. (CP 275, 279-93) In February 2006 McCormic obtained a \$1.33 million dollar loan and executed another deed of trust to secure the loan. (CP 47, 67-93) McCormic's lender, Mortgageit, Inc., commissioned two appraisals that valued the property at \$2.4 million and \$1.9 million. (CP 402, 411-63) McCormic informed the appraisers he claimed ownership over the northern 50 feet of the portway ("the disputed property"), but both appraisals stated that McCormic's claim of ownership was inconsistent with Kitsap County's records. (CP 419 ("County records indicate that the subject is 100FF. Homeowner indicated that he recently went through the proper channels with Kitsap County to prove that he owns 150FF and was granted the additional 50FF."); CP 444 ("The subject lot as reported by Kitsap County reflects .25 acre with 100 frontage feet of waterfront. Per Land Title Company of Kitsap County, the subject site also includes an additional .06 acre and 50 frontage feet").

McCormic later provided one of the appraisers a title insurer's litigation guarantee² stating he owned the disputed property and setting forth its legal description.³ (CP 411-412) The appraiser then updated her appraisal to reflect the title stated in the litigation guarantee, including the separate legal description of the disputed property. (CP 411-412)⁴ Based on these appraisals, the lender issued

² A litigation guarantee is a form of title report whose "purpose . . . is both to provide [a] foreclosing party with a list of the persons who must be joined in the foreclosure action and to provide insurance that if each of them is properly named and served, the foreclosure will eliminate all junior interests." Marjorie Rombauer, 27 *Wash. Prac., Creditors' Remedies – Debtors' Relief* § 3.2 at 137 (1998).

³ The legal description for the disputed property is:

The North 50 feet of that certain public street known as Portway delineated on the face of the Plat of Port Madison, according to the Plat recorded in Volume 3 of Plats, Page 3, records of Kitsap County, Washington, said street being limited on the East by Euclid Avenue, being 50 feet in width and on the West by the line of extreme low tide.

(CP 412)

⁴ The other appraiser appears to have likewise included the litigation guarantee in a supplemental addendum, but the version included in her appraisal is virtually illegible. (CP 446)

a deed of trust with a legal description that encumbered Lots 1 and 2, but not the disputed property. (CP 47, 82, 95)⁵

In 2014, eight years after McCormic executed the 2006 deed of trust, the Port Madison Water Company and McCormic executed and recorded reciprocal quitclaim deeds that granted each party one-half of the portway – McCormic granted the Water Company the southern 50 feet and the Water Company granted McCormic the northern 50 feet. (CP 61-63, 109-11) The quitclaim deeds state they are “for the sole purpose of clearing title.” (CP 61, 109) The Mortgageit deed of trust was never modified to include the disputed property.

⁵ The legal description in the deed of trust is:

THAT PORTION OF LOT(S) 1 AND 2, PORT MADISON, ACCORDING TO THE PLAT RECORDED IN VOLUME 3 OF PLATS, PAGE 3, RECORDS OF KITSAP COUNTY, WASHINGTON, LYING SOUTHERLY AND SOUTHWESTERLY OF THE FOLLOWING DESCRIBED LINE: BEGINNING AT THE SOUTH CORNER OF LOT 2; THENCE NORTH 62°43'52" WEST 123.62 FEET; THENCE SOUTH 89°43'48" WEST 48.95 FEET TO A POINT ON A CENTERLINE OF EAST END OF DOCK; THENCE SOUTH 89°43'48" WEST ALONG THE EXTENSION OF SAID CENTERLINE OF DOCK TO A POINT ON EXTREME LOW TIDE, THE END OF SAID LINE; TOGETHER WITH TIDELANDS OF THE SECOND CLASS AS CONVEYED BY THE STATE OF WASHINGTON, SITUATE IN FRONT OF; ADJACENT TO AND ABUTTING THEREON.

C. In 2016, Petersen purchased the property encumbered by the Mortgage deed of trust at a trustee's sale, obtaining a trustee's deed with a legal description that excluded the disputed property.

In 2016, McCormic defaulted on the deed of trust, prompting a nonjudicial foreclosure. (CP 105) The notice of trustee's sale issued on July 22, 2016, as required by RCW 61.24.040, identified the foreclosed property by its legal description, using the same legal description contained in the deed of trust, *i.e.*, it covered Lots 1 and 2, but not the disputed property. (CP 47, 104-07) Petersen purchased the property at the trustee's sale for \$1.05 million, obtaining a trustee's deed with the same legal description used in the deed of trust and notice of trustee's sale. (CP 47, 97-99) By accepting the trustee's deed, Petersen acknowledged that he "rel[ied] solely upon his . . . own due diligence investigation before electing to bid for the Property" and not on any representation of the trustee. (CP 99) Petersen used the property to obtain two loans worth over \$1.8 million, executing two deeds of trust with the legal description in the trustee's deed. (CP 48, 113-150)

After the trustee's sale, Petersen asked the trustee that conducted the non-judicial foreclosure, Quality Loan Service Corp. of Washington, to reform its trustee's deed to add the disputed

property, because “[t]he trustee’s deed failed to include it.” (CP 270)
The trustee refused. (CP 223-25)

When Petersen recorded his trustee’s deed, the Kitsap County Assessor’s Office, “in accordance with [its] standard practice,” did not include the disputed property in the tax description for the property conveyed to Petersen, but instead assigned a separate Tax Parcel ID Number to the disputed property and listed McCormic as its owner. (CP 596) The Assessor’s Office explained that it “presumed [McCormic’s] continued ownership” of the disputed property “[b]ecause the Trustee’s Deed Upon Sale did not include the 50-foot strip of property in the legal description of the property conveyed by the deed.” (CP 596) McCormic continued to pay the property taxes on the disputed property. (CP 65)

D. The trial court quieted title to the disputed property in favor of Petersen on summary judgment.

On April 3, 2017, Petersen filed suit against McCormic to quiet title to the disputed property. (CP 1-8) Petersen conceded that neither the deed of trust nor trustee’s deed included the disputed property in its legal description, asserting ownership over the property under three legal theories. First, he argued that the disputed property was “after acquired” property under Washington’s Deed of Trust statute, RCW 61.24.050(1). (CP 170-71) Second,

Petersen argued that McCormic and his lender committed a mutual mistake in excluding the disputed property from the deed of trust's legal description. (CP 171-73) Third, Petersen argued that McCormic had failed to disclose ownership of the disputed property in a separate judicial proceeding, and thus he was judicially estopped from claiming ownership in this case, and title instead must be quieted in Petersen. (CP 173-75) On October 4, 2017, the trial court granted Petersen's motion for summary judgment without explanation. (CP 511-13)

McCormic appeals. (CP 514-15)

V. ARGUMENT

A. **Petersen could not obtain title to the disputed property via a trustee's deed that purposefully failed to include the property in its legal description.**

A "trustee sells only the title he or she receives" under a deed of trust. *Mann v. Household Fin. Corp. III*, 109 Wn. App. 387, 392, 35 P.3d 1186 (2001). Here, it is undisputed that the legal description in the deed of trust executed by McCormic included only Lots 1 and 2, and excluded the disputed property. That is the beginning and end of this case – the trustee could not sell, and Petersen could not buy, the disputed property because it was not encumbered by the deed of trust. No language in the Washington Deed of Trust Act, RCW ch.

61.24, allows Petersen to claim ownership of property not encumbered by the deed of trust. And no exception to the Statute of Frauds, RCW 64.04.010, authorized the lender to encumber and the trustee to convey property not legally described in the deed of trust. This Court should reverse the trial court's summary judgment order and remand for entry of an order quieting title of the disputed property in McCormic.

This Court “review[s] a summary judgment order de novo, engaging in the same inquiry as the trial court.” *Washington Fed. v. Azure Chelan LLC*, 195 Wn. App. 644, 652, ¶ 15, 382 P.3d 20 (2016). As the party moving for summary judgment, Petersen bore the burden of showing no genuine issues of material fact existed bearing on the question of whether he held superior title to McCormic and that he was entitled to judgment as a matter of law. *White v. Kent Med. Ctr., Inc., P.S.*, 61 Wn. App. 163, 170, 810 P.2d 4 (1991).

Though it is recognized as unusually strict, the Supreme Court has refused to “apologize for” Washington’s statute of frauds, which it has instead consistently enforced because “it is fair and just to require people dealing with real estate to properly and adequately describe it, so that courts may not be compelled to resort to extrinsic evidence in order to find out what was in the minds of the contracting

parties.” *Key Design Inc. v. Moser*, 138 Wn.2d 875, 883, 983 P.2d 653, 993 P.2d 900 (1999) (quoting *Martin v. Seigel*, 35 Wn.2d 223, 228, 212 P.2d 107 (1949)); *see also Kofmehl v. Baseline Lake, LLC*, 167 Wn. App. 677, 689, ¶ 23, 275 P.3d 328 (2012) (recognizing “the unusually strict but well-settled rule in Washington”), *aff’d*, 177 Wn.2d 584 (2013).

“Deeds of trust and trustee’s deeds are subject to the statute of frauds.” *Glepeco, LLC v. Reinstra*, 175 Wn. App. 545, 554, ¶ 14, 307 P.3d 744 (2013); RCW 64.04.010-020 (requiring that encumbrances on real estate be by deed and that every deed be in writing); RCW 61.24.020 (“a deed of trust is subject to all laws relating to mortgages on real property. ”) “The long-established rule in Washington is that to comply with the statute of frauds, the writing must contain a legal description of the property.” *Home Realty Lynnwood, Inc. v. Walsh*, 146 Wn. App. 231, 237, ¶ 10, 189 P.3d 253 (2008). *See* Stoebeck and Weaver, 18 *Wash. Prac., Real Estate* § 20.3 at 408 (2d ed. 2004) (“As with a straight mortgage and with a deed, the full legal description must be given” in a deed of trust) (citing RCW 61.24.020) “[B]ecause land is never considered appurtenant to other land, a conveyance will not pass title to any land that is not described in the deed.” Washington Real Property Deskbook, WSBA, § 5.8(4) (4th ed. 2009).

The Deed of Trust Act requires, as a condition to foreclosure, that the trustee provide notice of default to the borrower and issue a notice of the trustee's sale. *See generally* RCW 61.24.030-040. Both the notice of default and the notice of the trustee's sale must contain a description of the property and the recording information for the deed of trust. RCW 61.24.030(8)(a)-(b); RCW 61.24.040(1)(f).

The deed issued by the trustee to the purchaser is, like the deed of trust upon which it is based, a conveyance of real property. The trustee's deed "convey[s] all of the right, title, and interest in the real and personal property sold at the trustee's sale." RCW 61.24.050(1); *see also Mann*, 109 Wn. App. at 392; *McPherson v. Purdue*, 21 Wn. App. 450, 452, 585 P.2d 830 (1978) ("The trustee sells the title he receives" and "has no powers except those conferred upon him by the deed of trust") (quoted source omitted). Because a trustee can convey only the property that it has received title to via the deed of trust, "[t]he trustee for a deed of trust is not empowered to change the legal description of the deed." *Azure Chelan LLC*, 195 Wn. App. at 660, ¶ 34.

Here, the deed of trust did not legally describe the disputed property. (CP 82, 95) The trustee never received title to and was powerless to sell the disputed property to Petersen or to anyone else.

The trustee recognized as much, including only the legal description from the deed of trust in its notice of sale and the trustee's deed. (CP 97, 104) Indeed, when Petersen asked the trustee to reform the trustee's deed to include the disputed property, the trustee refused, explaining it could "only convey the real property legally described in the Trustee's notice of trustee's sale, barring a court order or decree that includes additional property *prior to the foreclosure proceedings.*" (CP 224 (emphasis added))

- 1. The disputed property was not "thereafter acquired" property under RCW 61.24.050, which applies only to property actually described in a deed of trust.**

Faced with the undisputed fact that neither the deed of trust nor trustee's deed included the disputed property in its legal description, the trial court had no basis to conclude that the deed of trust nevertheless transferred title to the property as "after acquired property" under RCW 61.24.050(1). "[A]fter acquired title concerns the vesting of title to property *actually described in a deed*, but which the grantor did not own at the time of conveyance." Washington Real Property Deskbook, WSBA, § 32.7(7) (3d ed. 1997) (emphasis added).

Petersen relied on the "thereafter acquired" language of RCW 61.24.050(1), arguing that the deed of trust conveyed title to the disputed property because McCormic acquired title to it in 2014 via

the quitclaim deed from the Port Madison Water Company, after executing his deed of trust. (CP 170-71) The statute provides that in addition to conveying “all of the right, title, and interest . . . which the grantor had or had the power to convey at the time of the execution of the deed of trust,” a deed of trust also conveys any title to the property “the grantor may have thereafter acquired.”

That statute, however, does not alter the well-established concept of “after acquired” title in real property conveyances reflected in RCW 64.04.070, which states that where a grantor “convey[s] by deed” property without having title “at the time of such sale and conveyance” but later “acquire[s] a title to such lands so sold and conveyed,” that later title “inure[s] to the benefit of the purchasers or conveyee”:

Whenever any person or persons having sold and conveyed by deed any lands in this state, and who, at the time of such conveyance, had no title to such land, and any person or persons who may hereafter sell and convey by deed any lands in this state, and who shall not at the time of such sale and conveyance have the title to such land, shall acquire a title to such lands so sold and conveyed, such title shall inure to the benefit of the purchasers or conveyee or conveyees of such lands to whom such deed was executed and delivered, and to his or her and their heirs and assigns forever. And the title to such land so sold and conveyed shall pass to and vest in the conveyee or conveyees of such lands and to his or her or their heirs and assigns, and shall thereafter run with such land.

See Estate of Frank, 146 Wn. App. 309, 320, ¶ 24, 189 P.3d 834 (2008) (“Washington’s after-acquired title statute [RCW 64.04.070] permits a grantor to convey its future interest in property through a deed containing an after acquired title clause.”); Stoebuck and Weaver, 17 *Wash. Prac., Real Estate* § 7.8 (2d ed. 2004). Thus, a deed of trust can only convey after acquired title to property that is legally described in a deed of trust.

Petersen cited no authority supporting the extraordinary proposition that RCW 61.24.050(1) allows the conveyance of property that is not described in a deed. To the contrary, the cases cited by Petersen (and McCormic), involved property that the grantor actually described in the deed. *See, e.g., Gough v. Ctr.*, 57 Wash. 276, 277, 106 P. 774 (1910) (involving a deed that conveyed “all the following described real estate”); *Davis v. Starkenburg*, 5 Wn.2d 273, 280, 105 P.2d 54 (1940) (grantors “having represented themselves to be the owners of *the property*, and having given the mortgage as such owners . . . any interest to *this property* which thereafter may have been acquired by them . . . would immediately inure to the [grantees]”) (emphasis added) (cited at CP 38, 171)

Petersen’s concept of “after acquired” property under RCW 61.24.050(1) effectively nullifies the real estate statute of frauds. If

the scope of a conveyance is not limited by its legal description, parties could claim ownership of any real or personal property subsequently acquired by a grantor, wherever located and whenever acquired. This Court should reject the notion that a deed of trust encumbering a specific piece of real property may be considered to universally encumber *all* of a grantor's subsequently acquired property. *Seven Sales LLC v. Beatrice Otterbein*, 189 Wn. App. 204, 208, ¶ 10, 356 P.3d 248 (2015) (“It is fundamental that in construing any statute we avoid absurd results.”) (quoted source omitted).

Perhaps sensing the absurdity of his interpretation, Petersen raised a new argument in his summary judgment reply – that McCormic in fact owned the disputed property at the time he executed the 2006 deed of trust, and thus the deed of trust transferred title to the property because McCormic “had the power to convey” it under RCW 61.24.050(1). (CP 384) Because Petersen did not raise this argument in his summary judgment motion, it was untimely, and could not be basis for granting Petersen summary judgment. *White*, 61 Wn. App. at 168 (“It is the responsibility of the moving party to raise in its summary judgment motion all of the issues on which it believes it is entitled to summary judgment.”). But even if McCormic owned the property when he executed the deed of

trust his lender's refusal to include it as security for the loan disposes of Petersen's claim of ownership. (See § V.A.2, *infra*)

The trustee could only sell and Petersen could only buy the land actually described in the deed of trust – Lots 1 and 2. This Court should reverse and remand for entry of an order quieting title in McCormic.

2. The deed of trust could not be reformed for “mutual mistake” because both McCormic and his lender intended to encumber only Lots 1 and 2.

Petersen's second legal theory – that McCormic and his lender made a mutual mistake in the deed of trust's legal description – also fails. To prove mutual mistake, Petersen was required to prove by *clear, cogent, and convincing* evidence that both McCormic and his lender intended to include the disputed property in the deed of trust's legal description, but failed to do so. But Petersen offered no evidence to prove such an intent, and McCormic presented undisputed testimony he did *not* intend to encumber the disputed property. Moreover, the lender undisputedly knew that McCormic claimed ownership over the disputed property *that had a distinct legal description*, yet did not include it in describing the security covered by the deed of trust. At the very minimum, there is a disputed issue of fact concerning the intent of McCormic and his

lender that the trial court should not have resolved on summary judgment.

“The general rule in Washington is that an inadequate legal description is not subject to reformation.” *Halbert v. Forney*, 88 Wn. App. 669, 673, 945 P.2d 1137 (1997). “Although . . . a legal description of property may be reformed if a mutual mistake is established, a mutual mistake occurs only if the intentions of the parties were identical at the time of the transaction, and the written agreement did not express those intentions.” *Williams v. Fulton*, 30 Wn. App. 173, 176, 632 P.2d 920, *rev. denied*, 96 Wn.2d 1017 (1981). “The mutual mistake doctrine may not be invoked to correct knowing errors of parties . . . because if such errors were always corrected, the statute of frauds would be eviscerated” and “parties would have no incentive to include a proper legal description in any instruments purporting to convey real property.” *Halbert*, 88 Wn. App. at 674-75. Likewise, “unilateral mistake . . . will not support reformation.” *Williams*, 30 Wn. App. at 177 n.2. “The party seeking reformation must prove the facts supporting it by clear, cogent and convincing evidence.” *Denaxas v. Sandstone Court of Bellevue, L.L.C.*, 148 Wn.2d 654, 669, 63 P.3d 125 (2003).

McCormic and his lender both intended to encumber only the property legally described in the deed of trust – Lots 1 and 2. (CP 82, 95) Petersen presented no evidence to support his assertion “that the lender intended to secure . . . this loan based upon all of it” (9/22 RP 23-24), and failed to rebut McCormic’s statement that he gave the lender the only security it required. (CP 216)

Petersen’s assertion that McCormic “defrauded” his lender (CP 385), is entirely without merit. McCormic was entirely forthright with his lender. He told the lender’s appraisers that he claimed ownership of the disputed property and gave them *a legal description of the disputed property*. (CP 412) The lender knew that McCormic claimed ownership over the disputed property but with that separate legal description in hand nonetheless excluded the description of that property when preparing the deed of trust. This was no “mistake.” The trustee – experienced in non-judicial foreclosures – confirmed the lender’s intent, refusing to amend the deed of trust to include property outside its legal description. (CP 225) There was no competent evidence of the lender’s unilateral mistake, let alone clear and convincing evidence of mutual mistake that could support reformation.

This Court’s mutual mistake cases provide no support for the trial court’s decree here. In *Glepeco, LLC v. Reinstra*, 175 Wn. App. 545, 307 P.3d 744 (2013) (cited at CP 171-72), a borrower bought two adjacent lots, and then combined them into a “single legal lot,” as reflected in a recorded quit claim deed. 175 Wn. App. at 550, 561, ¶¶ 2-3, 27. The borrower then executed two deeds of trust which contained legal descriptions describing the combined lot. 175 Wn. App. at 550-51, ¶ 4. When the borrower refinanced, he executed a third deed of trust with a legal description that included only one of the former lots, a drain field, and excluded the other lot containing the borrower’s house. 175 Wn. App. at 551, ¶ 5. After buying the property at a trustee’s sale, the purchasers brought an action to reform the trustee’s deed based on mutual mistake. Division One affirmed the trial court’s order reforming the trustee’s deed, reasoning that the undisputed evidence established that the borrower and lender both intended to secure the loan with the combined lot. 175 Wn. App. at 559-64, ¶¶ 24-33.

Here, by contrast, McCormic did not repeatedly execute deeds of trust encumbering a combined lot only to later execute a deed of trust encumbering only a valueless portion of that lot. McCormic instead consistently encumbered Lots 1 and 2, which contained his

home of 42 years, and McCormic did not combine Lots 1 and 2 and the disputed property into a “single legal lot” before executing the deed of trust. (CP 279-93) And unlike *Glepco*, where the court could “discern no logical reason whatsoever . . . as to why [the lender] would have agreed to eliminate the valuable part of the security with the house on it,” 175 Wn. App. at 562, ¶ 28, McCormic’s lender reasonably decided that it did not want as security a parcel claimed by McCormic but that was not reflected in a recorded deed, that conflicted with county records, and could subject the lender to litigation over the disputed property. Moreover, any additional security was entirely unnecessary because Lots 1 and 2, by themselves, provided more than enough collateral for the loan. (CP 411, 419 (appraising property at \$2.4 million and noting that the disputed 50 feet of property was worth \$2,500 per foot (\$125,000 total))

Unlike the purchasers in *Glepco*, Petersen could not have reasonably believed he was purchasing the disputed property. The trustee’s notice of sale described only Lots 1 and 2, and made no mention of the disputed property. (CP 104) The trustee’s deed, which likewise did not describe the disputed property, in fact advised Petersen to perform “his . . . own due diligence investigation before

electing to bid for the Property.” (CP 99) Had Petersen conducted even a cursory title check, he would have discovered the 2014 quitclaim deed and the legal descriptions demarcating Lots 1 and 2 from the disputed property. *See McPherson*, 21 Wn. App. at 453 (buyer at trustee’s sale “could have readily discovered [deed of trust did not convey easement] by an inspection of the chain of title”). Indeed, under the Recording Act, the quitclaim deeds were constructive notice to Petersen that the disputed property had been conveyed separately from the deed of trust. *Newport Yacht Basin Ass’n of Condo. Owners v. Supreme Nw., Inc.*, 168 Wn. App. 56, 76, ¶ 36, 277 P.3d 18 (2012) (“the recording of a deed imparts constructive notice of the estate or interest acquired to all subsequent purchasers”) (quotation and quoted source omitted). The doctrine of mutual mistake cannot support the trial court’s decision.

3. **Petersen failed to establish the elements of judicial estoppel because McCormic did not assert inconsistent positions in court, nor would Petersen be unfairly harmed by denying him the windfall of title to property that was not sold at public auction.**

Petersen’s reliance on the equitable doctrine of judicial estoppel similarly fails. McCormic did not deny ownership of the property before any tribunal and thus judicial estoppel cannot apply. Even assuming McCormic denied ownership of the disputed

property when questioned by a creditor in supplemental proceedings – an assumption without evidentiary support – the remedy would be to allow that creditor to execute against the property, not to quiet title to the property in Petersen, who was a stranger to those proceedings and who was in no way harmed by the allegedly inconsistent positions.

“Judicial estoppel is an equitable doctrine that precludes a party from gaining an advantage by asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position.” *Overlake Farms B.L.K. III, LLC v. Bellevue-Overlake Farm, LLC*, 196 Wn. App. 929, 936, ¶ 17, 386 P.3d 1118 (2016), *rev. denied* 188 Wn.2d 1007 (2017). “The core factors are whether the later position is clearly inconsistent with the earlier position, whether judicial acceptance of the second position would create a perception that either the first or second court was misled by the party’s position, and whether the party asserting the inconsistent position would obtain an unfair advantage or imposes an unfair detriment on the opposing party if not estopped.” *Ashmore v. Estate of Duff*, 165 Wn.2d 948, 951-52, ¶ 6, 205 P.3d 111 (2009). “The inconsistent positions must be diametrically opposed to one another.” *Overlake Farms*, 196 Wn. App. at 936, ¶ 18 (quotations

and quoted source omitted). “[J]udicial estoppel . . . requires a showing of all elements.” *State v. Wilkins*, 200 Wn. App. 794, 804, ¶ 22, 403 P.3d 890 (2017).

Here, Petersen failed to establish any of the elements required for judicial estoppel:

- a. **McCormic has not made diametrically opposed statements about his ownership of the disputed property.**

McCormic never disavowed ownership of the property in a prior judicial proceeding. Petersen’s judicial estoppel claims rests entirely on the contention that McCormic “failed to distinguish his alleged ownership of the Disputed Strip from his ownership of Lots 1 and 2” during a deposition in supplemental proceedings conducted by William Omaitis one of his creditors.⁶ (CP 168) Omaitis asked whether, “other than [his] two rental properties and [his] personal residence,” McCormic owned any other real property. (CP 578) McCormic answered “no,” because he understood that his creditor sought disclosure of the houses McCormic owned. (CP 216, 578) Though an inaccurate answer to Omaitis’ question, McCormic’s

⁶ Omaitis executed on McCormic’s counterclaims in this action, paying \$5,000, and then had himself substituted as the real party in interest. (CP 185-86, 608-09) He then settled with Petersen resulting in a stipulation dismissing McCormic’s counterclaims. (CP 644-46)

response is not equivalent to taking a position “diametrically opposed” to McCormic’s current position that Petersen could not and did not gain title to property that was not described in the deed of trust.⁷

Moreover, McCormic’s failure to clearly assert his ownership of the disputed property during a long line of questions with a hostile creditor covering a wide range of topics was not, as Petersen has consistently implied, a nefarious scheme to defraud his creditor (let alone a court, *see* § V.A.3.b, *infra*), but simply reflects his mistaken understanding of the question. Such a mistaken statement cannot support judicial estoppel. *See Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 539, ¶ 8, 160 P.3d 13 (2007) (“Application of the doctrine may be inappropriate when a party’s prior position was based on inadvertence or mistake.”) (quoted source omitted).

By contrast, when McCormic filed a 2004 timber trespass lawsuit against nearby neighbors, the Greens, McCormic did not

⁷ Petersen also criticized McCormic for failing to produce the 2014 quitclaim deed from the Port Madison Water Company to his creditor (CP 381), but that omission is not a “position” that could support judicial estoppel, let alone one diametrically opposed to a position McCormic has taken in this case. As stressed *infra*, the remedy for any inaccuracies in McCormic’s response to supplemental proceedings is not to vest title in Petersen, a result that would deprive McCormic’s creditors of an asset on which they could otherwise execute. (*See* § V.A.3.c)

disavow, but confirmed his ownership of the disputed property in that judicial proceeding. In that 2004 complaint, McCormic explained that he owned both his “home located at 15920 Euclid Avenue,” and “[t]he north 50 feet of a 100 foot waterfront Lot known as Portway which lot is located immediately to the south.” (CP 320; *see also* CP 328) McCormic did not claim to have a recorded deed reflecting his title to the disputed property, but asserted that he was the “legal owner,” a fact the Greens stipulated to based on confirmation by the City of Bainbridge and the Port Madison Water Company. (CP 398) McCormic thus claimed – consistent with this lawsuit – that he owned separate *real properties* consisting of separate *lots*, which would necessarily be identified by separate legal descriptions. Because McCormic has not taken diametrically opposed positions in legal proceedings, judicial estoppel cannot apply.

b. McCormic has never misled a court about his ownership interest in the disputed property.

McCormic never misled a court with inconsistent positions about whether he owns the disputed property. Judicial estoppel protects courts not litigants, and thus applies only where the estopped party succeeded in convincing the first court to adopt its

inconsistent position. *CHD, Inc. v. Taggart*, 153 Wn. App. 94, 104, ¶ 23, 220 P.3d 229 (2009) (“Because the doctrine of judicial estoppel seeks to preserve judicial integrity, ‘[a]bsent success in a prior proceeding, a party’s later inconsistent position introduces no risk of inconsistent court determinations and thus poses little threat to judicial integrity.’”) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 750-51, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001); see also *Wilkins*, 200 Wn. App. at 804, ¶ 21 (“[J]udicial estoppel is available only when the trial court adopted the inconsistent claim or position”); *Arp v. Riley*, 192 Wn. App. 85, 100, ¶ 27, 366 P.3d 946 (2015) (“Judicial estoppel is an equitable doctrine courts apply to protect the integrity of the judicial process, not to benefit a party.”).

McCormic achieved no “success” in the supplemental proceedings, and the court supervising that proceeding never “adopted” the allegedly inconsistent position of McCormic’s, which was not made in court, but during a deposition. Where, as here the presiding court was wholly unaware of McCormic’s position, judicial estoppel cannot apply. *Cf. Johnson v. Si-Cor Inc.*, 107 Wn. App. 902, 910, 28 P.3d 832 (2001) (“in and of itself, a bankruptcy debtor’s failure to schedule an asset does not sufficiently involve the court so

that the debtor’s position becomes a position accepted by the court”) (cited by Peterson at CP 386).

Nor did McCormic mislead the trial court in this action, let alone “deceive” the trial court by advancing a “narrative” that he did not “own” the disputed property until 2014, as Petersen asserted. (CP 384) In fact, McCormic accurately noted that the 2014 quitclaim deed is the first *recorded deed* reflecting his ownership of the disputed property. (*See, e.g.*, CP 36 (“[the] property has not been conveyed in any other deed or to any other party prior to or since the recording of that 2014 Quit Claim Deed”)) McCormic did not address when and how he first acquired ownership of the disputed property (likely by adverse possession) because it would have required, as McCormic noted below, an expensive “trial within a trial” on an issue that was irrelevant to Petersen’s legal theory that McCormic’s lender acquired title to the disputed property when McCormic entered into his loan. (5/12 RP 13)

The documents cited by Petersen as evidence of McCormic’s “record” title – two litigation guarantees and a land survey commissioned by the City of Bainbridge – are not deeds, and thus did not and could not purport to convey title of the disputed property to McCormic. (CP 334-38, 621-30) Indeed, the litigation guarantees

expressly state they were “not to be used as a basis for closing any transaction affecting title to said land.” (CP 338, 623) Far from deceiving the trial court, McCormic rightly focused it on the dispositive issue: whether his deed of trust encumbered property outside its legal description.

c. The trial court gave Petersen a windfall, granting him title to property for which he has not paid, and for which McCormic has received no value.

Refusing to vest title to Petersen in this action in no way imposes an unfair detriment on him. The alleged harm caused by McCormic’s purportedly inconsistent representation – his creditor’s inability to execute on the property – is not remedied by vesting title in Petersen, and would in fact harm McCormic’s creditors by depriving McCormic of an asset he could otherwise use to pay his debts. Petersen sought and was granted an unfair windfall, obtaining title to property that was not subject to auction when McCormic’s lender foreclosed (§ V.A.1) and Petersen was in no way harmed by any misrepresentation made by McCormic to his creditor.

Indeed, Petersen’s application of judicial estoppel to obtain title to the disputed property is wholly unprecedented. Petersen cited not a single case applying the doctrine to not only deprive a property owner of an interest in real property, but to then vest title

to that property in another party that was in no way harmed by the allegedly inconsistent position. To the contrary, Washington has long recognized that “[t]he doctrine of estoppel will not be readily extended when the effect thereof is to divest an estate in real property.” *King Cty. v. Boeing Co.*, 62 Wn.2d 545, 551, 384 P.2d 122 (1963) (citing *Finley v. Finley*, 43 Wn.2d 755, 264 P.2d 246 (1953); see also *Mugaas v. Smith*, 33 Wn.2d 429, 434, 206 P.2d 332 (1949) (“Title to real property is a most valuable right and will not be disturbed by estoppel unless the evidence is clear and convincing.”). The refusal of Washington courts to apply estoppel to real property is consistent with the long-established rule that “a party seeking to quiet title to property must succeed on the strength of his or her own title, not on the weakness of the other party’s title.” *Kesinger v. Logan*, 113 Wn.2d 320, 328, 779 P.2d 263 (1989).

Judicial estoppel – like all equitable doctrines – should be applied only if necessary to do equity. *Arp*, 192 Wn. App. at 99, ¶ 26 (reversing because of “serious questions about the equity of applying judicial estoppel”). Here, the equities favor McCormic. Transferring title to Petersen would unjustly enrich him by granting him property he did not pay for based on allegations of harm to an unrelated third party. Moreover, Petersen could have easily discovered that the deed

of trust would not convey title to the disputed property if he had conducted even a cursory title search. *McPherson*, 21 Wn. App. at 453.

Nor would refusing to apply judicial estoppel unfairly benefit McCormic. The doctrine is applied to prevent a debtor from retaining and then pursuing a legal claim after the debtor's discharge from bankruptcy where the debtor failed to disclose the claim to the bankruptcy court. *See, e.g., Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn. App. 222, 231, ¶ 19, 108 P.3d 147 (2005) (cited by Petersen at CP 174). Here, however, allowing McCormic to retain his record title to the property in McCormic will not allow him to unfairly shield property from his creditors, but will instead provide him an asset that will be available to his creditors for execution. (CP 362-63 (McCormic's creditor stating intent to execute on the property)) It would in fact impose an unfair detriment on McCormic to deprive him of the property in this action by judicial fiat when it was not sold at the trustee's sale and neither he nor his creditors received value for it.

Judicial estoppel is intended to preserve the integrity of courts, not confer windfalls on undeserving parties, and thus judicial estoppel cannot award Petersen property he did not bid on, and that was not described in the deed of trust, or the trustee's deed.

B. The trial court erred in not granting McCormic summary judgment and quieting title in him based on the deed of trust that undisputedly did not encumber the portway property.

McCormic is the undisputed record owner of the portway property, as confirmed by the 2014 quitclaim deed granting him record title and the Kitsap Assessor's Office. (CP 61-63, 596) Because Petersen has no rightful claim to the disputed property under any legal theory, the trial court erred in not granting McCormic's cross-motion for summary judgment based on that record title. *Kesinger*, 113 Wn.2d at 328-29 (affirming summary judgment and quieting title in favor of landowner based on legal description granting her title). This Court should reverse the trial court's denial of summary judgment.

VI. CONCLUSION

This Court should reverse and remand for entry of an order quieting title of the disputed property in McCormic.

Dated this 3RD day of April, 2018.

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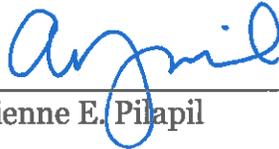
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That on April 3, 2018, I arranged for service of the foregoing Brief of Appellant, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 3rd day of April, 2018.



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