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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

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

Respondent Adrien Petersen concedes – as he must – that the property at issue in this case is not in the legal description of the deed he purchased at a trustee’s sale. That fact is dispositive. A trustee can only sell – and a purchaser such as Petersen can only buy – the land described in a deed of trust’s legal description.

None of Petersen’s legal theories supersede this black letter law. The disputed property cannot be “after acquired” under RCW 61.24.050 because that statute applies only to property actually described in a deed. Nor can there have been a “mutual mistake” in the deed of trust, because both McCormic and his lender were aware that the property had a legal description separate from Lots 1 and 2, and yet it was not included in the deed of trust’s legal description. Finally, the doctrine of judicial estoppel cannot apply because it would grant Petersen an unjustified windfall. 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, its rightful owner.

II. REPLY ARGUMENT

A. **The disputed property is not “after acquired” under RCW 61.24.050 because that statute applies only to property contained in a deed of trust’s legal description.**

Petersen’s argument that the disputed property became subject to the deed of trust under RCW 61.24.050 as property “thereafter acquired” cannot be squared with his current contention that McCormic owned the property at the time he executed the deed of trust in 2006. (*See* Resp. Br. 18)¹ To state the obvious, the property could not be “thereafter acquired” if McCormic owned it before executing the deed of trust. This is reason enough – by itself – for rejecting Petersen’s reliance on RCW 61.24.050.

Regardless, as he did below, Petersen fundamentally misconstrues the meaning of title “thereafter acquired” under RCW 61.24.050. RCW 61.24.050(1) 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 conveys any title to the property “the grantor may have thereafter acquired.” The phrase “thereafter

¹ As noted in McCormic’s opening brief (App. Br. 29), he agrees that he acquired title to the disputed property by adverse possession. McCormic, however, intentionally avoided this factual issue because it would have required an expensive and unnecessary “trial within a trial” in a case that should have been resolved based on the simple and undisputed fact that the disputed property is not included in the deed of trust’s legal description.

acquired” “concerns the vesting of title to property *actually described in a deed*, but which the grantor did not own at the time of conveyance.” (App. Br. 14-15 (quoting Washington Real Property Deskbook, WSBA, § 32.7(7) (3d ed. 1997) (emphasis added)) RCW 61.24.050 does not – as Petersen suggests – provide that the collateral securing a deed of trust automatically expands to include any property outside a deed of trust’s legal description that a borrower acquires after executing a deed of trust.

None of the cases cited by Petersen support his contention that title “thereafter acquired” under RCW 61.24.050 includes title to property not included in a deed’s legal description. (Resp. Br. 18) The cases cited by Petersen for the general proposition “that after-acquired title inures to the purchaser of land at a foreclosure sale” involve title to property *actually described* in the deed or mortgage being foreclosed. (Resp. Br. 16, citing *Gough v. Ctr.*, 57 Wash. 276, 277, 106 P. 774 (1910) (deed 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)))²

Likewise, the Washington State Bar Association’s Real Estate Deskbook does not support Petersen. As noted *supra*, the Deskbook expressly rejects the result Petersen advocates for here – that after-acquired title includes property not “actually described in a deed.” Deskbook, WSBA, § 32.7(7). The portion of the Deskbook cited by Petersen simply clarifies that the after-acquired doctrine applies both to expectancies in the encumbered property that exist when a deed of trust is granted, but have not yet matured, *and* to rights that arise entirely after a deed of trust is granted. (Resp. Br. 18, citing Deskbook, § 32.7(7))

Petersen also cites the Deskbook for the proposition that land “may become appurtenant to other land . . . by the acts and intentions of the parties” (Resp. Br. 18), but he nowhere explains how McCormic or his lender evidenced any intent that the disputed property would become appurtenant to Lots 1 and 2. The only evidence is to the contrary – despite being aware of McCormic’s claim to the disputed property, and having its legal description in hand, McCormic’s lender chose not to include it in the legal

² Petersen also cites *Everly v. Wold*, 125 Wash. 467, 219 P. 7 (1923), but in that case it is not clear whether the disputed property was described in the mortgage.

description of the encumbered property. (See App. Br. 5-6; § II.B, *infra*)

This same evidence negates Petersen's reliance on the doctrine of adverse possession. (Resp. Br. 20-21) The cases cited by Petersen apply the well-established rule that parties in privity may "tack" together their periods of adverse possession even if a deed omits the land from its legal description so long as "the land was *intended* to be included in the deed between them." See *El Cerrito, Inc. v. Ryndak*, 60 Wn.2d 847, 856, 376 P.2d 528 (1962) (emphasis added); *Howard v. Kunto*, 3 Wn. App. 393, 398, 477 P.2d 210 (1970) (quoting *El Cerrito*), *overruled by Chaplin v. Sanders*, 100 Wn.2d 853, 676 P.2d 431 (1984). That rule has no application here, where there is no evidence that McCormic and his lender intended the disputed property would be included in the deed of trust.

Petersen likewise points to no evidence supporting his suggestion that McCormic spontaneously gifted the disputed property to his lender as additional collateral after executing the deed of trust. The 2014 deed exchange relied on by Petersen was between McCormic and the Port Madison Water Company – it in no way involved McCormic's lender, Mortgageit, Inc. (Resp. Br. 19,

citing CP 550, 557) Nor is there any evidence that McCormic's lender ever requested additional collateral – a request McCormic would have been under no obligation to oblige. See *Badgett v. Sec. State Bank*, 116 Wn.2d 563, 572, 807 P.2d 356 (1991) (“While the parties may choose to renegotiate their agreement, they are under no good faith obligation to do so.”). Thus, while it may be true that “[n]o authority prevents a mortgagor/debtor from adding to his or her encumbered property” (Resp. Br. 19), that does nothing to help Petersen.

Petersen's notion of “after acquired” property cannot be squared with the fundamental rule that a “trustee sells only the title he or she receives.” *Mann v. Household Fin. Corp.* III, 109 Wn. App. 387, 392, 35 P.3d 1186 (2001); see also *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)). Petersen attempts to distinguish *Mann* and *McPherson*, arguing that they hold only that a trustee “does not guarantee title.” (Resp. Br. 17) But that lack of guarantee underscores that a trustee sells only the title it has and that it was Petersen's duty, not the trustee's, to confirm whether the legal description included the disputed

property. *See McPherson*, 21 Wn. App. at 453 (“The material fact here was the absence of any title to an easement which the deed of trust purported to convey. Examination of the chain of title would have revealed this defect.”).

Petersen’s interpretation of RCW 61.24.050 also leads to the absurd result that a lender can claim *any* of a borrower’s subsequently acquired property as collateral simply because it was acquired after the execution of a deed of trust. (App. Br. 17) While a lender *may* contract for such a sweeping security interest³, McCormic’s lender did not. Petersen does not argue otherwise, but simply asserts – without explanation – that “on the facts in this record” vesting title in Petersen is the only “coherent solution.” (Resp. Br. 21) There is nothing coherent about expanding the collateral securing a deed of trust to include property outside its legal description in the face of clear evidence the lender did not want that property as collateral. RCW 61.24.050 was not a basis for granting Petersen summary judgment.

³ *See* Restatement (Third) of Property (Mortgages) § 7.5 TD No 4 (1995) (“an after-acquired property mortgage provision purports to give the mortgagee not only a lien on the mortgagor’s specifically described real estate, but also on other parcels or tracts of land that the mortgagor subsequently acquires”).

B. Petersen points to no evidence – let alone clear, cogent, and convincing evidence – that McCormic and his lender intended to encumber the disputed property, as required to establish a mutual mistake.

Petersen concedes – as he must – “[t]he general rule . . . that an inadequate legal description is not subject to reformation.” (Resp. Br. 21, citing *Halbert v. Forney*, 88 Wn. App. 669, 673, 945 P.2d 1137 (1997)) Petersen likewise acknowledges that a court can reform an instrument subject to the statute of frauds only if there is *clear, cogent, and convincing* evidence the parties held a shared intent that is inconsistent with the written instrument. (Resp. Br. 22, 26 n.10, citing *Halbert*, 88 Wn. App. at 674 and *Glepeco, LLC v. Reinstra*, 175 Wn. App. 545, 561, 307 P.3d 744 (2013)) Petersen did not meet this heavy burden, especially considering that on summary judgment the facts must be viewed in the light most favorable to McCormic.

Both McCormic and his lender knew that McCormic claimed ownership over the disputed property and that it had a distinct legal description from Lots 1 and 2. Yet, the lender did not include the disputed property’s legal description in the deed of trust, even though McCormic provided the description to its appraisers. (CP 411-12, 446) The only reasonable inference from these undisputed facts is that McCormic’s lender did not want the disputed property

as collateral. At the very minimum, the absence of the disputed property from the deed of trust's legal description created a disputed issue of fact.

Petersen's arguments to the contrary are unavailing. Petersen relies heavily on the Mahon appraisal, but he ignores critical parts of that appraisal. Though Petersen correctly notes the Mahon appraisal valued both "the residential property and the disputed strip" (Resp. Br. 25, citing CP 438), he then ignores that the appraisal stated "[t]he subject lot as reported by Kitsap County reflects 0.25 acre with 100 frontage feet of waterfront," which was inconsistent with a litigation guarantee stating "the subject site also includes an additional .06 acre and 50 frontage feet," *i.e.*, the disputed property. (CP 444) Petersen further ignores that the Mahon appraisal appended the litigation guarantee, which set forth the disputed property's distinct legal description.⁴

Thus, while the appraisal valued the disputed property, it did so while noting that it could not confirm McCormic's claim of ownership over it, which was supported only by a litigation

⁴ The version of the litigation guarantee appended to Mahon's appraisal is unfortunately nearly illegible. Petersen, however, does not dispute McCormic's assertion that the litigation guarantee is the same guarantee that appears at CP 412. (See App. Br. 6 n.4; *see also* CP 334-39 (setting out litigation guarantee in full))

guarantee – a document that cannot convey title and which expressly stated it should “not to be used as a basis for closing any transaction affecting title to said land.” (CP 338) It would have been entirely reasonable for the lender, having appraised Lots 1 and 2 as well as the disputed property, to decide that it did not want the disputed property as collateral because McCormic’s lack of record title risked future legal disputes. That the value of Lots 1 and 2 provided more than enough security for McCormic’s \$1.33 million loan underscores the reasonableness of that decision.

Petersen’s reliance on the unknown loan-to-value (LTV) underwriting standards of McCormic’s lender is speculation and falls far short of the clear, cogent, and convincing he was required to provide. (Resp. Br. 25) There is no evidence that the lender required a 70% LTV ratio, nor is there anything magical about a 70% LTV ratio. Lenders may have LTV ratios as high as 85% for residential loans such as McCormic’s, a range that more than accommodated the loan to McCormic without the disputed property as collateral.⁵ See 12 C.F.R. 365.2, Subpt. A., App. A.

⁵ Though the Mahon appraisal does not value the disputed property separately, the other appraisal in the lender’s file valued it at \$125,000. Subtracting \$125,000 from Mahon’s appraisal of \$1.9 million for Lots 1 and 2 and the disputed property yields an LTV ratio of 75% (\$1.33 million/\$1.775 million).

Petersen offers no other “evidence” of the lender’s purported intent other than his misleading interpretation of the Mahon appraisal and an unknown LTV underwriting standard. Petersen argues that “the parties’ subsequent act[s] and conduct” support his position, but he nowhere identifies any subsequent acts by either McCormic or his lender evidencing an intent to encumber the disputed property. (Resp. Br. 26) The only subsequent acts are those of the trustee who rejected Petersen’s request to amend the deed of trust. (CP 225) And, contrary to Petersen’s suggestion (Resp. Br. 26), the trustee’s confirmation of the black letter law that a trustee cannot sell land outside a deed of trust’s legal description underscores that McCormic, not Petersen, offers the more reasonable interpretation of the deed of trust. *Glepeco*, 175 Wn. App. at 561 (courts consider “the reasonableness of respective interpretations” when ascertaining intent) (quoting *Berg v. Hudesman*, 115 Wn.2d 657, 667, 801 P.2d 222 (1990)).

The only record evidence of McCormic’s intent is that McCormic did not intend to encumber the disputed property because his lender did not require it as collateral. (CP 216) Petersen focuses on the wrong time period in arguing that “[t]he only plausible motive for McCormic to proactively educate the

appraisers of his ownership interest in the disputed strip was to borrow as much as he could.” (Resp. Br. 24) McCormic’s initial intent in providing the separate legal description of the property is irrelevant – what matters is McCormic’s intent when he signed the deed of trust. *Halbert*, 88 Wn. App. at 674 (parties must have “shar[ed] an identical intent *when they formed* a written document” (emphasis added)).

Petersen also nonsensically argues that “if McCormic’s intention at the time of granting the 2006 deed of trust was to knowingly omit the disputed strip as collateral,” then its omission was a scrivener’s error. (Resp. Br. 24-25) But the deed of trust is consistent – not inconsistent – with an intent “to knowingly omit the disputed strip as collateral,” and thus neither the doctrine of mutual mistake nor scrivener’s error can apply. *Halbert*, 88 Wn. App. at 674; *Glepeco*, 175 Wn. App. at 561.

Regardless, even assuming the parties intended to encumber the disputed property, Petersen still could not prevail because the omission of the disputed property from the deed of trust was – at best – a “knowing error” or “unilateral mistake.” *Halbert*, 88 Wn. App. at 674; *Williams v. Fulton*, 30 Wn. App. 173, 177 n.2, 632 P.2d 920, *rev. denied*, 96 Wn.2d 1017 (1981). Here, as in *Halbert*, the

deed of trust cannot be reformed because the lender knew the disputed property had a distinct legal description and yet did not include it in the deed of trust. 88 Wn. App. at 671 (“We affirm because the document cannot be reformed to correct what the parties knew was an incomplete legal description . . .”). This Court has previously stressed that “if such errors were always corrected, the statute of frauds would be eviscerated.” *Id.* at 674. This Court should reject Petersen’s arguments based on mutual mistake or scrivener’s error.

C. Judicial estoppel cannot vest title in Petersen because McCormic has not asserted inconsistent positions in court and because granting title to Petersen would grant him an unjustified windfall.

Petersen did not establish any of the three required elements of judicial estoppel: 1) a later position asserted in court that is clearly inconsistent with an earlier position, 2) that judicial acceptance of the later position would create a perception that either the first or second court was misled, and 3) that the party asserting the inconsistent position would obtain an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *Ashmore v. Estate of Duff*, 165 Wn.2d 948, 951-52, 205 P.3d 111 (2009). Petersen’s claim of judicial estoppel rests entirely on McCormic’s dispute with his creditor William Omaitis.

Petersen’s contention that McCormic disclaimed ownership of the disputed property to Omaitis is not supported by the record and, even if true, the proper remedy would not be to quiet title in Petersen, who was in no way harmed by McCormic’s allegedly inconsistent positions and has never paid for the disputed property. This Court should refuse to grant Petersen an unjustified windfall.⁶

1. McCormic has not taken diametrically opposed positions concerning his ownership of the disputed property.

Petersen wrongly asserts that McCormic’s failure to clearly distinguish the disputed property from Lots 1 and 2 when responding to Omaitis’s aggressive efforts to enforce his judgment are a “position” diametrically opposed to his current position that Petersen could not gain title to property that was not described in the deed of trust. *Overlake Farms B.L.K. III, LLC v. Bellevue-Overlake Farm, LLC*, 196 Wn. App. 929, 936, 386 P.3d 1118 (2016) (judicial estoppel requires “[t]he inconsistent positions [to] be diametrically opposed to one another” (quotations and quoted

⁶ This Court has acknowledged confusion over whether the standard of review for a summary judgment order based on judicial estoppel is de novo or abuse of discretion. *See Taylor v. Bell*, 185 Wn. App. 270, 283 n.13, 340 P.3d 951 (2014) (“[W]e have said that the proper standard of review is abuse of discretion . . . [y]et, it is well settled that summary judgment orders and all rulings made in conjunction with summary judgment are reviewed de novo.” (citation omitted)). This Court should apply de novo here because the trial court provided no findings or explanation supporting its ruling, and thus this Court cannot tell how it exercised its discretion, if at all.

source omitted)), *rev. denied* 188 Wn.2d 1007 (2017). Additionally, “[a]pplication of the doctrine may be inappropriate ‘when a party’s prior position was based on inadvertence or mistake.’” *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 539, 160 P.3d 13 (2007) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 753, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001)).

Petersen first seizes on McCormic’s answer to a single question during a lengthy deposition by Omait’s attorney. Petersen concedes that McCormic’s answer that he did not own real property “other than [his] two rental properties and [his] personal residence” could by itself reflect mistake or inadvertence. Nonetheless, Petersen argues that – as a matter of law – McCormic’s answer was part of a nefarious scheme to defraud Omait’s because McCormic did not list the disputed property in a June 2015 declaration or provide Omait’s the 2014 quitclaim deed from the Port Madison Water Company. (Resp. Br. 30)

Petersen ignores critical context for McCormic’s actions. The June 2015 declaration did not purport to be an exhaustive list of McCormic’s real property, but was filed in opposition to Omait’s serial writs of execution that were a constant source of humiliation for McCormic and his wife. (CP 632-35) Likewise, McCormic’s

failure to produce the 2014 quitclaim deed reflects nothing more than an innocent oversight by a debtor exhausted by his creditor's unrelenting collection efforts. Petersen's argument that "intent" is not an element of judicial estoppel (Resp. Br. 29), ignores *Arkison's* admonishment that the doctrine should not be applied to inadvertent mistakes. The evidence presented by Petersen – at most – created a disputed issue of fact concerning whether McCormic inadvertently omitted the disputed property from his disclosures, and thus the issue could not be resolved in Petersen's favor on summary judgment. *Arp v. Riley*, 192 Wn. App. 85, 101, 366 P.3d 946 (2015) (remanding for further proceedings because "the record does not establish by undisputed facts the pertinent elements of judicial estoppel").

2. Judicial estoppel cannot apply because McCormic did not mislead a court.

"Judicial estoppel is an equitable doctrine courts apply to protect the integrity of the judicial process, not to benefit a party." *Arp*, 192 Wn. App. at 100. Petersen concedes that judicial estoppel requires a party to prove that a court – not a party – has been misled by the allegedly inconsistent positions. (Resp. Br. 28-29, citing *Arkison*, 160 Wn.2d at 538-39) Yet, Petersen cites no

evidence that McCormic ever misled a court. Petersen's judicial estoppel argument thus fails as a matter of law.

Petersen erroneously relies on cases involving a court's discharge of debts during bankruptcy. (Resp. Br. 30-31, citing *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn. App. 222, 233, 108 P.3d 147 (2005)) *Cunningham* affirmed dismissal of a debtor's legal claim that the debtor had not disclosed to the bankruptcy court, reasoning that "the bankruptcy court's discharge of [the debtor's] debts was an implicit acceptance of his position that he had no assets that could be liquidated for the benefit of his creditors," and that the debtor "received the benefit of a complete discharge of debts." 126 Wn. App. at 233; *see also Baldwin v. Silver*, 147 Wn. App. 531, 537, 196 P.3d 170 (2008) ("A bankruptcy court is deemed to have 'accepted' a litigant's inconsistent position when that court discharges the debtor's debt without knowledge of the prepetition cause of action.").

Unlike the bankruptcy court in *Cunningham*, the court presiding over the Omais/McCormic supplemental proceeding never accepted any assertion by McCormic. Indeed, it was wholly unaware of McCormic's allegedly inconsistent statement, which was not made in court, but in a deposition. Likewise, McCormic has not

had his debt to Omaitis discharged. To the contrary, Omaitis continues to aggressively pursue satisfaction of his judgment, even going so far as to execute on McCormic's counterclaims in this action and substitute himself as the real party in interest. (CP 185-86, 608-09) Finally – and most fundamentally – *Cunningham* did not vest title in the undisclosed property in a third party, but simply denied the debtor the right to recover on the claim. No authority supports the sweeping application of judicial estoppel Petersen would have this Court adopt.

3. Applying judicial estoppel gives Petersen an undeserved windfall and deprives McCormic of property without any compensation.

“Judicial estoppel does not exist to create a windfall for the proponent party.” *Gosney v. Fireman’s Fund Ins. Co.*, ___ Wn. App. ___, 419 P.3d 447, 479 (2018). Petersen does not dispute that he has never paid for the disputed property or that McCormic never received value for it. (*See App. Br. 32*) Nor does Petersen deny that had he exercised reasonable diligence he could have discovered the disputed property was not in the deed of trust’s or trustee’s deed’s legal description. *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”) (cited at

App. Br. 32). These undisputed facts confirm that invoking judicial estoppel in Petersen's favor would erroneously grant him a windfall.

Petersen now contends that McCormic's purported misstatements harmed him because had Omaitis executed on the property, he "would have been dealing with Omaitis . . . not McCormic, as owner of the disputed strip." (Resp. Br. 31) But if Omaitis had executed on the property, his title would only be as good as McCormic's title. *See v. Hennigar*, 151 Wn. App. 669, 674, 213 P.3d 941 (2009) ("It is axiomatic that a person cannot convey a greater interest in real estate than she owns."). Unless Omaitis simply conceded Petersen's title, Petersen would still have to establish his title to the disputed property and would be in the same position he is now, refuting his contention that McCormic improperly "prolonged the day when Petersen could resolve the strip's ownership." (Resp. Br. 33)

The unstated assumption underlying Petersen's argument is that he could have bought the property from Omaitis rather than having to litigate the issue. But judicial estoppel can be invoked only to prevent *unfair detriment*. *Ashmore*, 165 Wn.2d at 951-52. It would undermine fundamental principles of freedom to contract to find that a property owner's unwillingness to sell his property

was an “unfair” detriment supporting the application of judicial estoppel. *Cf. Haire v. Patterson*, 63 Wn.2d 282, 286, 386 P.2d 953 (1963) (“It is unthinkable that courts should undertake the writing of contracts for sellers and buyers who have failed or refused, rightly or wrongly, to come to terms between themselves.”).

The only other harm identified by Petersen is not to Petersen, but to Omaitis, who Petersen alleges “was denied the opportunity to execute on [the property] to satisfy his judgment.” (Resp. Br. 12; *see also* Resp. Br. 31) But applying judicial estoppel would not remedy the harm to Omaitis or any other creditor; it would instead harm those creditors by depriving McCormic of an asset he could otherwise use to pay his debts. *Bartley-Williams v. Kendall*, 134 Wn. App. 95, 102, 138 P.3d 1103 (2006) (refusing to apply judicial estoppel where it would “create a windfall for the party seeking to invoke judicial estoppel at the expense of the bankruptcy creditors”). It would be wholly inequitable to deprive McCormic of property that was not sold at the trustee’s sale and for which neither he nor his creditors received value. *Arp*, 192 Wn. App. at 100 (“Judicial estoppel is an *equitable doctrine*”; reversing because of “serious questions about the equity of applying judicial estoppel” (emphasis added)).

As below, Petersen has not cited any case applying judicial estoppel 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 positions. Petersen simply ignores the long-established law 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.”) (cited at App. Br. 31). This Court should reject Petersen’s unprecedented application of judicial estoppel.

D. The trial court erred in denying McCormic summary judgment.

Petersen provides no basis for affirming the trial court’s summary judgment order except for his arguments presented below and refuted *supra*. Because all of Petersen’s legal theories fail, he has no rightful claim to the disputed property and the trial court erred in not granting McCormic’s cross-motion for summary

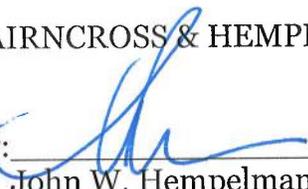
judgment based on his undisputed record title. (See App. Br. 33-34)

III. CONCLUSION

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

Dated this 8th day of August, 2018.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on August 8, 2018, I arranged for service of the foregoing Reply Brief of Appellant, to the court and to the parties to this action as follows in the methods indicated below:

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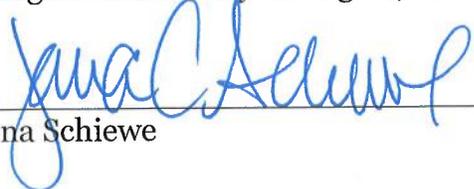
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