

FILED
Court of Appeals
Division II
State of Washington
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CASE 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 D. HULL

AMENDED BRIEF OF RESPONDENT

SANCHEZ, MITCHELL, EASTMAN
& CURE, PSC

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I. RESTATEMENT OF THE ISSUES

A. Did the Superior Court err by quieting title in a disputed strip of real property abutting a mortgage loan's collateral for a deed of trust, where the deed of trust's grantor acquired the strip by adverse possession that vested and was ratified before the lender executed a nonjudicial foreclosure and issued a trustee's deed legally describing only the collateral and not the strip?

B. Did the Superior Court err by quieting title to correct a mortgage lender and borrower's mutual mistake or scrivener's error of omitting a disputed strip of real property from the deed of trust's legal description, where the lender's appraisal pertained to both the described property and the omitted strip and the borrower had long-claimed to be the strip's owner?

C. Did the Superior Court err by judicially estopping the former owner of judicially foreclosed real property from claiming ownership in a disputed strip abutting the collateral of record, when the former owner previously (1) successfully sued for property damages to the disputed strip in a Superior Court tort action and (2) concealed his ownership of the strip in a Superior Court collection

action by omitting the strip from his inventories of real property in declaration and supplemental proceedings testimony?

II. INTRODUCTION

In 1974 McCormic purchased waterfront property on Bainbridge Island's Port Madison Bay. For the next 42 years, McCormic and his spouse resided at the property. During his ownership of the residential property, McCormic acquired title via adverse possession to a 50-foot wide strip of land (the "disputed strip") that lies next to McCormic's residential property.

McCormic maintained and landscaped the disputed strip in a manner consistent with the maintenance and landscaping of residential property. The boundary between the disputed strip and the residential property is not marked by any obvious landmarks or demarcation lines.

In 2006 McCormic obtained a \$1.33 million dollar loan which was secured by a deed of trust (the "2006 deed of trust"). Although McCormic had acquired title to the disputed strip via adverse possession many years earlier, the 2006 deed of trust's legal description did not include the disputed strip. In 2014 McCormic's ownership of the disputed strip was formally recognized when the

neighboring landowner to the south of the disputed strip – the Port Madison Water Company – executed and recorded a quitclaim deed granting McCormic its interest in the disputed strip “for the sole purpose of clearing title”.

McCormic defaulted on the 2006 deed of trust, and in 2016 the lender executed a nonjudicial foreclosure. Petersen purchased the property at the trustee’s sale and received a trustee’s deed which recited the 2006 deed of trust’s exact legal description and repeated that description’s omission of the disputed strip.

Soon after the trustee’s deed was delivered to Petersen, McCormic notified Petersen that McCormic owned the disputed strip and demanded that Petersen pay him rent for using it. McCormic also (a) placed a sign on the disputed strip with McCormic’s name on it, (b) spray painted a long bright orange line along what McCormic alleged was the boundary line between the disputed strip and McCormic’s former residential property, and (c) caused the water service to the residential property to be turned off.

Petersen sued McCormic to quiet title to the disputed strip and asserted superior title under three legal theories. **First**, that Washington’s Deed of Trust Act applies the after-acquired title doctrine to trustee’s deeds, and this trustee’s deed must convey all

of McCormic's right, title and interest in the disputed strip, including that acquired via the 2014 quitclaim deed from the Water Company, pursuant to RCW 61.24.050(1). **Second**, that McCormic and his lender made a mutual mistake or scrivener's error by omitting the legal description of the disputed property from the 2006 deed of trust. **Finally**, because McCormic failed to disclose his ownership interest in the disputed strip in a separate judicial proceeding, the equitable doctrine of judicial estoppel prohibits McCormic from claiming separate ownership of the disputed strip in this case.

The trial court properly granted Petersen's motion for summary judgment and quieted title to the disputed strip in his favor. The trial court's ruling should be affirmed.

III. STATEMENT OF THE CASE

This case involves a 42-plus year history of McCormic's ownership of waterfront property located in the Plat of Port Madison on Bainbridge Island's Port Madison Bay. (CP 46, 51, 53) McCormic's former property includes: (a) Lots 1 and 2 of the Plat which consists of 100 feet of waterfront and is the location of McCormic's residence (the "residential property"), and (b) the north 50 feet of the

“Portway¹” described in the Plat which consists of 50 feet of waterfront and has been used and maintained by McCormic since 1974 as an extension of the residential property’s yard and landscaping (the “disputed strip”). Until 2014, the record owner of the Portway (including the disputed strip) was the Port Madison Water Company.

A. Four Decades of Ownership

In 1974 McCormic and his spouse (the “McCormics”) purchased waterfront property consisting of Lots 1 and 2. (CP 46, 51, 53) For the next four decades, McCormic and his spouse resided at the property. (Brief of Appellant (“Brief”) at 3, CP 97-99) From 1974 until the property was sold at a trustee’s sale to Petersen in 2016, McCormic exclusively and regularly maintained the disputed strip, including planting, landscaping, and mowing. (CP 342)

In 1994 Land Title Company of Kitsap County issued a litigation guarantee to McCormic which identified McCormic as fee simple owner of the disputed strip (the “1994 title report”). (CP 595, 598-602)

¹ The Portway neighbors the residential property to the south and consists of a separate 100 foot wide tract.

In 1996 a survey of the Portway was recorded with the Kitsap County Auditor. The 1996 survey identifies McCormic as the owner of the disputed strip and the Water Company as the owner of the south 50 feet of the Portway. (CP 630) The 1996 survey also shows wood retaining walls extending from the residential property onto the disputed strip. (CP 612-13, 630)

In February 2004, the McCormics sued their uphill neighbors for timber trespass and damages in Kitsap County Superior Court after they caused three mature pine tree located on the disputed strip to be cut-down. (CP 313, 319-26) In December 2004, McCormic testified that he was the owner of the disputed strip, had maintained it since 1974, and had planted the three pine trees in 1994 the disputed strip. CP 314, 328-29. In June 2005, the trial court entered judgment upon a jury verdict awarding \$86,000.00 of damages to the McCormics for timber trespass and outrage. (CP 315, 354-57)

In 2006, McCormic sued his attorney in the timber trespass case. (CP 325, 394) In February 2007, McCormic was deposed and testified that his timber trespass lawsuit was predicated on his ownership of the disputed strip. (CP 390-91, 394, 397-98)

In February 2006, "MortgageIT Inc." loaned \$1.33 million to McCormic, secured by the 2006 deed of trust. (CP 67-93)

MortgageIT's loan file includes two appraisals. (CP 402, 411-32, 435-63) Both appraisals included the disputed strip and included the full 150 feet of waterfront in determining value. (CP 416-17, 437-38, 443)

The first appraisal was commissioned by Quality Express Mortgage and dated December 12, 2005 (the "Quality Express appraisal"). (CP 411, 416) The Quality Express appraisal recognized the disputed strip, stating "[t]he subject enjoys 150 FF of low to medium bank waterfront located in the prestigious neighborhood of Port Madison". (CP 416) The Quality Express appraisal accounted for the disputed strip's 50 frontage feet and valued the combined properties at \$2.4 million. (CP 416-17²) Notably, Quality Express Mortgage was not the lender for McCormic's \$1.33 million loan. (CP 67, 104)

McCormic's lender - MortgageIT, Inc. - commissioned the second appraisal, which was prepared by Mahon & Rutledge Appraisal Group and dated February 6, 2006 (the "Mahon appraisal"). (CP 67, 435) The Mahon appraisal evaluated the total

² McCormic notes the Quality Express appraisal discounted the value of the disputed strip's frontage at \$2,500 per frontage foot. (Brief at 22, citing CP 412, 419) Oddly, the appraisal's review of comparable sales lists the subject property as 0.25 acres with 150 frontage feet, which accounts for the total FF but only the acreage of Lots 1 and 2. (CP 417)

0.31 acres of land and 150 feet of water front and valued the property at \$1,900,000. (CP 437-38, 444) The Mahon appraisal states:

Per Land Title Company of Kitsap County, the subject site also includes an additional 0.5 acre and 50 frontage feet of the adjoining vacated street. The appraisal has been written to include this additional area.

(CP 444) MortgageIT, Inc.'s \$1.33 million loan to McCormic was exactly 70 percent of the \$1.9 million appraised value of Lots 1 and 2 and the disputed strip, per MortgageIT Inc.'s own appraisal.

William Omaitis is a judgment creditor of the McCormics. In 2011, Omaitis filed a collections action against the McCormics in Kitsap County Superior Court (the "Omaitis case") and in 2013 Omaitis obtained two judgments upon which the court authorized writs of execution against the McCormics. (CP 360, 632-33)

On February 11, 2014, McCormic visited the Kitsap County Assessor's Office and inquired why it was not requiring him to pay real property taxes for the disputed strip. (CP 595) McCormic provided the Assessor's Office with a copy of the 1994 title report identifying him as the disputed strip's fee simple owner.³ As a result,

³ The 1994 title report listed two 1994 deeds of trust as encumbrances on the disputed strip. (CP 598-602) The cited deeds of trust described Lots 1 and 2 but not the disputed strip as collateral. (CP 275, 279-93)

the County's Cadastral Supervisor combined the residential property's legal description with the disputed strip's legal description in the County's parcel system. (CP 595, 598-602) Thus, Lots 1 and 2 and the disputed strip were united as one parcel "of record". (CP 595)

Later that same year, McCormic's ownership interest in the disputed strip was formally recognized by deed. In November 2014, the McCormics and the neighboring landowner to the south, the Port Madison Water Company, executed a deed exchange:

- The McCormics conveyed via quitclaim deed their interest in the southern 50-feet of the Portway to the Water Company (CP 550-52); and
- The Water Company conveyed via quitclaim deed its interest in the disputed strip (the northern 50-feet of the Portway) and the residential property (Lots 1 and 2) to McCormic (the "2014 quit claim deed"). (CP 557-59)

Both quitclaim deeds are prefaced "for the sole purpose of clearing title". (CP 550, 557⁴) The corresponding real estate excise tax affidavits filed in December 2014 each cite the WAC 458-61A-109(2)(b) exemption for boundary line adjustments. (CP 554, 561)

⁴ In 2005, nine years earlier, the McCormics acknowledged the Company was the legal owner of the Portway's southern 50-feet. (CP 315, 346)

Meanwhile, execution proceedings continued in the Omaitis case. On June 11, 2015, McCormic filed a declaration inventorying his real properties. (CP 613, 632-35). McCormic's declaration identified his residential property and his two rental properties:

9. Mr. Omaitis suggests the real property I own has value. Yet through his prior supplemental proceedings and subpoenaing bank records, he knows much more is owed against these properties than they are worth.
 - a. *15920 Euclid Ave, Bainbridge Island, WA.* Mr. Omaitis suggest this property is worth \$700,000, but he knows there is a first mortgage in the amount of \$1,691,982 encumbering this property, see Exhibit B, and that this property is also encumbered by a second mortgage and IRS tax lien.
 - b. *15025 Washington Ave, Bainbridge Island, WA.* Mr. Omaitis suggests the taxed assessed value is \$237,000, but he knows I owe \$738,495 on a first mortgage for this property and that it is also encumbered by a second mortgage. See Exhibit C.
 - c. *15015 Washington Ave, Bainbridge Island, WA.* Mr. Omaitis suggests the taxed assessed value is \$178,410, but he knows I owe more than \$500,000 to the first and second mortgage lien holders. See Exhibit D.

(CP 613, 634) Thus, McCormic failed to disclose or segregate his ownership interest in the disputed strip to the court. (CP 363, 634)

In October 2015, Omaitis caused the court to enter an Order for Supplemental Proceedings (the “Supplemental Proceedings Order”) directing McCormic to appear in court on a certain date and provide testimony concerning his assets and to bring with him the records and documents identified in the Supplemental Proceedings Order, including:

[a]ll deeds and other instruments evidencing any interest of McCormic ... in any real property acquired on or after June 1, 2013 to the present.

(CP 360-61, 365-66)

Although McCormic was expressly ordered to do so by the Supplemental Proceedings Order, McCormic did not produce the 2014 quitclaim deed or any other documents pertaining to the disputed strip at the supplemental proceedings hearing. (CP 362⁵)

Pursuant to the Supplemental Proceedings Order, McCormic testified in December 2015 that he (a) produced all records and documents responsive to the Supplemental Proceedings Order, and (b) did not own any real property other than the residential property

⁵ In the instant action, McCormic claimed to obtain “record title” to the “McCormic Portway Property” via the 2014 quit claim deed. (CP 21, 362, 376)

and two rental properties. (CP 362, 547, 576, 578⁶) Omaitis relied on McCormic's testimony and as a result of McCormic's failure to disclose his interest in the disputed strip, Omaitis was denied the opportunity to execute on it to satisfy his judgment. (CP 362-63)

In 2016 McCormic defaulted on the 2006 deed of trust, prompting a nonjudicial foreclosure. (CP 104-5) There is no evidence indicating that McCormic ever notified his lender of his formal acquisition of the disputed strip. As described above, the notice of trustee's sale and the trustee's deed delivered to Petersen did not contain a legal description of the disputed strip. (CP 104)

In early 2017, based on the trustee's deed's legal description, the Assessor's Office created a new tax parcel for the disputed strip "to reflect [McCormic's] presumed continued ownership". (CP 596) The Assessor's Office made this designation in accordance with its standard office practices and expressed no view on the merits of McCormic's claim of ownership in the disputed strip. (CP 596)

⁶ At the time, McCormic acknowledged being at least six months behind on his home mortgage for his personal residence on Lots 1 and 2. (CP 587)

B. In December 2016, Petersen purchased McCormic's property at a trustee's sale.

Petersen purchased the property at a trustee's sale for \$1.05 million and received a trustee's deed. (CP 47, 97-99) The trustee's deed did not include a legal description of the disputed strip. Soon after Petersen obtained the trustee's deed, Petersen became aware that McCormic continued to claim ownership to the disputed strip. McCormic demanded Petersen pay rent for his use of the disputed strip. When Petersen refused to pay McCormic rent, McCormic (a) hung a sign bearing his name on the disputed strip, (b) spray painted a long bright orange line along the (former) boundary between the residential property and the disputed strip, and (c) shut off the water supply to residential property. (CP 654-55, 673, 675)

Following the trustee's sale, McCormic also entered the residence during remodeling, identifying himself as a "friendly neighbor". (CP 675) Suspiciously, the keys to the residence went missing during McCormic's visits to the residential property. (CP 655, 675)

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

As a result of McCormic's ownership claim and troubling behavior, Petersen filed suit against McCormic to enjoin interference

with Petersen's ownership and to quiet title to disputed strip that had become integral to the residential property. (CP 651, 655-56)

On October 4, 2017, the trial court correctly granted Petersen's motion for summary judgment. (CP 511-513)

IV. ARGUMENT

A. Standard of Review.

This Court reviews summary judgment de novo, engaging in the same inquiry as the trial court and viewing the facts and all reasonable inferences in the light most favorable to the nonmoving party. *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 501, 115 P.3d 262 (2005). In conducting its de novo review of the trial court's entry of summary judgment, this Court may affirm "on any basis supported by the record." *Coppernoll v. Reed*, 155 Wn.2d 290, 296, 119 P.3d 318 (2005). Summary judgment is proper if, as here, the pleadings, depositions, and affidavits show that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. CR 56(c); *Hearst*, 154 Wn.2d at 501.

A trial court's decision with respect to the application of judicial estoppel is reviewed for an abuse of discretion. *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007). To defeat summary judgment, the nonmoving party must present evidence "to

rebut the determination of clearly inconsistent positions and establish that application of the doctrine of judicial estoppel would be an abuse of discretion.” *Harris v. Fortin*, 183 Wn. App. 522, 527, 333 P.3d 556 (Div. 1 2014). A trial court abuses its discretion only where “its decision is manifestly unreasonable or based on untenable grounds.” *Skinner v. Holgate*, 141 Wn. App. 840, 173 P.3d 300 (2007).

B. Robert McCormic Acted as Owner of the Disputed Strip and Ratified his Adverse Possession Claim to the Strip, Thereby Establishing After-Acquired Property under Washington’s Deed of Trust Statute.

The after-acquired property doctrine has long applied to mortgage loans:

A mortgage intended to cover after-acquired property can only attach itself to such property in the condition in which it comes into the mortgagor's hands. If that property is already subject to mortgages or other liens, the general mortgage does not displace them, though they may be junior to it in point of time.

United States v. New Orleans R.R., 79 U.S. 362, 365, 20 L. Ed. 434 (1870). A deed of trust is, “in effect, a mortgage”. *Gardner v. First Heritage Bank*, 175 Wn. App. 650, 660, 303 P.3d 1065 (Div. 1 2013) (citing *Morrill v. Title Guar. & Sur. Co.*, 94 Wash. 258, 162 P. 360 (1917)). Thus, mortgage case authority is “useful in deciding issues regarding deeds of trust”, except as provided in the Deeds of Trust Act. *Gardner*, 175 Wn. App. at 660 (quoting *In re Trustee's Sale of*

Real Property of Burns, 167 Wn. App. 265, 270, 272 P.3d 908, *rev. denied*, 175 Wn.2d 1008 (2012)).

It has long been held that after-acquired title inures to the purchaser of land at a foreclosure sale. *Gough v. Center*, 57 Wash. 276, 278-79, 106 P. 774 (1910)); see also *Everly v. Wold*, 125 Wash. 467, 469, 219 P. 7 (1923) (title subsequently acquired by a mortgagor inures to the benefit of a mortgagee whose debt is still existing and enforceable); *Davis v. Starkenburg*, 5 Wn.2d 273, 280, 105 P.2d 54 (1940) (where all right, title and interest held by mortgagor was divested and foreclosed under foreclosure decree, any interest in mortgagor's after-acquired property "would immediately inure to the [foreclosing mortgagees]").

With exceptions not applicable here, Washington law subscribes to the proposition that a property seller's after-acquired title automatically passes to the property's buyer. 17 *Stoebuck*, *Washington Practice*, § 7.8 (1995).

Washington's Deed of Trust statute, enacted in 1965, codified the applicability of the after-acquired property doctrine to deeds of trust:

[T]he trustee's deed shall convey all of the right, title, and interest in the real and personal property sold at the trustee's sale **which the grantor had or had the**

power to convey at the time of the execution of the deed of trust, and such as the grantor may have thereafter acquired.

RCW 61.24.050(1) (emphasis added).

McCormic cites *Mann v. Household Fin. Corp. III*, 109 Wn. App. 387, 392, 35 P.3d 1186 (2001) for the proposition that “a trustee sells only the title he or she receives”. (Brief, at 10) In *Mann*, the trustee for a nonjudicial foreclosure sale did not disclose a senior deed of trust. The court affirmed dismissal of the winning bidder’s suit for negligent misrepresentation, based on the limited duty of the trustee at a foreclosure sale. *Mann*, 109 Wn. App. at 392 (citing *McPherson v. Purdue*, 21 Wn. App. 450, 452, 585 P.2d 830 (1978)). *McPherson* explained the duty as consistent with RCW 61.24’s policy that a trustee does not guarantee title:

Requiring the trustee to guarantee title or make disclosures concerning defects would necessarily involve greater time and expense on his part, and these added burdens would be ultimately borne by the lender and purchaser.

McPherson, 21 Wn. App. at 452 (citing *Peoples Nat’l Bank v. Ostrander*, 6 Wn. App. 28, 31, 491 P.2d 1058 (1971)). Thus, the *Mann* and *McPherson* cases underscore why the trustee was not required to investigate and correct the 2006 deed of trust’s incomplete legal description.

McCormic cites the Bar's Deskbook for the proposition that "after-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". (Brief at 14, citing Washington Real Property Deskbook, WSBA, § 32.7(7) (3d. ed. 1997) (the "Deskbook")) This is incomplete; the Deskbook goes on to refute McCormic's portrayal of RCW 64.04.070 as limiting real property conveyances to the property legally described in a deed of trust (Brief, at 15-16):

The after-acquired title which flows to a grantee pursuant to RCW 64.04.070 includes any title or interest later acquired by the grantor, irrespective of how or when acquired. **This includes not only rights or expectancies that existed at the time the deed was given, and later matured, but also any title subsequently acquired by the grantor, even if acquired through an independent purchase transaction.** *Stevens v. Stevens*, 10 Wn. App. 493, 519 P.2d 269 (1974).

Deskbook, § 32.7(7) (emphasis added). This reference also clarifies that land "may become appurtenant to other land ... by the acts and intentions of the parties." Deskbook, § 32.7(6).

At the time McCormic executed the 2006 deed of trust, because he had acquired title to the disputed strip via adverse possession, McCormic had the power to convey all of his right, title, and interest in the disputed strip. In addition, McCormic formally

“thereafter acquired” via the 2014 quitclaim deed from the Water Company a right, title, and interest in the disputed strip.

In the 2014 deed exchange, the McCormics and the Company exchanged deeds “for the sole purpose of clearing title”. (CP 550, 557) The exchange parties’ corresponding real estate excise tax affidavits each claimed exemption under WAC 458-61A-109(2)(b), which exempts from real estate excise tax a boundary line adjustment to settle a boundary dispute “if no other consideration is present.” (CP 554, 561⁷) No authority prevents a mortgagor/debtor from adding to his or her encumbered property during the life of the mortgage loan.

⁷ WAC 458-61A-109(2) provides:

(2) Boundary line adjustments.

(a) Introduction. A boundary line adjustment is a legal method to make minor changes to existing property lines between two or more contiguous parcels. Real estate excise tax may apply depending upon the specific circumstances of the transaction. Boundary line adjustments include, but are not limited to, the following:

(i) Moving a property line to follow an existing fence line;

(ii) Moving a property line around a structure to meet required setbacks;

(iii) Moving a property line to remedy a boundary line dispute;

(iv) Moving a property line to adjust property size and/or shape for owner convenience; and

(v) Selling a small section of property to an adjacent property owner.

(b) Boundary line adjustments in settlement of dispute. Boundary line adjustments made solely to settle a boundary line dispute are not subject to real estate excise tax if no other consideration is present.

McCormic acknowledges the 2014 quitclaim deed reflected McCormic's likely adverse possession claim. (Brief at 29) If land is adversely possessed for the statutorily required 10 years, title is said to be "vested" notwithstanding the property's absence in a deed's description. *El Cerrito, Inc. v. Ryndak*, 60 Wn.2d 847, 855, 376 P.2d 528 (1962). In fact, the deed need not expressly convey both the property to which the seller holds record title and the property acquired through adverse possession. *Howard v. Kunto*, 3 Wn. App. 393, 400, 477 P.2d 210 (1970) (recognizing conveyance of title acquired by adverse possession despite deed's total misdescription of the property), overruled in part on other grounds by *Chaplin v. Sanders*, 100 Wn.2d 853, 857, 676 P.2d 431 (1984); See also 17 Stoebuck & Weaver, Washington Practice, §8.18, at 540 (2d ed. 2004) (Washington courts recognize transfer of adversely possessed property notwithstanding defects in "paper title").⁸

(c) Taxable boundary line adjustments. In all cases, real estate excise tax applies to boundary line adjustments if there is consideration (other than resolution of the dispute), such as in the case of a sale or trade of property.

⁸ It is immaterial when the 10-year statutory period occurred. "Once a person has title (which was acquired by him or his predecessor by adverse possession), the 10-year statute of limitations does not require that the property be continuously held in an adverse manner up to the time his title is quieted in a lawsuit." *El Cerrito*, 60 Wn.2d at 855. A

McCormic's interpretation of after-acquired property under RCW 61.24.050(1) conflicts with the adverse possession doctrine's transfer of fee simple title to the successor owner who is in privity with an adversely possessing predecessor owner. See *El Cerrito*, Wn.2d at 855 (recognizing when realty has been held by adverse possession for the statutory period, such possession ripens into an original title which cannot be divested by acts other than those required where title was acquired by deed) (citing cases).

McCormic contends that if the trial court's interpretation of RCW 61.24.050(1) is adopted "absurd" results will follow. (Brief at 17) Hyperbole aside, on the facts in this record, the trial court's interpretation of RCW 61.24.050(1) is the only coherent solution to the fate of the disputed strip.

C. Robert McCormic and the Lender Each Believed the Collateral Real Property Consisted of Lots 1 and 2 and the Contested Strip, but Both Mistakenly Executed a Deed of Trust Describing Only Lots 1 and 2 as the Collateral for McCormic's Mortgage.

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) (citing *Snyder v. Peterson*, 62

quiet title action may be brought "at any time after possession has been held adversely for 10 years." *Id.*

Wn. App. 522, 525-26, 814 P.2d 1204 (1991)). A court may reform instruments that are subject to the statute of frauds “where scrivener’s error or mutual mistake leads to a deficient description of land.” *GLEPCO, LLC v. Reinstra*, 175 Wn. App. 545, 554, 307 P.3d 744, *rev. denied*, 179 Wn.2d 1006 (2013) (citing cases). Here, the 2006 deed of trust satisfies the statute of frauds in its description of the residential property, and the mutual mistake or scrivener’s error caused omission of the disputed strip’s legal description.

A mutual mistake occurs “when the parties, although sharing an identical intent when they formed a written document, did not express that intent in the document.” *Halbert*, 88 Wn. App. at 674 (citing *Snyder*, 62 Wn. App. at 527). “The rationale is that, but for the mutual mistake, the parties would have executed the reformed contract.” *Halbert*, 88 Wn. App. at 674 (citing *Tenco, Inc. v. Manning*, 59 Wn.2d 479, 485, 368 P.2d 372 (1962)). A mistake is a belief not in accord with the facts. *GLEPCO*, 175 Wn. App. at 561 (citing *Simonson v. Fendell*, 101 Wn.2d 88, 91, 675 P.2d 1218 (1984)).

“A scrivener’s error occurs when the intention of the parties is identical at the time of the transaction but the written agreement errs in expressing that intention.” *GLEPCO*, 175 Wn. App. at 561

(citing *Reynolds v. Farmers Ins. Co. of Wash.*, 90 Wn. App. 880, 885, 960 P.2d 432 (1998)).

A court ascertains the parties' intent “by viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties.”

GLEPCO, 175 Wn. App. at 561 (quoting *Berg v. Hudesman*, 115 Wn.2d 657, 667, 801 P.2d 222 (1990) (quoting *Stender v. Twin City Foods, Inc.*, 82 Wn.2d 250, 254, 510 P.2d 221 (1973))).

Washington’s case authority has not explicitly defined “the parameters of a mutual mistake for reformation purposes”. *Halbert*, 88 Wn. App. at 674. McCormic cites *Halbert* for the proposition that 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”. Brief, at 19 (citing *Halbert*, 88 Wn. App. at 674-75).

Halbert concerned a real property sale where the earnest money agreement violated the statute of frauds by identifying the property by its street address, but not by a lot number, block

number, and addition. *Halbert*, Wn. App. at 672-73 (citing *Martin v. Seigel*, 35 Wn.2d 223, 226-29, 212 P.2d 107 (1949)), *Tenco*, 59 Wn.2d at 485). The Court rejected reformation as a remedy because “the document cannot be reformed to correct what the parties knew was an incomplete legal description . . .” *Halbert*, Wn. App. at 671.

McCormic’s intention in early 2006 was to borrow \$1.33 million by refinancing his property. The 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. McCormic counters that the mutual mistake doctrine may not be applied to knowing errors. Brief, at 19 (citing *Halbert v. Forney*, 88 Wn. App. 669, 673, 945 P.2d 1137 (Div. 1 1997)). The *Halbert* case distinguished the parties’ knowing acceptance of an omission from the omission found in a scrivener’s error:

This case is unlike *Snyder*, however, because here the parties did not adopt the inadvertent omission of a scribe, but instead agreed to use the street address in lieu of a complete legal description. The document thus reads exactly as the parties intended it to read. In such a case, the doctrine of scrivener error is inapplicable.

Here, the 2006 deed of trust does not read exactly as the parties intended it to read, because there is no appraisal supporting a deed of trust for only the residential property. Thus, if McCormic’s

intention at the time of granting the 2006 deed of trust was to knowingly omit the disputed strip as collateral, then the mistake is a scrivener's error.

McCormic imputes to his lender an intention to secure the mortgage loan with only the residential property, ignoring that the Mahon appraisal valued the entirety of the property. (Brief, 6-7) The purpose of the Mahon appraisal was "to estimate market value of the subject property as defined herein. This appraisal report and value estimate is to be used solely by ["MortgageIT] for a loan decision." (CP 444) The appraiser used the sales comparison approach, comparing the 0.31 acres comprised of the residential property and the disputed strip, with other comparable real estate sales on Bainbridge Island. (CP 438)

MortgageIT Inc. subsequently approved its \$1.33 million mortgage loan to McCormic, which computes with the \$1.9 million appraisal to a 70 percent loan-to-value measure of the borrower's equity in the collateral.⁹ Mortgage lenders must adopt underwriting standards, including loan-to-value limits. 12 C.F.R. § 365.2(b)(2). If

⁹ See *Fed. Home Loan Bank of Seattle v. Barclays Capital, Inc.*, 1 Wn. App. 2d 551, 557, 406 P.3d 686 (2017) ("The numerator of this LTV ratio is the amount of a loan, and the denominator is the appraised value of the property securing that loan").

MortgageIT, Inc. intended to secure the mortgage loan with only the residential property, it would have commissioned an appraisal of residential property only.

McCormic writes that “the trustee – experienced in non-judicial foreclosures – confirmed the lender’s intent”. (Brief at 20 (citing CP 412)) The trustee’s lawyer could provide no admissible opinion of the lender’s intent 11 years earlier and it should surprise no one that the trustee declined to reform the trustee’s deed in light of the instant action.

The evidence is that MortgageIT Inc. and McCormic agreed to MortgageIT Inc.’s \$1.33 million loan to McCormic based on MortgageIT Inc.’s own appraisal of the entirety of the real property. Under the circumstances of that contract, the parties’ subsequent act and conduct and the reasonableness of their respective interpretations¹⁰, that evidence constitutes clear, cogent and convincing evidence of the mistake or scrivener’s error in omitting the disputed strip from the 2006 deed of trust.

For these reasons, McCormic’s portrayal that both he and his lender intentionally omitted the disputed strip from the 2006 deed

¹⁰ *GLEPCO*, 175 Wn. App. at 561

of trust's legal description is not plausible. This Court should affirm the trial court's grant of summary judgment due to the mistake or scrivener's error in omitting the disputed strip.

D. Judicial Estoppel Should Bar McCormic from Claiming Ownership of the Disputed Strip Separate from his Foreclosed Real Property, After Leading One Superior Court to Conclude he is the Owner and then, in a Separate Action, by Failing to Disclose the Strip to the Court and in his Debtor's Exam, Leading the Court to Issue Writs of Execution not Attaching the Strip.

The equitable doctrine of judicial estoppel “precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position.” *Anfinson v. FedEx Ground*, 174 Wn.2d 851, 861, 281 P.3d 289 (2012) (quoting *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007) (internal quotations omitted)). Judicial estoppel's purpose is to:

...preserve respect for judicial proceedings without the necessity of resort to perjury statutes; to bar as evidence statements by a party which would be contrary to sworn testimony the party has given in prior judicial proceedings; and to avoid inconsistency, duplicity, and ... waste of time.

Cunningham v. Reliable Concrete Pumping, Inc., 126 Wn. App. 222, 226-27, 108 P.3d 147 (Div. 1 2005). Judicial estoppel is invoked to “protect the integrity of the judicial process” by “preventing parties from playing fast and loose with the courts to suit the exigencies of

self-interest”. *Miller v. Campbell*, 137 Wn. App. 762, 155 P.3d 154 (Div. 1 2007) (quoting *Brandon v. Interfirst Corp.*, 858 F.2d 266, 268 (5th Cir. 1988)).

A trial court’s application of judicial estoppel is discretionary. *CHD, Inc. v. Taggart*, 153 Wn. App. 94, 101, 220 P.3d 229 (2009) (citing *Miller v. Campbell*, 164 Wn.2d 529, 536, 192 P.3d 352 (2008); *New Hampshire v. Maine*, 532 U.S. 742, 750, 121 S. Ct. 1808, (2001) (exercising original jurisdiction)). “Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

1. The core factors supporting the application of judicial estoppel were met.

Three “core factors” guide the trial court’s application of judicial estoppel; all factors are clearly satisfied by the undisputed facts of this case. Those factors are:

1. whether a party’s later position is clearly inconsistent with its earlier position;
2. whether judicial acceptance of an inconsistent position in a later proceeding would create the

perception that either the first or the second court was misled; and

3. whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Arkison v. Ethan Allen, Inc., 160 Wn.2d 535, 538-39, 160 P.3d 13 (2007). Intent to mislead is not an element of judicial estoppel. *Cunningham*, 126 Wn. App. at 234.

With respect to the first core factor, McCormic's position in this case – that he owns the disputed strip as a separate and distinct parcel of real property from that of the residential property – is clearly inconsistent with his earlier position – that the only real property he owned was the residential property and two rental properties.

McCormic contends that his failure to disclose the disputed strip reflected his “mistaken understanding of the question.” (Brief at 26). However, intent to mislead is not an element of judicial estoppel and a debtor's failure to “satisfy its statutory disclosure duty is ‘inadvertent’ only when, in general, the debtor either lacks knowledge ... or has no motive for their concealment.” *Cunningham*, 126 Wn. App. at 234. Here, McCormic has claimed ownership of the disputed strip since as early as 1994, obtained a judgment for

property damages to the property in 2005, received the 2014 quitclaim deed from the Water Company, and then failed to disclose his ownership interest in the disputed strip to his judgment creditor six months later.

Here, McCormic might plausibly claim mistake or inadvertence, if his lone failure to identify the disputed strip consisted of his omission in the heat of the December 2015 deposition. However, that failure is coupled with omitting the disputed strip from his June 2015 declaration and omitting the 2014 quit claim deed from his document disclosure upon the trial court's Supplemental Proceedings Order. There is no reconciling McCormic's claim of ownership in the 2004 property lawsuit with his three-time omission of the disputed strip in the Omaitis case.

The second core factor has also been met.

In *Cunningham*, the debtor argued on appeal that judicial estoppel was inapplicable because his failure to disclose an asset in his bankruptcy petition did not sufficiently involve the court to establish an acceptance of his position. The court rejected that argument, writing:

Judicial estoppel applies "only if a litigant's prior inconsistent position benefited the litigant or was accepted by the court." **Either of these two results**

permits the application of judicial estoppel. Both are not [required].

Cunningham, 126 Wn. App. at 230-31 (quoting *Johnson v. Si-Cor, Inc.*, 107 Wn. App. 902, 909, 28 P.3d 832 (2001)) (emphasis added). Like the debtor in *Cunningham*, McCormic similarly failed to disclose an asset advantage to conceal that property, but he now claims that his interest is separate and apart from his former interest in Lots 1 and 2.

Washington courts have applied judicial estoppel in the bankruptcy context to preclude debtors from pursuing legal claims or interests post-bankruptcy when those interests were not disclosed in the bankruptcy. *Cunningham*, *supra*; *Bartley-Williams v. Kendall*, 134 Wn. App. 95, 138 P.3d 1103 (2006) (failure to disclose medical malpractice lawsuit as asset in bankruptcy).

Judicial estoppel is proper, because, but for McCormic's repeated failure to disclose the disputed strip under oath, his creditor Omaitis would have executed on the strip before his mortgage lender started the foreclosure process.¹¹ Furthermore, but for McCormic's failure to disclose the disputed strip upon the court's

¹¹ Had McCormic disclosed the disputed strip, Omaitis would have executed upon this unencumbered real property, which would enjoy no homestead protection as a separate parcel. (CP 362-65)

order, the instant case would be unnecessary because Petersen would have been dealing with Omaitis (or his successor), not McCormic, as owner of the disputed strip.

McCormic claims to have never disavowed ownership of the disputed strip in the Omaitis case (Brief, at 24-26), citing *Overlake Farms B.L.K. III, LLC v. Bellevue-Overlake Farm, LLC*, 196 Wn. App. 929, 936, 386 P.3d 1118 (2016), *rev. denied*, 118 Wn.2d 1007 (2017), for the proposition that the “inconsistent positions must be diametrically opposed to one another” and *Arkison*, 160 Wn.2d at 539 for the proposition that “application of the doctrine may be inappropriate when a party’s prior position was based on inadvertence or mistake”.

In *Overlake Farms*, the Court rejected a claim that judicial estoppel should bar appellants from asserting an interpretation of the partition statute different from appellants’ interpretation at trial, finding that the competing interpretations could be reconciled and were not diametrically opposed. *Overlake Farms*, 196 Wn. App. at 936-37.

The cited *Arkison* “inadvertence or mistake” passage is a cautionary note in the context of that case’s discussion of the formula

(or lack thereof) for this equitable doctrine. Of the three core factors, the *Arkison* court wrote:

These factors are not an “exhaustive formula” and “[a]dditional considerations” may guide a court's decision. [*New Hampshire*, 532 U.S.] at 751; see, e.g., *Markley v. Markley*, 31 Wn.2d 605, 614-15, 198 P.2d 486 (1948) (listing six factors that may likewise be relevant when applying judicial estoppel). Application of the doctrine may be inappropriate “when a party's prior position was based on inadvertence or mistake.” *New Hampshire*, 532 U.S. at 753 (quoting *John S. Clark Co. v. Faggert & Frieden, PC*, 65 F.3d 26, 29 (4th Cir. 1995)).

Arkison, 160 Wn.2d at 539.

The third core factor is also met. McCormic's deception not only harmed both Omaitis and Petersen, but it caused “inconsistency, duplicity, and waste of time” in our justice system. McCormic's on-again, off-again, and on-again claim to ownership of the disputed strip caused both Omaitis and Petersen to suffer an unfair detriment. McCormic derived an unfair advantage over Petersen, because, if the disputed strip was not after-acquired property, then McCormic's non-disclosure needlessly prolonged the day when Petersen could resolve the strip's ownership issues.

Judge Hull did not abuse his discretion in invoking judicial estoppel in this case. This court should affirm judicial estoppel of McCormic's ownership claims to the disputed strip.

V. CONCLUSION

This Court should affirm the trial court's orders granting plaintiff/respondent's motion for summary judgment and denying defendant/petitioner's motion for summary judgment.

Dated this 10 day of May, 2018.

SANCHEZ, MITCHELL,
EASTMAN & CURE, PSC

By: 
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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 May 10, 2018, I arranged for service of the foregoing Amended Brief of Respondent, to the court and to the parties to this action as follows:

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