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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 33060-5-III

COURT OF APPEALS OF THE  
STATE OF WASHINGTON, DIVISION III

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LARRY B. JUDD AND CHERYLL L. JUDD, a marital community;  
and CHRISTOPHER L. JUDD, a married individual,

Plaintiffs/Appellants

v.

RON JOHNS and SUZANNE JOHNS, a marital community; and  
JAY HEALY, a single individual,  
Defendants/Respondents

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APPEALED FROM SPOKANE COUNTY SUPERIOR COURT  
CAUSE NO. 11-2-04719-3

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**APPELLANTS' OPENING BRIEF**

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Appendix F – RCW 7.28.160

Appendix G – RCW 7.28.070

*“[t]he holder of legal title is presumed to have possession...”<sup>1</sup>*

## I. INTRODUCTION

Plaintiffs/Appellants Judds are the tax paying holders of recorded legal title to the 50’ strip of land at issue (“the strip”). In 1999 Plaintiffs/Appellants Larry B. Judd and Cheryl L. Judd, and their son Christopher L. Judd, acquired 40 acres of overgrown, unimproved property in Spokane County by Warranty Deed. They promptly had the acreage surveyed to verify the property’s legal boundaries so they could subdivide it into 20 acre parcels. Their survey was duly recorded. Ex 3. Shortly thereafter, the Judds notified their existing abutting neighbor to the west (defendant Healy) of their recorded survey, as well as of their future intent to realign fence remnants in order to construct a viable fence on the true surveyed property boundary between their abutting parcels, a 50’ difference constituting “the strip”. In 2006, defendants Johns purchased property abutting the Healy and Judd properties seven years after the Judds’ property purchase and recorded survey. In spite of having prior notice of the existing Judd survey and asserted true boundary line **before** their purchase, the Johns nonetheless proceeded with the acquisition.

Twelve years after Plaintiffs Judds bought their property, they were forced to bring litigation in 2011 against adjoining property owners

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<sup>1</sup> Anderson v. Hudak, 80 Wn. App. 398, 401 (1995).

(defendants Healy and Johns) quieting title to the 50' portion of Plaintiffs' property (the strip) that ran the entire 662 feet of their westerly boundary. Ex 4; CP 1-8. In response to their ownership claim, both defendants for the first time claimed adverse possession ownership of the strip. CP 9-16. Defendant Healy who purchased his property in 1971, made his newly asserted adverse possession claim despite having actual and legal notice in 1999 of the Judds' recorded survey, their claim of legal title, and the property's legally described and recorded shared boundary line. Despite such notice, defendant Healy did and said nothing during the ensuing 12 years of Judd ownership to assert a contrary ownership, much less anything to quiet title to the 50' strip. The Johns then likewise claimed adverse possession despite not having owned the property the requisite 10 years; asserting nonetheless that they had "tacked" onto their prior owner's (Nendls) purported adverse possession.

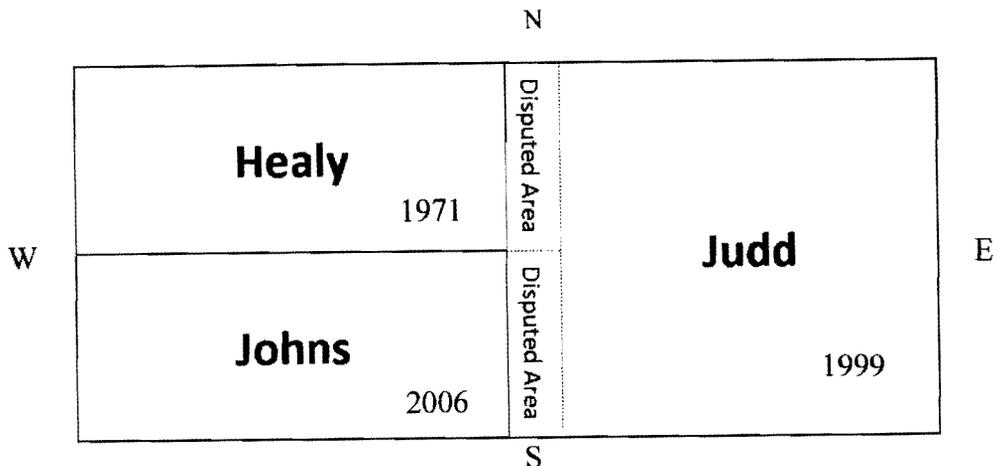


Figure 1: Judd/Healy/Johns Boundary Lines

After a 2 ½ day bench trial in May 2014, Spokane Superior Court Judge Maryann Moreno issued a **Memorandum Opinion** letter (CP 786-792) erroneously finding that despite the Judds' status as the tax paying holder of legal title since 1999, "*defendants Healy and Johns acquired ownership of the disputed property by adverse possession*" (CP 792); and that the Judds were not entitled to any RCW 7.28 et seq. pro rata refund of property taxes they paid from the date of their 1999 purchase. CP 793-4. The trial court's findings, conclusions, and order (CP 795-800) quieting title in favor of defendants, constituted reversible error insofar as the court misapplied facts to applicable Washington law. Defendants in fact failed to establish each and every element of adverse possession by a preponderance of the evidence - their requisite burden of proof. Thus, the trial court's erroneous findings and conclusions, and failure to quiet title in favor of the Judds constituted reversible error.

## II. ASSIGNMENTS OF ERROR

- No. 1.** The trial court erred in finding defendants' possession of the disputed strip open, notorious, and exclusive for over 10 years.
- No. 2.** The trial court erred in finding defendants acquired adverse possession ownership of the disputed strip because by 2006 it "*had already been established in the predecessor owners*".
- No. 3.** The trial court erred in allowing defendants Johns to bad faith "tack" adverse possession ownership.

- No. 4.** The trial court erred in denying plaintiffs' statute of limitations defense.
- No. 5.** Alternatively, the trial court erred in denying plaintiffs' RCW 7.28 et. seq. property tax reimbursement request.

### **III. ISSUES PRESENTED**

- No. 1.** Whether it was error finding defendants' possession of the disputed strip open, notorious, and exclusive for over 10 years?
- No. 2.** Whether it was error finding defendants acquired adverse possession of the disputed strip because by 2006 it "*had already been established in the predecessor owners?*"
- No. 3.** Whether it was error allowing defendants Johns to bad faith "tack" adverse possession ownership?
- No. 4.** Whether it was error to deny plaintiffs' statute of limitations defense?
- No. 5.** Alternatively, whether the trial court erred in denying plaintiffs' RCW 7.28 et seq. property tax reimbursement request?

### **III. STATEMENT OF CASE**

**A. Plaintiffs Judds' Ownership.** Plaintiffs Judds have owned in fee, and have had possession and control of the real property and improvements at issue since September 1999. CP 4-8; RP 155; RP 232. Their rural acreage is in Spokane County described as GOVERNMENT LOT 9 IN SECTION 2, TOWNSHIP 24 NORTH, RANGE 42 EAST, W.M.; SITUATED IN THE COUNTY OF SPOKANE, STATE OF WASHINGTON. CP 4-8; 9-10; RP 165; Exs 3; 7. The Judds purchased Government Lot 9 consisting of 40 acres more or less, then divided it in

half: Larry and Cheryl Judd's 20 acres are situated on the North ½ of Lot 9; while son Chris owns 20 acres situated on the South ½ of Lot 9. RP 154-6, 233, 235-6. The Judds' subsequent Deed of Trust dated 8/15/2003 reflects an Assessor Parcel ID number as 24021.9041. Ex 1; RP 235.

Plaintiffs Judd purchased their rural property by way of recorded Statutory Warranty Deed. RP 165; Ex 7. At the time of purchase in 1999, the property was raw, untouched land, overgrown, with multiple trees preventing south side access to it. RP 156. It was so weed infested and over-grown it was 3 to 3 ½ feet tall. RP 156-7; RP 191. On Chris Judd's first visit to the property he could see remnants of approximately 20 cedar posts along the far west boundary but could not tell whether there was wire strung between the posts because of the overgrowth. RP 157-8. Beyond the posts was the same terrain -- weeds, overgrowth, unclean, unmaintained -- extending another 75 to 100 feet. RP 161-2; 239. The wood posts observed by the Judds on their initial property visits were not delineated in a clean line of vegetation or mow line. RP 164; 241.

At the time of their duly recorded title, the Judds' realtor told Mrs. Judd that because the lot was an old Government Lot, the smart thing to do would be to get it surveyed. RP 235; Ex 7. After closing, the Judds ordered and paid for a survey of their property. RP 165-6; RP 156. The survey was ordered because they didn't want neighbor issues, and wanted

to know exactly where their boundaries were so they could fence. RP 166. The Judds weren't satisfied when they originally saw the wood posts that those served as the actual westerly boundary line because none of the surrounding area had been surveyed. RP 166.

Subsequently, surveyors told the Judds they were pretty sure there were old fence remnants on the property. RP 167. The Judds then walked to where the property boundaries had been identified to verify fence remnants on the property. RP 168. At that point they observed cedar posts leaning in both directions with field fence and overgrown hog wire that was not standing but more compressed down on the ground. RP 168. The Judds were physically able to walk or step over the remnants in trying to find the survey stakes. CP 636. There was no climbing or jumping, it was a matter of just stepping over. RP 241. You could freely walk back and forth virtually anyplace. RP 325; 344. There was nothing that the Judds observed that day leading them to conclude it was a fully functional fence. RP 168-9. The dilapidated, crushed down, unmaintained fence remnant extended the entire length of the westerly boundary. RP 170-1. There were no steel posts or barbed wire observed by the Judds at that point along the westerly boundary. RP 171; 218; 229; 357. A neighbor called by the defendants at trial, Thomas Wiley, described it as "*simply an old rickety farm fence*" (RP 380) that was not "*viable for livestock.*" RP 384.

Wiley's son also testified stating he never saw any metal T-posts on the fence remnant at issue. RP 396.

**B. Defendant Healy's Ownership.** Defendant Healy had resided on his property since 1971. RP 17. At the time he purchased his property it was a 20 acre parcel; he never inquired from the seller or his realtor whether the property had been surveyed. RP 18; RP 45. Healy himself never surveyed the property before his purchase or afterwards. RP 18. It was Healy who put in the dividing line separating his 20 acres into two 10 acre parcels, building "*a fence that essentially split the two properties in two going from east to west all the way to (bordering) Dorset Road.*" RP 46-7. Healy's neighbors, the Nendls, purchased their 10 acres 1½ or 2 years after Healy's purchase. RP 26. The Nendls' acreage was bare property at the time they purchased it. RP 27.

Before the Judds became his abutting neighbors in 1999, he recalls the abutting property owner's name was Williams, an absentee landowner of the unimproved property. RP 20-1. Healy admits at one time he had special interest in purchasing that property. RP 21. He decided against it because the property seemed landlocked and because aesthetically it was more barren than he preferred. RP 22. At the time, Healy was considering being a potential purchaser of the land and admits it was not being used for anything; and as far as he knew it had never been maintained prior to

the Judds' purchase. RP 23-4. Healy never recalled seeing anyone prior to the Judds maintaining the property. RP 23.

The Judds' survey was certified and recorded with the County Auditor on 11/2/99, providing legal notice of their ownership as holders of legal title. Ex 3. Shortly after receiving the survey results, Plaintiff Larry Judd ran into defendant Healy in the field. RP 326. Mr. Judd advised defendant Healy about the survey and how the fence remnants were encroaching onto the Judds' property. RP 326; 341-2. Mr. Judd told defendant Healy he wasn't worried about it right now, but that he would remove the old fence and replace it with a new one on the property line when he was able to get it done. RP 326. Defendant Healy said virtually nothing in response to this actual notice regarding the survey. Healy did not object to any assertion that there was a different property line. He did not assert he owned the strip at issue as a result of adverse possession. Healy made no statements indicating he was objecting to the notion that the Judds were permissive of his encroachment for the time being, or that they would be establishing a future fence on the legal boundary. RP 326-7.

Defendant Healy doesn't recall the actual year of his first encounter with Larry Judd, but remembered Judd being on his tractor and coming over to where Healy was working. RP 30-31. Mr. Judd told him *"he felt there was an error on the placement of the fence that separated"*

the two properties. RP 31. Judd told Healy "*We'd like to correct that, and we'll put in a new fence in for you where the fence should in fact be.*" RP 31. Healy's version of his response was that he wasn't aware of an error but he'd be happy to talk to Judd about it. RP 31. Healy admits he didn't say anything about adverse possession or anything to implicate it at that point in time. RP 34. There were no more communications by defendant Healy with plaintiffs Judds prior to 2011. RP 36.

The next time the Judds had any contact with Healy was in 2011. RP 327. At no time after the Judds told defendant Healy in 1999 of their recorded survey and titled ownership to the disputed strip did defendant Healy assert a claim of adverse possession. That is, until 12 years later in 2011 when the Judds were forced to file their quiet title action. CP 1-8.

**C. Judds' Ownership Was Open and Notorious.** Chris Judd testified his father undertook activities on the southwest end of their property including mowing and prepping, cleaning up the land, and accessing it with a mower deck behind the tractor. RP 179; 226. The Judds "*had like 15-foot access into which now is the Johns property*" – on that southwest side. Everything in terms of the purported fence was "down" allowing the Judds access into the property. RP 180. The Judds drove onto that portion of their property numerous times. RP 294; 338; Ex

118. Maintenance and hand sickle work was done by the Judds on the Johns' side of the disputed strip. RP 299; 330; 348-9.

From 1999 into 2011, the Judds never observed intermittent T-posts along their westerly fence line. RP 180-1; 357. However in 2011, the Judds did begin to notice T-posts on defendant Healy's side when they started to fence their property. RP 181; 248. Prior to 2011, the Judds never saw any livestock activity by defendants Healy or Johns in the vicinity of the disputed strip. RP 181; 227. The Judds never saw anything at all to indicate defendants were using any of the disputed property east of the survey line for any purpose. RP 182; 249-50; 258. Defendant Healy's horses were never seen grazing the strip, and Healy was never observed mowing it. RP 297-8; 300.

**D. Defendant Johns' Ownership.** Defendants Johns in May 2006 purchased the adjoining property to the west of Plaintiffs Larry and Cheryl Judd, 7 years after the Judds acquired their property. RP 81. Defendants Johns' adjoining neighbor to the north was defendant Healy, who they knew from being co-faculty members at Spokane Falls Community College. RP 24-5; RP 104. Prior to the Johns' property purchase, they were provided a "**Buyer's Contingency Addendum**". RP 83. One of the **Addendum's** acknowledgments was that a "*generally accepted method for identifying boundary lines and verifying property size*

*is to have a property surveyed and the corners identified and marked."* RP 84-5. The Johns signed off on that particular contingency item but did not request a survey of the property at issue. RP 84.

The Johns made no effort to determine whether a survey had been previously filed in any form or fashion with Spokane County recording entities concerning the property they were looking to purchase. RP 84. They also did not request their realtor or brokerage entity to assist them in determining whether a survey had been done of the property boundaries. RP 85. Further, the Johns made no inquiry at the time of their purchase as to whether the property boundaries had been measured in any way; and they never walked the four corners of the property. RP 85-6. The Johns never had a conversation with the sellers - the Nendls, to discern the location of their far eastern property boundary. RP 87-8.

Another **Addendum** provision defendants Johns received prior to their purchase stated *"A survey will confirm that the legal description is accurate and that any presumed fences or other boundary markings are correctly located."* RP 90. The Johns reviewed and signed off on that **Addendum** provision as well. RP 90. The concept of getting a survey to confirm a legal description was accurate and that any presumed fences or other boundary markings were correctly located, was not a new concept to the Johns at the time they received the **Addendum**. RP 90-1.

When defendants Johns received the Statutory Warranty Deed for their property they understood the legal description for their property was situated totally on Government **Lot 10**. RP 93; Ex 3; 8. Defendants Johns never had any understanding that they ever had an ownership interest in any part of Government **Lot 9**, the Judds' property. RP 93. Indeed, at the time of their closing, defendants Johns made no effort to determine exact boundaries based on the legal description set forth in their Warranty Deed. Id. Prior to closing, defendants Johns received a title report for the property they were purchasing and it contained no indication whatsoever that there was any ownership interest being conveyed to them involving property in Government **Lot 9**. RP 94.

Yet, **before** their closing, defendants Johns learned that their seller's (Nendl) real estate agent had received a phone call stating that the North/South fence line separating their property and defendant Healy's property encroached on the property to the East, the Judds' property. RP 94. Defendants Johns received this information "*a couple of days probably*" before their closing. RP 95. Defendants Johns learned that there had been an anonymous call and that the message was "*that the fence line didn't match up with the survey line.*" RP 96. The report to defendants Johns was that there was an encroachment onto the property that they were about to purchase. RP 96. Despite learning a survey of

some kind existed on the property concerning an encroachment **before** their closing, defendants Johns "*did nothing to run it down*". RP 98.

Defendants Johns were not surprised there was a survey on the property when they learned of it. RP 98. When they did, defendants Johns had a "*remote concern*" there was an issue about a boundary matter being called to their attention prior to closing. RP 98-9. Despite learning prior to closing that there was a boundary line issue apparently on the property, defendants Johns never consulted an attorney before executing the closing documents. RP 100. Defendants Johns only saw the property "*maybe twice*" before they actually executed any document by way of earnest money or purchase and sale agreement. RP 83.

**E. The 2011 Dispute.** In May or June 2011, the Johns removed old fencing remnants leaving the Johns/Judd property line unfenced. RP 114-5. Wooden posts were taken out because they were rotted off at the bottom and for the most part weren't functional. RP 118-9. At the time, defendants Johns knew the Judds were beginning to construct a new fence to the survey line. RP 115-6. The Judds had a conversation with defendant Johns in the field while they were preparing to build the westerly fence. RP 115, 182; 184; 186. It was a civil discussion with no animosity. Mr. Judd told Mr. Johns he had a survey to his property and essentially that the fence line didn't match up with the survey line. RP

117-8. Mr. Judd told Mr. Johns that they were starting their fencing and they *“were going to adjust the fence line back to where our surveyors’ markers are supposed to be and put it in.”* RP 184. Mr. Johns’ response was he would like to keep the fence where it was; that he heard there was no problem; that it was going to stay as-is. RP 184. Nonetheless, Mr. Johns told the Judds he and Mr. Healy *“would be interested in having a further discussion and maybe there could be some sort of monetary arrangement made.”* RP 122. Mr. Johns remembers suggesting he *‘would be maybe willing to furnish a round (riding) pen, which was worth about \$1,000 at the time.’* It wasn't an extended conversation. RP 122. Mr. Johns admits Mr. Judd never said *“Hey, we’ll concede. You can—you can replace a fence off of the survey line.”* RP 123.

Defendant Johns later went to the Judds’ house on or about 6/11/2011, and offered a round (riding) pen in exchange for the property strip. The Judds declined his offer stating they were going to keep the property as-is where the surveyor’s markers were located. RP 185. During the meeting defendant Johns admitted to plaintiffs he’d been aware the property lines were properly designated and he had been 98% ready to back out of the property purchase. RP 334; 259-62. Mrs. Judd on 6/17/01 wrote to defendants Johns confirming this discussion and his admissions, to which defendants never responded. RP 259-62; Ex 9.

In that same 2011 summer timeframe, the Judds contacted defendant Healy *“to meet relative to the controversy over the fence.”* RP 37. Defendant Healy invited the Judds to his house to discuss *“the details of the disparity regarding the fence”*. RP 37. Healy asked the Judds if they were familiar with adverse possession, then generally explained the whole concept telling them that *“the function of the fence line over time trumped virtually everything in terms of defining the parameters of the property.”* RP 38. Healy suggested that *“maybe they should familiarize themselves with the concept of adverse possession so that then you, collectively, would understand where each party was coming from.”* RP 39. Defendant Healy summarized their conversation by stating the Judds *“were coming at it from a position of survey”* and he was *“coming from the position of adverse possession.”* RP 39.

On 6/19/11, the Judds started constructing fence on the surveyed boundary line. RP 125. Defendants Healy and Johns went out into the field and angrily confronted the Judds, then left. RP 125-7. On or about 10/26/11, defendants Johns had their own survey done of the property at issue. RP 129; Ex 102. Defendant Johns then compared the two surveys - the Auditor recorded survey commissioned by the Judds and his survey - and conceded they are essentially the same with respect to the legal boundaries set forth in the properties' deed descriptions. RP 131.

At some point after the Johns' survey, defendants Healy and Johns went back into the field while the Judds were absent and tore down their newly constructed fence, and stacked it on the Judds' property. RP 186-7; RP 127-8; 130. Defendants did not obtain permission to rip out the Judds' fence. RP 128; 187. Approximately 2 days prior to defendants ripping the Judds' fence out, defendants thought there was going to be a confrontation so they called the Sheriff's office to determine whether they could hire an off-duty officer to be on the scene at the time they were going to start the fence rip-out. RP 133-4. Defendant Johns, despite his own survey and knowing where the legal boundary line was, and knowing there was going to be a confrontation that might need police protection, nonetheless decided to go ahead and rip the fence out. RP 134-5. A lawsuit was started after the Judds' fence was torn down. RP 128; CP 1-8. The Judds' Motion for Restraining Order followed thereafter. CP 22-31; 32-4.

**F. Property Tax Payments.** At all times subsequent to purchasing their property in 1999, the Plaintiffs Judds paid property taxes on their entire property as legally described in their Deeds. Exs 1; 2; 7. This included the strip at issue. They did so under the same Tax ID number as listed in their Deed of Trust. RP 242; Exs 1; 14. The Judds missed no tax payments on their property from 1999 through trial, and beyond. RP 242; Ex 14. Over the years, only the Judds contributed to

paying property taxes on the strip in dispute. RP 243. Based upon the taxes paid, the plaintiffs' unrebutted trial testimony was that their property was worth approximately \$10,000 per acre. RP 263-4. Defendants presented no countervailing evidence concerning the value of the Judds' 50' x 662' (33,100 sq. ft.) strip or the amount of taxes they paid. Ex 14.

At no point prior to trial did defendants Johns have or ever prepare a legal description of the strip (.76 acre) they now allege they took by adverse possession. Further, defendants Johns never proposed or prepared a new legal description for a new deed based on their theory of adverse possession. RP 135. It is undisputed that defendants Johns never paid any property taxes on the strip of property at issue. Prior to trial, Healy likewise never prepared any legal description of the property he claimed to adversely possess; and never previously prepared any deed with a legal description identifying the property constituting the disputed strip. RP 47.

#### **IV. SUMMARY OF ARGUMENT**

Adverse possession, and the scope and breadth of its applicability are under serious review by our State's courts and legislature. See Substitute House Bill 1026 (2011)(enacting RCW 7.28.083 to provide for reimbursement of real estate taxes on adversely possessed land; See Gorman v. City of Woodinville, 175 Wn.2d 68 (2012) (Madsen, C.J., concurring) Chief Justice Madsen detailed the doctrine's current

obsolescence noting that its original purpose of encouraging “maximum utilization of land” conflicts with modern concerns of environmental conservation and historic preservation. Id. at 77. Adverse possession “discourages neighborly conduct and accommodation” requiring property owners “either to formalize permissive arrangements, or to prevent use by others to avoid the risk that rights will be established by prescription.” Id. at 79. Poignantly, Justice Madsen concluded “the doctrine’s basic premise is legalization of wrongful acquisition of land by ‘theft,’ conduct that in our time we should discourage, notwithstanding the possibility of putting land to a higher or better use.” Id. at 75; See also recent Washington HB 1829 (01/29/15), relating to adverse possession, adding a new section to RCW 7.28 establishing an honest belief requirement for adverse possession. (**Appendix A** hereto). See also Gamboia v. Clark, 183 Wn.2d 38 (2015) establishing an initial presumption of permissive use in cases involving neighborly sufferance or acquiescence.

Despite decided recent legislative and case law developments to narrow the scope and application of adverse possession in Washington, the trial court here was misled into committing reversible error based upon erroneous factual and legal contentions. Surveys in this case had unequivocally established that the legal boundary at issue is located 50’ west of a purported fence claimed by defendants. Further, it was

undisputed at trial that the Judds are the tax paying, record owners of the disputed strip ; and that defendants Johns **prior to their purchase** knew the Judds claimed to be the lawful owners of the strip.

After misapplying facts to law, the trial court then compounded its reversible error by finding the Judds were not entitled to reimbursement of pro rata property taxes they paid during the same period defendants claimed adverse possession ownership. The trial court's erroneous granting of adverse possession ownership in favor of defendants and against the Judds, the tax paying holders of legal title to the disputed property at issue requires reversal.

## V. ARGUMENT

### A. Standard Of Review.

Whether a party has established all elements of adverse possession is reviewed as a mixed question of fact and law. Gamboa v. Clark, 183 Wn.2d at 44.<sup>2</sup> Factual findings supported by the record are reviewed for abuse of discretion. Id. An appellate court's review is de novo as to whether the trial court's conclusions of law are properly derived from the findings of fact. Id. Where facts in an adverse possession case are not in dispute, whether the facts constitute adverse possession is for the court to

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<sup>2</sup> Trial Judge Moreno sat pro-tem on Gamboa v. Clark 180 Wn. App. 256 (Div. III 2014, affirmed) decided shortly before trial here. Gamboa, although a prescriptive easement case, nonetheless provides legal tenets that have general applicability here.

determine as a matter of law. Id. An adverse possessor's burden is to prove all elements by a preponderance of the evidence. Varrelman v. Blount, 56 Wn.2d 211, 211-12 (1960).

**B. The Court Erred In Misapplying Fundamental Propositions of Adverse Possession.**

Adverse possession claims require possession that is open and notorious; actual and uninterrupted; exclusive; and hostile. Chaplin v. Sanders, 183 Wn.2d 853, 857 (1984). The party claiming to have adversely possessed the property has the burden of establishing the existence of each element for the statutorily prescribed period of 10 years. ITT Rayonier, Inc. v. Bell, 112 Wn.2d 754, 757 (1989); RCW 4.16.020. The seminal decision in Washington regarding prescriptive rights is NW Cities Gas v. Western Fuel Company, 13 Wn.2d 75 (1942) cited by Gamboa, *supra*. Although NW Cities is a prescriptive easement case, our Supreme Court set forth 16 principles or "fundamental propositions" established in Washington or to be adopted relating to adverse possession in Washington. Gamboa, 183 Wn.2d at 43; Roediger v. Cutten, 26 Wn.2d 690, 706 (1946). One of those propositions is that "*when one enters into the possession of another's property there is a presumption that he does so with the true owner's permission and in subordination to the latter's title.*" NW Cities, 13 Wn.2d at 84; Gamboa, 183 Wn.2d at 44. Another is that

*"Prescriptive rights...are not favored in the law, since they necessarily work corresponding losses or forfeitures of the rights of other persons."* NW Cities, 13 Wn.2d at 83; and another principle is that *"the burden of proving a prescriptive right rests upon the one who is to be benefited by the establishment of such right"* and that is the party who *"must prove that his use of the other's land has been open, notorious, continuous, uninterrupted, over a uniform route, adverse to the owner of the land sought to be subjected, and with the knowledge of such owner at a time when he was able in law to assert and enforce his rights."* (Emphasis added). Id. at 84-5; Gamboa, 183 Wn.2d at 43. The initial presumption is that the claimant's use is permissive, but the claimant can shift the presumption from permissive use to adverse depending on the facts. Gamboa, 183 Wn.2d at 44-45 (citing NW Cities, 13 Wn.2d at 84 and 87.)

**1. Presumption of Permissive Use.**

The presumption of permissive use applies to adverse possession cases. Gamboa, 183 Wn.2d at 44. If use *"is permissive in its inception, [it] cannot ripen into a prescriptive right, no matter how long it may continue, unless there has been a distinct and positive assertion by the dominant owner of a right hostile to the owner of the servient estate."* NW Cities, 13 Wn.2d at 84; Gamboa, 183 Wn.2d at 45. A claimant's license to use the land can never ripen into a prescriptive right unless the

user distinctly asserts he is using the land as a matter of right. Bulkey v. Dunkin, 131 Wash. 422, 425 (1924); Gamboa, 183 Wn.2d at 45. In the event of neighborly acquiescence, the use is deemed “*permissive in its inception*”. Roediger, supra at 713-14; Gamboa, 183 Wn.2d 45-6. “*This presumption is more difficult for claimants to rebut because it requires them to distinctly and positively assert a claim of right.*” (Emphasis added). Gamboa, 183 Wn.2d at 45-6.

Here, neither defendant provided any evidence they had distinctly and positively asserted a claim of right against the Judds’ prior owner (Williams). Indeed, defendant Healy, who bought his adjoining property in 1971, never had any contact with Williams the prior adjacent absentee owner of the then unimproved, barren property later purchased by the Judds. RP 17; RP 20-2. Healy also admitted the adjacent undeveloped property was not used for anything; was never maintained; and he never saw anyone doing so prior to the Judds. RP 23-4. Since neither Healy nor Johns presented any evidence or testimony to rebut the presumption that they were in possession of the disputed strip “*with the true owner’s permission*” or that their use wasn’t as a result of William’s prior neighborly sufferance or acquiescence, they failed to meet their burden of proving all elements of adverse possession. Gamboa, 183 Wn.2d at 45. As such the trial court erred in misapplying facts to law.

**2. Exclusive Possession.**

In order for ‘would-be’ adverse possessors to establish exclusivity “*the possession must be of a type that would be expected of an owner.*” ITT Rayonier, 112 Wn.2d at 758. Alleged adverse possession is lacking when there is shared and occasional use of the disputed area; such use does not rise to the level of exclusive possession indicative of a true owner for the full statutory period. Thompson v. Schlittenhart, 47 Wn. App. 209 (1987); ITT Rayonier, 112 Wn.2d at 759. Because the Judds announced their ownership and thereafter accessed and freely used their property from 1999 forward, neither defendant proved that they had exclusive possession of the strip at issue for over 10 years. RP 179-80; 226; 294; 299; 330; 338; 348-9. Thus, the trial court erred in misapplying facts to law regarding defendants’ burden of proving the ‘exclusive’ element of adverse possession.

**3. Hostile, Open, and Notorious.**

i. **Judds’ Ownership** - To establish the element of open and notorious, a claimant must show: “(1) *the true owner has actual notice of the adverse use throughout the statutory period, or (2) the claimant uses the land so that any reasonable person would assume that the claimant is the owner.*” Anderson v. Hudak, 80 Wn.App. 398, 404-5 (citing Chaplin, 100 Wn.2d at 863). Notice is required for adverse

possession in order *“to provide the true owner of the property with adequate notice that a trespass is occurring and that the owner's property rights are in jeopardy, so that the owner can take steps to protect his or her interests.”* 3 Am. Jur. 2d. Adverse Possession §57.

From 1999 when the Judds’ acquired legal title and announced ownership of the strip, they at all times treated it exactly the same as they treated their remaining surrounding property. On the other hand at least until the 2011 fence dispute defendants treated possession of the strip unlike true owners. Possession *“is established only if it is of such a character as a true owner would make considering the nature and location of the land in question.”* ITT Rayonier, 112 Wn.2d at 759. Indeed, when defendant Healy was presented with information in 1999 that the remnant fence encroached on the Judds’ property as confirmed by recorded survey, Healy said nothing and didn’t object to the Judds’ assertion that future construction would be on the legal boundary line. RP 326-7; 341-2. Instead, defendant Healy’s only response to being told of the boundary line error in 1999 was that he would be “happy” to talk to Judd about it. Notably, he said nothing about being an adverse possessor and certainly did not initiate any action to quiet title. RP 31; 34.

Hostile possession *“is opposed and antagonistic to all other claims, and which conveys the clear message that the possessor intends to*

*possess the land as his own.*” Selby v. Knudson, 77 Wn. App. 189, 197 (1995) (cites omitted). Use of the land by another does not undermine the element of hostility if such use was permissive. Miller v. Anderson, 91 Wn. App. 822, 828 (1998). Permission can be express or implied. Id. Permissive use is inferred where it is reasonable to assume “*that the use was permitted by sufferance and acquiescence.*” Id.; Gamboa, 183 Wn.2d at 47 (citing Roediger, 26 Wn.2d at 707) Clearly in 1999 when the Judds announced deed and survey proof of ownership defendants, if true owners, where required to come forward to defend their own purported adverse possession ownership. That never happened.

The parties’ next communication wasn’t until 2011 when the Judds started building fence. RP 36. That involved defendant Johns’ offer to buy the Judds’ strip. Johns did so by suggesting “*some sort of monetary arrangement*” with the Judds. Mr. Johns later offered to exchange a riding pen for the strip. RP 185. These offers evidenced the Johns’ admissions that they understood ownership of the strip was actually vested in the Judds. RP 122-3. Indeed, the reality is that defendants’ adverse possession claim did not actually ‘materialize’ until the Judds commenced suit in 2011! Defendants’ lack of actions or even contrary statements, coupled with their acquiescence in response to the Judds’ claims and proof of ownership were entirely inconsistent with that of true owners. ITT

Rayonier, 112 Wn.2d at 759. From 1999 to 2011 defendants' permitted use of the strip, if any, never interfered with the Judds' announced ownership and inferred nothing beyond the Judds' neighborly accommodation. Bryant v. Palmer Coking Coal Co. 86 Wn. App. 204 (1997). Defendants failed to provide any evidence that their claim to the strip at issue was factually or legally hostile, open, and notorious.

ii. **Williams' Ownership** - Before the Judds bought their property in 1999, Williams was the record owner of the strip at issue. CP 12; Ex 7. At all times, Williams was an absentee owner. CP 612. No evidence was presented that Williams was ever aware of defendants' encroachment. Indeed, defendants stated, "*the Williams [.] never questioned the location of the fence or the use of the property west of the fence. . .*" CP 134. Despite the fact defendants' purported use of the strip was not sufficient to impart constructive notice on Williams—an absentee owner of landlocked land, the trial court erroneously concluded that defendants' possession was open and notorious and held that defendants had acquired title by adverse possession **before** the Judds bought their property in 1999. CP 420. However, based on uncontested facts, the element of "notorious" was not met prior to the Judds' ownership.

In Washington, possession is "notorious" for purposes of adverse possession if the record owner has actual knowledge of the adverse

possession, or the possession is such as “*would put a person of ordinary prudence on notice of a hostile claim.*” Muench v. Oxley, 90 Wn.2d at 642, overruled on other grounds by Chaplin, 100 Wn.2d at 853. Notice is required for adverse possession in order “*to provide the true owner of the property with adequate notice that a trespass is occurring, and that the owner’s property rights are in jeopardy, so that the owner can take steps to protect his or her interests.*” 3 Am. Jur. 2d Adverse Possession §57. If the record holder does not have actual knowledge, the adverse possession “*must possess such notoriety that the owner may be presumed to have notice of it, so that the owner is guilty of laches in failing to assert his title during the statutory period against the claimant.*” Murray v. Bousquet, 154 Wash. 42, 50 (1929). Whether a person of ordinary prudence would be put on notice depends on the character of the land. See Chaplin, 100 Wn.2d at 863 (explaining that the use need only be that which a true owner would do in view of the land’s nature and location.) Where the landowner is absentee, the claimant must show “[g]reater use” of the land as compared to a claim against “*one occupying the land who would observe an offensive encroachment daily.*” Hunt v. Matthews, 8 Wn.App. 233, 237 (1973) overruled on other grounds by Chaplin, 100 Wn.2d at 853. The “*element of notice is important*” where the disputed land is “*wild country.*” Murray, 154 Wash. at 49.

In Murray the court held the “notorious” element was not met even though the possessors: (1) built and maintained fences sufficient to maintain cattle and horses for fifteen years, (2) actually pastured cattle and horses, (3) built a pipe line for carrying water from the creek to the livestock, and (4) excluded others who had permission to use the land from the true record holder. Id. at 47-48, 50. The disputed land was “*wild country, broken, mountainous, very sparsely settled, and a small portion of it might be taken and held for years without [anyone] knowing whether there was a trespass or not.*” Id. at 49. Possession was not notorious to the absentee landowner because:

*“To hold that the entry and occupation here relied on as adverse are of such nature and notoriety that the owner must be presumed to know that there was a possession of the land would be to announce a rule under which a man might be disseised without his knowledge, and the statute of limitations would run against him when he had no reason to believe that his seisin had been interrupted. The land is located in a wild and mountainous country and is used only for grazing. The possession of appellants is limited to the pasture season. Few people, other than hunters and sheep herders, visit the land. A parcel of such land might be taken, fenced, and held for years and none know—and this, of course, includes the taxpaying owner 3,000 miles away who leased the land to sheep herders—that a trespass was being committed . . . [U]nder the facts of this case . . . the occupancy [was not] of such nature and notoriety that the respondents are presumed to have knowledge thereof.”*

Id. at 50-51.

There is a difference between a landowner who has no reason to believe his seisen has been interrupted and a landowner who is “*guilty of laches in failing to assert his title during the statutory period against the claimant.*” *Id.* at 50. As in Murray, there is no evidence here that Williams (Judds’ predecessor) - the taxpaying absentee landowner of unimproved, landlocked land - knew of the intrusion and had no reason to know. *Id.*; CP 134.

Defendants here failed to produce even a scintilla of proof that the strip’s prior owner (Williams) had actual notice of any adverse use by defendants, or that the existence of a fence remnant of unknown origin, on unmaintained, barren land was being asserted by defendants as a land use connoting adverse ownership. Furthermore, defendants provided no evidence that during 1999 to late 2011 the Judds had notice that any purported use by defendants was hostile to them after their announced legal ownership and recorded survey. Thus, the elements of open and notorious never existed to allow defendants’ adverse possession.

“*Hostility*” is also lacking under the facts here where defendants’ access to the Judds’ strip was permissive. Possession is not hostile if done with the true owner’s permission. O’Donnell v. McCool, 89 Wash. 537 (1916), overruled on other grounds by Chaplin, *supra*. Defendants do not dispute that in 1999 plaintiffs Judd provided them notice of the true

surveyed and recorded boundary. It's also factual that the Judds did not altogether exclude defendants from the strip until 2011 when their fence construction commenced. Under the facts, plaintiffs simply permitted defendants to continue whatever purported disputed use of the strip defendants now claim, if any actually occurred. Nonetheless, the trial court improperly misconstrued the doctrine of adverse possession under tenuous facts, in total disregard of defendants' legal burden of proof. This misapplication of facts to law resulted in reversible error.

**C. The Court Erred In Finding Defendants Johns Met Adverse Possession's Statutory Period.**

From 1973 until 2006, the Johns' predecessor owners (Nendls) claim to have occupied the southern portion of the strip at issue under the purported belief it was included under their deed. CP 788. Yet, in 2006, the Johns bought the Nendl's property despite pre-purchase notice that a portion of the strip at issue purportedly thought to be owned by the Nendls was disputed, and per survey not included in the Nendls' deed. RP 94-5; CP 787-8. Despite this advance notice of a dispute, the Johns indifferently proceeded in 2006 to purchase the property anyway. RP 97. At the time the Judds' quiet title action was filed in 2011, the Johns therefore had only been in possession 5 years. CP 1-8. These facts are significant because the trial court erroneously concluded that privity--the requirement for tacking, was not disputed. CP 420; 748. Based on its erroneous conclusion and

without additional analysis, the court then perfunctorily ruled defendants Johns had acquired adverse possession title by being permitted to “*tack*” their ownership time to the Nendls. CP 417; 420. However, privity *was* challenged and the trial court simply misapplied Washington law. RP 534.

The only way defendants Johns with ownership of just 5 years could successfully claim adverse possession of the strip at issue for the 10 year prescriptive period, was to claim a tacking of their time to the prior owners (Nendl). El Cerrito, Inc. v. Ryndak, 60 Wn.2d 847, 855 (1962). However, based on uncontested facts, privity between the Johns and Nendls was not, and could not be established as a matter of law for two reasons. First, assuming *arguendo* that the prior possessors (Nendl) had acquired title by adverse possession as the Johns and trial court contend, tacking is not allowed because that interest ripened into a perfected title and thus could only be transferred by conveyance. Second, tacking is not allowed where the subsequent possessor acquired possession of the land despite prior knowledge of disputed ownership, i.e. “bad faith tacking”.

**1. A prior perfected title precludes tacking.**

Tacking is only applicable where the previous possessor alone did not meet the ten year period for adverse possession. See 17 Wash. Prac., Real Estate §8.18 (2d ed.). It is well established that where the previous possessor held land adversely for over ten years, the title to land becomes

ripe and the interest in the land can then **only be transferred by conveyance**. Gorman v. City of Woodinville, 175 Wn.2d at 73 (“*Title acquired through adverse possession cannot be divested by acts other than those required to transfer a title acquired by deed.*”). This highlights the distinction between a “*perfected title*” in land which may only be transferred by deed, as compared to the “*shadow*” or “*inchoate*” possessory interest that exists before title is ripe and may be transferred by other means. See 17 Wash. Prac., Real Estate §8.1 (2d ed.). In McInnis v. Day Lumber Co., 102 Wash. 38, 42 (1918) our Supreme Court recognized this principle, reasoning:

*A title or easement right in real property is no different when acquired by adverse possession or use than when acquired by formal grant in the manner prescribed by the statute of frauds. It seems to follow as a matter of course that such title or right can be parted with only in the manner that a title or easement right otherwise acquired may be parted with.*

See also Mugaas v. Smith, 33 Wn.2d 429, 431 (1949); El Cerrito, 60 Wn.2d at 855, citing language with approval.

Even if a claimant is able to show that a predecessor in interest gained title to property through adverse possession, the claimant must still show “*that the title was subsequently conveyed to him,*” notwithstanding the transfer of possession. Muench, 90 Wn.2d at 644, overruled on other grounds by Chaplin, 100 Wn.2d at 853. “*Where the claimant's predecessor had acquired title to the property by adverse possession for*

*the statutory period when such person conveyed it, there was no occasion for tacking, and the successor cannot benefit from the possession of the predecessor unless the transfer was sufficient to convey title to realty under ordinary rules.*" 2 C.J.S. Adverse Possession §170; Gorman, 175 Wn.2d at 68.

Thus, perfected title to adversely possessed property may only be transferred by conveyance, thus precluding tacking. Gorman, 175 Wn.2d at 73. Here the court even cited to this very language but inexplicably and erroneously failed to apply it to the facts of the case. CP 773. *Arguendo*, even if the Nendls had fulfilled the 10 year prescriptive period as contended (CP 420, 748), the Johns could only acquire an interest in the disputed strip if the Nendls thereafter actually conveyed title to the strip to the Johns. Yet, the disputed strip (all of which is in **Gov. Lot 9**), was not included in the Johns' deed. CP 685, 749; Ex 7; Ex 8. Since no evidence exist that Nendls ever conveyed the disputed strip, defendants Johns are precluded from tacking to the Nendls' possession. Muench, 910 Wn.2d at 644. It also follows that if the Nendls were not adverse possessors, the Johns too could not legally adversely possess because their ownership without tacking, failed to meet the statutory ten year period (2006-2011). Therefore, the Johns' claim of adverse possession fails legally and factually and the court erred ruling otherwise. CP 780 ¶'s 2.4 and 2.5.

## 2. **Bad faith tacking is not allowed in Washington.**

In Washington tacking is only allowed where both the subsequent and previous owners have privity. Shelton v. Strickland, 106 Wn. App. 52 (2001). Privity is established only if: (1) “*the prior possessor willingly turn[ed] over possession to the succeeding one,*” and (2) there is a “*reasonable connection between the successive occupants as will raise [the subsequent possessor’s] claim of right above the status of wrongdoer or trespasser.*” Id. at 52-3. (cites omitted). This requirement has “*its roots in the notion that a succession of trespasses, even though there was no appreciable interval between them, should not, in equity, be allowed to defeat the record title.*” Id. at 53.

Although no Washington court has specifically addressed the issue of ‘bad faith’ tacking, the established rule requiring subsequent possessors to have a claim of right above a wrongdoer or trespasser is instructive. A mutual mistake as to a proper boundary raises one’s property claim above wrongdoer or trespasser. Howard v. Kunto, 3 Wn. App. 393, 400 (1970) overruled on other grounds by Chaplin, 100 Wn.2d at 853. The same however, cannot be said of one who in spite of full **prior** knowledge that legal title is disputed, indifferently disregards recorded evidence of competing ownership claims and proceeds nonetheless to purchase

disputed property. This type of bad faith conduct, especially as it applies to adverse possession and tacking, underscores the rule of law in Kunto.

In Kunto, the court noted that the possessors there were buyers who in good faith possessed under *mistaken* belief that their land was described in the deed. Id. Under these facts, the Kunto court found there was a reasonable connection that placed the subsequent possessor above the status of wrongdoer or trespasser. Id. at 400. The Kunto court recognized that the requirement of privity serves to protect a landowner from a succession of trespasses, noting there is a “*substantial difference between the squatter or trespasser and the property purchaser*” who is possessing land based on *mistake*. Id. at 399.

Although Kunto was quiet on the specific issue of whether bad faith conduct precludes tacking, the court’s consistent reference to *mistaken* possession cannot be ignored. Id. at 399-400. The court’s distinction between a *mistaken* buyer and a trespasser is telling as to the significance of a buyer’s actual knowledge regarding the status of land being considered for purchase. Indeed, the Kunto court considered such to be critical for purposes of establishing privity. Thus by analogy here, bad faith conduct by purchasers implicating adverse possession is similar to conduct by trespassers – both assume consequences knowing and aware that their property possession is clouded **before** actually engaging in such

occupancy. Under Kunto, that knowledge and awareness by someone other than a mistaken or innocent purchaser, necessarily relates to the issue of privity. Thus, embracing the rule laid down in Kunto, this Court can and should hold that bad faith purchasers have no privity to permit adverse possession tacking. Such an application is entirely consistent with the converse-- good faith purchasers are permitted to tack as they are above wrongdoers. Kunto, 3 Wn. App at 400.

Following this privity rule of law will ensure consistent public policy in furtherance of adverse possession's underlying rationale that *"title to land should no longer be in doubt."* ITT Rayonier, 112 Wn.2d at 757. Not allowing 'bad faith' tacking will incentivize parties to property transactions, where adverse possession interests are known or are claimed to exist, to address disputes concerning legal ownership and clear title **before** transfers occur. Here the previous possessors (Nendls) and their purchasers (Johns), by notice and recorded survey knew of an ownership dispute **before** their transaction, yet never initiated any action to determine whether the strip at issue could actually be transferred. RP 94-5; RP 97. Instead, defendants Johns chose to proceed with the purchase and then to 'lay in the weeds' until the legal owners, the Judds, were forced to seek quiet title redress, only to be blindsided by the Johns' adverse possession claim and "tacking" argument. Without a rule preventing bad faith tacking

conduct it is clear that successive buyers like those here who had specific pre-transaction knowledge of an existing ownership dispute, will never have any incentive to ensure quiet title.

*"[I]t is time to rethink the doctrine of adverse possession. Many of the beneficial purposes the doctrine is said to serve do not justify the doctrine in modern times. Moreover, the doctrine's basic premise is legalization of wrongful acquisition of land by "theft", conduct that in our time we should discourage, notwithstanding the possibility of putting land to a higher or better use. The doctrine also creates uncertainty of ownership, lying as it does outside documents in writing and the recording statutes. I encourage the legislature to seriously consider phasing the doctrine out, at least where the adverse possessor has no colorable title or good faith belief in ownership of the land."*

Gorman, 175 Wn.2d at 75-76, (Madsen, C.J., concurring).

Although Justice Madsen recognized the legislature is ultimately responsible for phasing the doctrine completely, disfavor of those who lack colorable title or good faith belief in ownership is already clear under existing case law. As such, this court can clarify that tacking is not available to satisfy an element of adverse possession for those possessors claiming title in bad faith. Here, the Johns' claim of right is not above that of a trespasser or wrongdoer. As such, under Washington law, the Johns are not permitted to tack to the Nendl's possession and the trial court erred in allowing their claim of adverse possession.

**D. Denying Plaintiffs' Statute Of Limitations Defense Was Error.**

In answer to defendants' counterclaims and affirmative defenses, Plaintiffs pled a statute of limitations defense and presented their pretrial argument in **Plaintiff's Trial Memorandum**. CP 19-20; CP 399–400. The defense was asserted based upon the fact the Judds undisputedly put defendant Healy on notice in 1999 of their status as record owners of the strip as confirmed by recorded survey. RP 636-8; RP 787-9. Healy never refuted the Judds' assertion of ownership until 2011. CP 637-8. Thus, even assuming *arguendo* that defendant Healy had acquired adverse possession ownership of the strip at issue prior to 1999, the Judds themselves subsequently re-acquired their own land under adverse possession by holding it open, hostile, and notorious thereafter for over 10 years! This position was articulated pretrial in **Plaintiff's Trial Memorandum** as well. CP 399. At trial when the Judds claimed the defendants were thus time barred to assert any ownership claims to the strip, the court rejected their defense. CP 771-74; CP 779 ¶1.10. In doing so, the court erred factually and legally.

Where land has been adversely possessed, the original owner may reacquire title by adverse possession. See Acord v. Pettit, 174 Wn. App. 95 review denied, 178 Wn.2d 1005 (2013). An adverse possessor who pays taxes on the possessed land may acquire title in seven years if the

possession was “*actual, open and notorious . . . [made] under claim and color of title, [and] made in good faith.*” RCW 7.28.070. To invoke the seven year statutory period, the claim must be based in good faith with color of title. Daubner v. Mills, 61 Wn. App. 678, 681-83 (1991). Color of title is “*that which is a semblance or appearance of title, but is not title in fact nor in law.*” Nicholas v. Cousins, 1 Wn. App. 133, 136 (1969).

The strip at issue is clearly included in the property description in the Judds’ Deed (CP 11; Ex 7) again confirmed by recorded surveys. (CP 10; Ex 3; Ex 4). Since the Judds have color of title, their ownership claim was made in good faith. Thus, both the ten year prescriptive period and the seven year statutory period (RCW 7.28.070) were applicable to time bar any adverse ownership claims by defendants. Conversely, this allowed the Judds in defense to establish and/or affirm their true ownership as well as to assert their own adverse possession claim to quiet title. In doing so they met and proved all the necessary elements.

**Permissive Use** - Clearly, the Judds treated the strip at issue as their own at all times subsequent to 1999, which was the ownership message they conveyed at the time. RP 636. Their claim of ownership was unequivocal and antagonistic to any claim of ownership defendants may have had up to that point. RP 636-8. Thus, use if any by defendants between 1999 and 2011 was permissive by the Judds and a neighborly

accommodation by them, not inconsistent with their claim of ownership. This type of neighborly relationship is not uncommon. Lilly v. Lynch, 88 Wn. App. 306, 315 (1997). The Judds claimed the strip against the world while simply permitting defendants' purported use of the strip thereafter.

*"The law should, and does encourage acts of neighborly courtesy; a landowner who quietly acquiesces in the use [of his land], resulting in no injury to him, but in great convenience to his neighbor, ought not to be held to have thereby lost his rights. It is only when the use [] is clearly adverse to the owner of the land, and not an enjoyment of neighborly courtesy, that the landowner is called upon 'to go to law' to protect his rights . . . Applying a presumption of permissive use incentivizes landowners to allow [neighborly accommodation]. We do not want to require a landowner "to adopt a dog-in-the-manger attitude in order to protect his title to his property."*

Gamboa, 183 Wn.2d at 48-49, (internal citations omitted). In the words of the Gamboa court, *"Not applying a presumption of permissive use in these circumstances punishes a courteous neighbor by taking away his or her property right."* Id.

**Actual and Uninterrupted** - There is also no question that from 1999 forward the Judds had actual and uninterrupted possession of the strip at issue. That doesn't mean that the Judds were required necessarily to have been *"in personal occupation of the land."* Foote v. Kearney, 157 Wash. 681, 685 (1930).

*"Neither actual occupation, cultivation, nor residence are necessary to constitute actual possession when the property is so*

*situated as not to admit of any permanent, useful improvement, and the continued claim of the party has been evidenced by public acts of ownership, such as he would exercise over property which he claimed in his own right, and would not exercise over property which he did not claim."*

Bellingham Bay land Company v. Dibble 4 Wash. 764, 770-1 (1892);

Public acts of ownership include any overt act the true owner would take, such as "*uninterrupted payment of taxes*" just as the Judds' did here. Id. at 772; RP 242; Ex 14.

**Hostile, Open, and Notorious** - Possession is open and notorious if the landowner knows or should know the claimant is making a claim hostile to the landowner's property interest. Muench v. Oxley, 90 Wn.2d at 642. Here there is no question defendants specifically knew of the Judds' claim to ownership as supported by their deeds of record, recorded survey, communications with defendants, and their actual use of the property itself. RP 179; 226; 294; 299; 235; 326-7; 338; 341-2; 636 Ex 3; Ex 7. Yet, despite such actual notice, defendant Healy did nothing for 12 years to protect whatever purported interest he suggests he acquired to the strip. As a result he was time barred to raise his claims and any defenses to the Judds' asserted ownership.

Hostility is merely treating the land "*as his own as against the world throughout the statutory period.*" Roy v. Cunningham, 46 Wn. App. 409, 412 (1986). Hostility "*conveys the clear message that the possessor*

*intends to possess the land as his own.” Selby v. Knudson, 77 Wn. App. 189, 197 (1995). The Judds’ claim of ownership in 1999 was unequivocal and effective to put any reasonable person on notice. CP 637. The Judds’ claim of ownership clearly conveyed to defendant Healy that they intended to possess the land as their own. This was a claim that Healy simply ignored at his peril until 2011. RP 636–8. Despite evidence presented at trial regarding time limitations applicable to defendants’ adverse possession claims and to the Judds’ own prescriptive rights, the court failed to appropriately apply the facts to Washington law. As a result the court committed reversible error.*

**E. Alternatively, Denying Judd’s RCW 7.28 Tax Reimbursement Request Was Error.**

RCW 7.28.160 provides that in any action for the recovery of real property where taxes have been paid, the value such taxes, with interest thereon “**must be allowed as a counterclaim**”. Here, the Plaintiffs’ **Complaint** alleged they had paid “*any and all taxes on their entire property, including the portion at issue, since purchasing the property in 1999.*” CP 6 ¶17. Defendants paid no taxes on the property at issue. CP 6 ¶18. These facts were again set forth in **Plaintiffs’ Trial Memorandum**. CP 387. The **Complaint’s Prayer for Relief** requested “*such other and further relief as the court deems just and equitable.*” CP 8 ¶5. Additionally, **Plaintiffs’ Trial Memorandum** raised and addressed RCW

7.28 *et seq.* in support of their request for grant of affirmative defenses. CP 399–400. The **Memorandum** made specific reference to the fact that adverse possession in Washington has been under serious and long overdue review including “*enacting RCW 7.28.083 to provide for reimbursement of real estate taxes on adversely possessed land.*” CP 403.

Despite the pleadings, as well as the facts presented at trial, the court in its Letter Memorandum (CP 768-774) quieting title against the Judds, omitted any reference to reimbursing the Judds pro rata property taxes paid during the prescriptive period which the court determined in favor of defendants. Plaintiffs thereafter filed a **Motion for Reconsideration** based upon the court’s failure to consider the applicability of RCW 7.28 *et seq.* including RCW 7.28.160 as a counterclaim addressing and adjudicating the rights and entitlements of the Judds who were at all times the lawfully titled owners of the property, paying all taxes on the property for more than seven successive years. CP 722-23. In turn the court denied the Judds’ motion for reconsideration despite acknowledging that RCW 7.28.160 “*allows the plaintiff here to bring a counterclaim for any taxes and local assessments paid ...*” CP 793-794; CP 780 ¶2.8.

The court’s rationale for denying the request for reimbursement was that “*The Judds failed to specifically plead the applicability of RCW*

7.28.160. *At trial, they presented no evidence as the amount of taxes, assessments and improvements they may have made to the land.*” CP 779 ¶ 1.10, 794. Ignoring that no such counterclaim was even mature until an adverse ruling was made against the Judds and despite trial testimony and evidence presented (RP 242-3, 263-4; Ex 14), the court’s subsequent refusal to consider the Judds’ tax reimbursement claim, constituted error.

First, Washington is a notice pleading state requiring only short and plain statements of a claim showing that the pleader is entitled to relief. CR 8(a). Second, no technical form of pleading is required. CR 8(e). Third, all rules and pleadings shall be construed as to do justice. CR 1; CR 8(f). Fourth, when issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. CR 15(b). Fifth, amendments to conform to the evidence may be made upon motion of any party at any time, even after judgment. *Id.* Sixth, claims which either mature or are acquired after serving a pleading or through oversight, inadvertence, or excusable neglect, may with court permission, be presented as a counterclaim by supplemental pleading. CR 13(e) and (f).

RCW 7.28.080 precludes an action for trespass or quiet title to vacant land against someone holding color of title in good faith, and who pays the taxes on the land in question for seven successive years. RCW

7.28.080. Here, Plaintiffs' 1999 survey of the vacant and unoccupied strip substantiated their color of title, along with the fact that they paid taxes on the land ever since acquiring it in 1999. RP 242; Ex 7; Ex 14. Moreover, the Judds, believing the strip to be their own, acted in good faith by continuing to pay the property taxes for all successive years. Id. Thus under this statute, defendants were barred from asserting their quiet title counterclaims. Incredibly, if the defendants were to be believed that they truly treated the strip as their own, why then after being placed on notice that their ownership was being disputed (a fact supported by the Judds' recorded survey) did they do nothing to secure title? RCW 7.28.080 is premised on recognizing good faith conduct in the matters of quiet title. *"Every person having color of title made in good faith to vacant and unoccupied land, who shall pay all taxes legally assessed thereon for seven successive years, he or she shall be deemed and adjudged to be the legal owner of said vacant and occupied land to the extent and according to the purport of his or her paper title."* Id. Here defendants knew that they were not the strip's title owners and as such did nothing to assert ownership; while the Judds continued to pay property taxes in all successive years beyond 1999. Under RCW 7.28 et seq., such bad faith conduct is simply not condoned, thus it was error to reject the Judds' claim for tax reimbursement.

**VI. RAP 18.1 MOTION FOR ATTORNEY FEES AND COSTS**

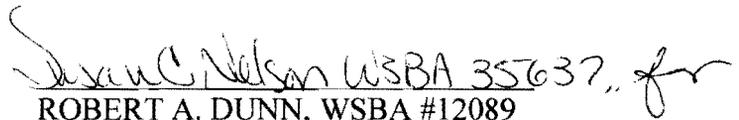
Appellants Judds respectfully request an award of reasonable attorney fees and costs incurred on appeal. RAP 18.1; RCW 7.28.083. Moreover, alternatively Appellants Judds respectfully request remand to the trial court for an award of tax reimbursement damages pursuant to RCW 7.28 et seq.

**VII. CONCLUSION**

Appellants Judds respectfully request the trial court's **Order Quieting Title** (CP 777-82) be reversed and judgment entered for Plaintiffs Judds; and/or alternatively the trial court's denial of the Judds' request for tax reimbursement be reversed and remanded for determination of damages; that Respondents' fees and costs awarded by the trial court be dismissed; and that Appellants Judds be awarded their reasonable costs and attorneys fees on appeal.

DATED this 20 day of July, 2015.

DUNN BLACK & ROBERTS, P.S.

  
ROBERT A. DUNN, WSBA #12089  
Attorney for Appellants Judd

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 20 day of July, 2015, I caused to be served a true and correct copy of the foregoing document to the following:

- |                                     |                  |                         |
|-------------------------------------|------------------|-------------------------|
| <input type="checkbox"/>            | HAND DELIVERY    | Richard D. Wall         |
| <input checked="" type="checkbox"/> | U.S. MAIL        | Richard D. Wall, P.S.   |
| <input type="checkbox"/>            | OVERNIGHT MAIL   | 505 W. Riverside, Suite |
| <input type="checkbox"/>            | FAX TRANSMISSION | 400                     |
| <input type="checkbox"/>            | EMAIL            | Spokane, WA 99201       |

Swan C Nelson WSBA 35637 for  
ROBERT A. DUNN

---

**SUBSTITUTE HOUSE BILL 1026**

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**State of Washington**

**62nd Legislature**

**2011 Regular Session**

**By** House Judiciary (originally sponsored by Representatives Rolfes, Orcutt, Carlyle, Blake, Angel, and McCune)

READ FIRST TIME 01/21/11.

1       AN ACT Relating to adverse possession; adding new sections to  
2 chapter 7.28 RCW; and creating a new section.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

4       NEW SECTION.   **Sec. 1.** A new section is added to chapter 7.28 RCW  
5 to read as follows:

6       (1) In an action involving a claim asserting title to real property  
7 by adverse possession, the person asserting the claim must prove each  
8 element of the claim by clear, cogent, and convincing evidence.

9       (2) In an action involving a claim asserting title to real property  
10 by adverse possession, the person asserting the claim of adverse  
11 possession may be required to pay the costs and reasonable attorney  
12 fees of the party defending against the claim of adverse possession if,  
13 considering all the facts, the fact finder determines that such an  
14 award is appropriate in order to do justice between the parties.

15       (3) This section does not apply to claims of adverse possession  
16 brought under RCW 7.28.050, 7.28.070, or 7.28.085.

17       NEW SECTION.   **Sec. 2.** A new section is added to chapter 7.28 RCW  
18 to read as follows:

1 (1) A party who prevails on a claim of adverse possession of real  
2 property against the holder of record title to the real property at the  
3 time the action involving the claim was filed or against a subsequent  
4 purchaser from such holder may be required to:

5 (a) Reimburse such holder and/or purchaser for part or all of any  
6 taxes or assessments levied on the real property that are proven by  
7 competent evidence to have been paid by such holder or purchaser during  
8 the period that the prevailing party was in possession of the real  
9 property in question; and

10 (b) Pay to the county treasurer of the county in which the real  
11 property is located part or all of any taxes or assessments levied on  
12 the real property that are due after the filing of the adverse  
13 possession claim and that remain unpaid at the time judgment on the  
14 claim is entered.

15 (2) The fact finder shall determine what, if any, reimbursement  
16 and/or payment of taxes and assessments under this section is  
17 appropriate in order to do justice between the parties.

18 NEW SECTION. **Sec. 3.** This act applies to actions filed on or  
19 after July 1, 2012.

--- END ---

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HOUSE BILL 1829

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State of Washington

64th Legislature

2015 Regular Session

By Representatives Goodman and Rodne

Read first time 01/29/15. Referred to Committee on Judiciary.

1 AN ACT Relating to adverse possession; and adding a new section  
2 to chapter 7.28 RCW.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

4 NEW SECTION. **Sec. 1.** A new section is added to chapter 7.28 RCW  
5 to read as follows:

6 (1) In any action or counterclaim asserting ownership to real  
7 property acquired by adverse possession, the owner of the real  
8 property as shown by the recorded deed descriptions is entitled to an  
9 affirmative defense by proving that the person who commenced the  
10 possession of the real property did not have the honest belief, at  
11 the time of commencing the possession, that he or she was the  
12 rightful owner and entitled to possession of the real property. A  
13 person asserting ownership to real property by adverse possession is  
14 entitled to a rebuttable presumption that the person, or the person's  
15 predecessor in interest, who commenced possession of the real  
16 property had an honest belief, at the time of commencing the  
17 possession, that he or she was the rightful owner and entitled to  
18 possession of the real property, unless the court concludes that  
19 belief was not reasonable under the circumstances.

.  
1       (2) This section applies to actions or counterclaims first  
2 asserting ownership based upon adverse possession on or after the  
3 effective date of this section.

--- END ---

West's Revised Code of Washington Annotated  
Title 7. Special Proceedings and Actions (Refs & Annos)  
Chapter 7.28. Ejectment, Quieting Title (Refs & Annos)

West's RCWA 7.28.080

7.28.080. Color of title to vacant and unoccupied land

Currentness

Every person having color of title made in good faith to vacant and unoccupied land, who shall pay all taxes legally assessed thereon for seven successive years, he or she shall be deemed and adjudged to be the legal owner of said vacant and unoccupied land to the extent and according to the purport of his or her paper title. All persons holding under such taxpayer, by purchase, devise or descent, before said seven years shall have expired, and who shall continue to pay the taxes as aforesaid, so as to complete the payment of said taxes for the term aforesaid, shall be entitled to the benefit of this section: PROVIDED, HOWEVER, If any person having a better paper title to said vacant and unoccupied land shall, during the said term of seven years, pay the taxes as assessed on said land for any one or more years of said term of seven years, then and in that case such taxpayer, his heirs or assigns, shall not be entitled to the benefit of this section.

**Credits**

[1893 c 11 § 4; RRS § 789.]

Notes of Decisions (31)

West's RCWA 7.28.080, WA ST 7.28.080

Current with legislation effective through May 18, 2015, which includes Chapters 1 through 4, 70 (part), 125, 134, 193, 222, 234 (part), 244 (part), 269 (part), 273, 281, and 289 from the 2015 Regular Session

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## APPENDIX C

West's Revised Code of Washington Annotated Title 4. Civil Procedure (Refs & Annos) Chapter 4.16. Limitation of Actions (Refs & Annos)
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West's RCWA 4.16.020

4.16.020. Actions to be commenced within ten years--Exception

Currentness

The period prescribed for the commencement of actions shall be as follows:

Within ten years:

(1) For actions for the recovery of real property, or for the recovery of the possession thereof; and no action shall be maintained for such recovery unless it appears that the plaintiff, his or her ancestor, predecessor or grantor was seized or possessed of the premises in question within ten years before the commencement of the action.

(2) For an action upon a judgment or decree of any court of the United States, or of any state or territory within the United States, or of any territory or possession of the United States outside the boundaries thereof, or of any extraterritorial court of the United States, unless the period is extended under RCW 6.17.020 or a similar provision in another jurisdiction.

(3) Of the eighteenth birthday of the youngest child named in the order for whom support is ordered for an action to collect past due child support that has accrued under an order entered after July 23, 1989, by any of the above-named courts or that has accrued under an administrative order as defined in RCW 74.20A.020(6), which is issued after July 23, 1989.

**Credits**

[2002 c 261 § 2; 1994 c 189 § 2; 1989 c 360 § 1; 1984 c 76 § 1; 1980 c 105 § 1; Code 1881 § 26, 1877 p 7 § 26; 1854 p 363 § 2; RRS § 156.]

Notes of Decisions (455)

West's RCWA 4.16.020, WA ST 4.16.020

Current with legislation effective through May 18, 2015, which includes Chapters 1 through 4, 70 (part), 125, 134, 193, 222, 234 (part), 244 (part), 269 (part), 273, 281, and 289 from the 2015 Regular Session

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## APPENDIX D

West's Revised Code of Washington Annotated  
Title 7. Special Proceedings and Actions (Refs & Annos)  
Chapter 7.28. Ejectment, Quieting Title (Refs & Annos)

West's RCWA 7.28.083

7.28.083. Adverse possession--Reimbursement of taxes or assessments--  
Payment of unpaid taxes or assessments--Awarding of costs and attorneys' fees

Effective: July 22, 2011  
Currentness

(1) A party who prevails against the holder of record title at the time an action asserting title to real property by adverse possession was filed, or against a subsequent purchaser from such holder, may be required to:

(a) Reimburse such holder or purchaser for part or all of any taxes or assessments levied on the real property during the period the prevailing party was in possession of the real property in question and which are proven by competent evidence to have been paid by such holder or purchaser; and

(b) Pay to the treasurer of the county in which the real property is located part or all of any taxes or assessments levied on the real property after the filing of the adverse possession claim and which are due and remain unpaid at the time judgment on the claim is entered.

(2) If the court orders reimbursement for taxes or assessments paid or payment of taxes or assessments due under subsection (1) of this section, the court shall determine how to allocate taxes or assessments between the property acquired by adverse possession and the property retained by the title holder. In making its determination, the court shall consider all the facts and shall order such reimbursement or payment as appears equitable and just.

(3) The prevailing party in an action asserting title to real property by adverse possession may request the court to award costs and reasonable attorneys' fees. The court may award all or a portion of costs and reasonable attorneys' fees to the prevailing party if, after considering all the facts, the court determines such an award is equitable and just.

**Credits**

[2011 c 255 § 1, eff. July 22, 2011.]

West's RCWA 7.28.083, WA ST 7.28.083

Current with legislation effective through May 18, 2015, which includes Chapters 1 through 4, 70 (part), 125, 134, 193, 222, 234 (part), 244 (part), 269 (part), 273, 281, and 289 from the 2015 Regular Session

West's Revised Code of Washington Annotated  
Title 7. Special Proceedings and Actions (Refs & Annos)  
Chapter 7.28. Ejectment, Quieting Title (Refs & Annos)

West's RCWA 7.28.160

7.28.160. Defendant's counterclaim for permanent improvements and taxes paid

Effective: July 22, 2011

Currentness

In an action for the recovery of real property upon which permanent improvements have been made or general or special taxes or local assessments have been paid by a defendant, or those under whom he or she claims, holding in good faith under color or claim of title adversely to the claim of plaintiff, the value of such improvements and the amount of such taxes or assessments with interest thereon from date of payment must be allowed as a counterclaim to the defendant.

**Credits**

[2011 c 336 § 176, eff. July 22, 2011; 1903 c 137 § 1; RRS § 797.]

Notes of Decisions (22)

West's RCWA 7.28.160, WA ST 7.28.160

Current with legislation effective through May 18, 2015, which includes Chapters 1 through 4, 70 (part), 125, 134, 193, 222, 234 (part), 244 (part), 269 (part), 273, 281, and 289 from the 2015 Regular Session

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APPENDIX F

West's Revised Code of Washington Annotated  
Title 7. Special Proceedings and Actions (Refs & Annos)  
Chapter 7.28. Ejectment, Quieting Title (Refs & Annos)

West's RCWA 7.28.070

7.28.070. Adverse possession under claim and color of title--Payment of taxes

Currentness

Every person in actual, open and notorious possession of lands or tenements under claim and color of title, made in good faith, and who shall for seven successive years continue in possession, and shall also during said time pay all taxes legally assessed on such lands or tenements, shall be held and adjudged to be the legal owner of said lands or tenements, to the extent and according to the purport of his or her paper title. All persons holding under such possession, by purchase, devise or descent, before said seven years shall have expired, and who shall continue such possession and continue to pay the taxes as aforesaid, so as to complete the possession and payment of taxes for the term aforesaid, shall be entitled to the benefit of this section.

**Credits**

[1893 c 11 § 3; RRS § 788.]

Notes of Decisions (158)

West's RCWA 7.28.070, WA ST 7.28.070

Current with legislation effective through May 18, 2015, which includes Chapters 1 through 4, 70 (part), 125, 134, 193, 222, 234 (part), 244 (part), 269 (part), 273, 281, and 289 from the 2015 Regular Session

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## APPENDIX G