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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

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

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

APPELLANTS' CROSS/REPLY BRIEF

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I. INTRODUCTION

Respondents Johns and Healy apparently elected not to provide this Court with a response addressing the specific issues raised by the Judds on appeal. Instead, “Respondents/Cross Appellants' Opening Brief” is devoted primarily to their contention that the Judds’ quiet title action was “frivolous”. This is despite the fact that Respondents’ prior summary judgment motion was denied because of existing material questions of fact (CP 199-200; CP 232-5); and that the underlying suit was commenced only after Respondents engaged in extra judicial self-help conduct when they intentionally ripped down the Judds’ newly constructed fence built on the legal boundary line. Respondents’ actions were undertaken despite knowing that a recorded survey, title, and tax records and documents existed confirming the Judds’ claims of legal ownership to the disputed strip at issue.

Respondents’ responsive pleading for the most part consists of a disjointed rationalization as to why the trial court’s rejection of their demand for attorney’s fees under RCW 4.84.185 was a purported abuse of discretion. The remainder of Respondents’ Brief proffers only minimal argument and circular reasoning regarding the actual issues raised by Appellants Judd. Indeed, large parts of Respondents’ Brief has been simply cobbled together by copying direct, identical excerpts from their

unsuccessful 7/12/12 Memorandum In Support Of Motion for Summary Judgment. (CP 126-40, e.g., Respondents' Brief, 9-11 and CP 129-31). However, even the limited response submitted by Respondents is notably superficial, without pertinent support or recitation to the underlying record, and devoid of relevant and applicable Washington law.

II. REPLY STATEMENT OF CASE

Certain of Respondents' purported assertions of fact are simply unsupported and incorrect. The salient, undisputed facts of this case concern 3 adjoining parcels, connected by a 50' disputed strip as depicted below.

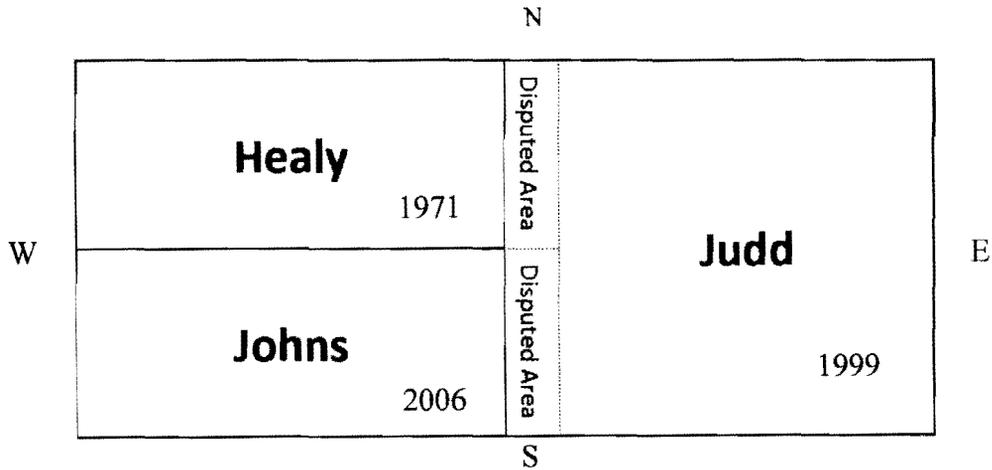


Figure 1: Judd/Healy/Johns Boundary Lines

The factual question of whether a "fence" actually existed between the Respondents' property and the Appellants' property at the time the Judds purchased it in 1999 was the primary focus of most of the deposition and subsequent trial testimony presented to the trial court. To

say that the testimony in that regard was hotly contested and unequivocally disputed is an understatement. (CP 415-19; RP 157-8; 164; 168-71; 241; 325; 344).

Ultimately however, whether a 'fence' actually existed or not in 1999 is really ancillary since the following critical and relevant facts are the essential ones that relate directly to the appropriate **legal analysis** required for this case.

HEALY/JUDDS - 1) Healy purchased his un-surveyed property in 1971. (RP 17-8; 416). 2) Healy's Deed did not include a property description for the disputed strip. (RP 47; CP 560-2; CP 746, ¶ 1.1). 3) In September 1999, the Judds by Warranty Deed purchased their adjoining acreage, the legal description for which included the 50' disputed strip. (CP 4-8; RP 155; 165; 232; Exs 3, 7). 4) The Judds promptly ordered and paid for a survey that was certified and recorded on 11/2/99 confirming the disputed strip was in fact within their Deed's legal description. (Exs 3, 7; RP 156; 165-7). 5) The Judds at all times thereafter paid the property taxes for their parcel which included the disputed strip. (Exs 1, 2, 7, 14; RP 235; 242). 6) Shortly after the survey, Healy was informed by Larry Judd of the survey results and that the "fence" remnants at issue encroached onto the Judds' property. (RP 326; 341-2). 7) Judd told Healy he wasn't worried about it "right now" but that he would build a new

fence on his property line when he was able to get it done. (RP 326). **8)** Healy did and said nothing in response, including nothing about purported adverse possession. (RP 31; 326-7). **9)** There were no more communications between Healy and Judds for 12 years prior to 2011. (RP 36; 327). Healy certainly did not institute quiet title proceedings to the strip after learning the Judds claimed it as their own and permitted the fence remnants to remain.

JOHNS/JUDDS - **1)** The Johns purchased their adjoining property from the Nendls in May 2006. (RP 81). **2)** The Johns' Statutory Warranty Deed did not include any legal description for the disputed strip. (RP 93; Exs 3; 8). **3) Before** the Johns closed their purchase, they learned of a claim of encroachment involving the disputed strip's boundary line, and also learned of the prior property survey. (RP 95-8). **4)** Upon learning of the boundary matter prior to closing the Johns had a "remote concern" about it. (RP 98-9). **5)** The Johns did not request their own survey and made no effort to procure any prior survey before closing. (RP 84-98). The Johns likewise did not initiate quiet title proceedings.

III. ARGUMENT

A. The Trial Court Properly Rejected Respondents' Request For RCW 4.84.185 Attorney's Fees.

Respondents have appealed the trial court's denial of their request for attorney fees. Additionally they are requesting attorney fees on appeal.

(Respondents' Brief, 20-3). As a basis for requested fees, Respondents argue that both the underlying action and appeal are frivolous and advanced without reasonable cause, citing RCW 4.84.185.

i. The trial court's denial of Respondents' request for attorney's fees was appropriate.

A frivolous action is one that cannot be supported by any rational argument on the law or facts. Ahmad v. Town of Springdale, 178 Wn. App. 333, 344 (2013). The standard of review for a "frivolous" lawsuit attorney fee request is abuse of discretion. Id. A decision denying a fee request will be reversed under this standard only if it is "untenable or manifestly unreasonable." Id.

The Judds' action was and is clearly supported by fact and law. Three points exemplify the merit behind Judds' lawsuit. First, throughout trial the character and nature of the boundary at issue was contentiously disputed, including whether Respondents purportedly ever *adversely* used the disputed strip after the Judds gave notice in 1999 of their legal ownership and thus simply permitted any purported subsequent use by Respondents. Thus, there was always significant doubt whether Respondents could ever convince a trier of fact that they were able to **factually** meet their adverse possession burden of proof as to all elements.

Second, arguendo, even if title had vested in Healy before 1999 by way of adverse possession, the Judds thereafter re-acquired the strip by

adverse possession based on their own unchallenged and unequivocal announced claim of legal ownership supported by recorded Deed, tax records, and survey. The evidence is undisputed that 12 years passed after the Judds informed Healy of their documented and recorded ownership claim. In the interim, Healy acquiesced to the Judds' claim of ownership by doing nothing whatsoever to address 1) the Judds' Warranty Deed and the legal description therein which included the disputed strip; 2) that Healey's own Deed contained no legal description for the disputed strip; 3) that the Judds' 1999 recorded survey conclusively identified the disputed strip was in the Judds' legal description ownership; and 4) that the Judds continued to pay taxes on property Healy claimed was purportedly his. These facts support the legitimacy of the litigation the Judds were forced to initiate.

Third, as a matter of fact and law, the Judds had superior title to the Johns even if title *arguendo*, had vested in the Johns' predecessor owners (the Nendls) before the Judds' acquisition in 1999. It is undisputed that the Johns' Deed from the Nendls never included a description of the disputed strip, a requirement under Washington law in order to effectuate a conveyance. As such, the Johns did not acquire title to the disputed strip upon purchase in 2006. RCW 64.04.010, *et seq.*; Dickson v. Kates, 132 Wn.App. 724, 733 (2006), *as amended* (12/12/06).

Further, if legal title was never vested in the Nendls, then the Johns were unable to meet adverse possession's statutory ten years. This is because in Washington, the Johns could not tack their "possession" time to the Nendls in bad faith—i.e., where one knows the property being considered for purchase is subject to an ownership dispute.

For all the foregoing reasons, the quiet title litigation the Judds were compelled to commence was necessary and certainly not frivolous. Accordingly, the trial court's denial of Respondents' attorney fee request was not "untenable or manifestly unreasonable." Ahmad, supra.

ii. Respondents' attorney fee request on appeal is likewise meritless.

Respondents also request an award of attorney fees for defending a "frivolous" appeal; a position likewise warranting no consideration. Attorney fees for filing a frivolous appeal are granted only if:

[C]onsidering the entire record, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ, and that the appeal is so devoid of merit that there is no possibility of reversal . . . All doubts as to whether the appeal is frivolous should be resolved in favor of the appellant.

Advocates for Responsible Dev. v. W. Washington Growth Mgmt. Hearings Bd., 170 Wn.2d 577, 580 (2010) (internal citations omitted).

The record is replete with evidence that the Judds challenged Respondents' sufficiency of evidence at every turn. The Judds repeatedly

proffered evidence and argument claiming Respondents failed to prove facts sufficient to establish all the requisite adverse possession elements. Respondents' contentions to the contrary are as if they attended a different trial than the one reflected by the existing record.

Lastly, Respondents suggest in a specious, off-handed manner that the Judds' appeal purportedly raises new issues not previously before the trial court for consideration. (Respondents' Brief, 20). Yet, clear citation to the record in the Judds' **Opening Brief**, as well as the parties' summary judgment briefing previously before the trial court (CP144-57; 177-85; 187-91; 193-97), dispels all of Respondents' spurious claims that arguments are now being first raised on appeal. Respondents' arguments in this regard to this Court are disingenuous. As Respondents acknowledge: "*[t]he purpose of RCW 4.84.185 is to discourage abuse of the legal system by providing for award of expenses and legal fees to any party forced to defend itself against meritless claims asserted for the purposes of harassment, delay, nuisance or spite.*" Respondents' Brief, 21; Ahmad, supra at 343.

The Judds didn't start their suit to harass. They were forced to commence suit to ensure that the property they had specifically paid for and acquired pursuant to a recorded Deed, and for which at all times thereafter they paid property taxes on, was quieted in their name. Taking

all doubts (if any) in favor of the Judds, this appeal as a matter of fact and law is clearly not frivolous.

B. Respondents' Possession Of The Disputed Strip Was Not Open, Notorious, And Exclusive For Over 10 Years.

Respondents' Brief is contradictory. On one hand Respondents concede the Judds argued "*that neither the Nendls' nor Healy's use of the disputed strip was sufficiently exclusive, hostile, open or notorious to support adverse possession.*" (Respondents' Brief, 14). Yet, in the next sentence Respondents state: "*However, the Judds do not argue that the evidence, taken as a whole, was insufficient to support the trial court's findings to the contrary.*" Id. It is difficult to conceive how Respondents can in good faith make the latter claim while admitting the former! A claim that the elements of adverse possession were not established, necessarily implies the facts are insufficient to find the elements are met, which was always the Respondents' burden.

Besides this glaring contradiction, Respondents' latter statement seems to imply that the standard for review of whether the elements of adverse possession are met is a sufficiency of evidence standard rather than *de novo*. The trial court's ruling that the elements of adverse possession were met, is a question of law. Yet, the trial court erroneously placed its conclusion under 'findings of fact'. CP 797; also see In re Det. of M.K., 168 Wn.App. 621, 623 (2012) (finding of law, despite being

labeled as a finding of fact, is treated as a finding of law). Respondents' intimation that this conclusion was a finding of fact to be considered a verity on appeal is at best misleading given their own citation to the law stating otherwise. (Respondents' Brief, 8, 12-13). As such, this Court is tasked with determining whether Respondents established each element of adverse possession by a preponderance of the evidence. Peeples v. Port of Bellingham, 93 Wn.2d 766, 661 (1980) overruled on other grounds by Chaplin v. Sanders, 100 Wn.2d 853 (1984).

Contrary to what Respondents claim, the trial court's mis-stated findings of fact cited by Respondents do not establish the elements of adverse possession.

i. **Respondents did not rebut the presumption of permissive use.**

Respondents' Brief argues that "*for the first time on appeal, appellants argue that the evidence presented at trial was insufficient to overcome a presumption that the use of the disputed area was permissive. That argument is completely without merit.*" (Respondents' Brief, 13). Whether Respondents adequately rebutted the presumption of permissive use was indeed always at issue in this case and was challenged both at summary judgment and trial. (CP 19; CP181-2; CP 194-6). Even if the argument had been first raised on appeal as Respondents erroneously contend, RAP 2.5(a) is permissive. Jones v. Stebbins, 122 Wn. 2d 471

(1993). Indeed, whether Respondents established hostility by overcoming the presumption of permissive use falls within the well-defined exception for arguments that assert a party has “*failed to establish facts upon which relief can be granted.*” RAP 2.5.

In that regard, Respondents failed to provide a shred of evidence inconsistent with the Judds’ position that they had allowed Respondents’ permissive use of the strip after 1999. Respondents’ entire rebuttal suggests that their use was not consistent with permission because they *believed* the strip was theirs. (Respondents’ Brief, 13-14). Yet, this argument has no legal support, and in fact entirely misses the point. Whether Respondents *believed* the strip was theirs is completely irrelevant to whether the Respondents met the element of hostility. Chaplin v. Sanders, 100 Wn.2d at 861 (“*His subjective belief regarding his true interest in the land and his intent to dispossess or not dispossess another is irrelevant to this determination.*”). As such, the Nendles’ and Respondents’ *belief* is inconsequential for a determination of whether Respondents overcame the presumption that their use was permissive, especially after notice of the Judds’ survey and Deed, coupled with the Judds’ stated intent to construct a fence on their legal boundary line. Because this is the only rationale proffered by Respondents against the presumption of permissive use, they have necessarily failed to meet their

burden and the Judds' claim against them must prevail as a matter of fact and law.

ii. **Respondents misunderstand and fail to address the applicability of binding precedent.**

Respondents assert that “*for the first time on appeal,*” the Judds argue that “*the Nendls and Healy [possession] was insufficiently hostile and notorious because the surrounding land was ‘wild country.’*” (Respondents’ Brief, 16). Rather than address Murray v. Bousquet 154 Wash. 42 (1929) and its applicability to the case here, Respondents dismiss it altogether, claiming:

No evidence of any kind was presented to suggest that the surrounding area was so “wild, unbroken, mountainous, or sparsely settled” that the adjoining landowner, Williams, would not have been put on notice.

(Respondents’ Brief, 16). Respondents clearly misunderstand the nature of Murray entirely. Murray did not articulate a separate doctrine from the element of open and notorious. While the term “wild country” was not expressly used by the trial court here, this is not material because Murray does not create a distinct rule or theory. Indeed, “wild country” is not a separate doctrine from the requirements of open and notorious. It is an application of the rule’s focus on the nature of the land and its impact on whether the true owner should have known about a trespass—the

requirement for open and notorious where actual notice is lacking. Id. at 50.

The element of open and notorious was indeed challenged at all stages of this litigation. (CP 19, 180-1, 391-4; RP 533-545; Appellants' Opening Brief, 23-30). Yet, the trial court did not need a specific finding that the land was "wild, unbroken, mountainous, or sparsely settled" as suggested by Respondents. (Respondents' Brief, 16). Rather, a trial court only exercises its judgment to determine if the nature of the land and ownership, combined with the use, is enough to hold that a true non-resident owner should have known of an adverse possessor such that losing property ownership by adverse possession is supported. Murray serves as instructive guidance from our Supreme Court on this issue, not a distinct argument on the element of open and notorious notice.

In dismissing Murray, Respondents simply ignored their heightened requirement for establishing notice against an absentee owner of landlocked land – in this case the Judds' prior owner Williams. Further, Respondents made no effort to establish that Williams knew or *should have known about Respondents' encroachment*. The Respondents' flippant comment that there were people living in the area does not detract from the concern that allowing a strip of land to be taken from an absentee owner "*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.” Murray, supra at 50. The case here falls directly in line with the spirit and rationale of Murray, which highlights the importance of the nature of ownership and the character of land for adverse possession. As such, Respondents’ purported possession of the disputed strip was not proved to be open and notorious against the Judds’ absentee predecessor, Williams.

C. Johns’ Predecessor Never Had, Much Less Conveyed, Legal Title To The Disputed Strip.

Respondents’ Brief perfunctorily concludes that (1) title to the disputed strip was transferred to the Johns and (2) the Judds’ argument to the contrary lacks merit: *“It is undisputed the Johns purchased from Mrs. Nendl and received a statutory warranty deed. Thus, title to the disputed strip, which was perfected in the Nendls before September 1999, was conveyed to the Johns by deed.”* (Respondents Brief, 16-17).

While the Johns correctly note there was a deed transferred from the Nendls to the Johns, the Johns fail to mention the disputed strip ***was not included in their deed!*** (CP 114, 122, 516). This fact is legally fatal to the Johns’ unsubstantiated and incorrect claim that they acquired title by deed from the Nendls. As such, Judds’ assertions to the contrary not

only have merit, they necessarily undermine the Johns' entire claim to the disputed strip.

As the trial court recognized but failed to correctly apply, title to land perfected through adverse possession may only be transferred by written deed. (CP 420; RCW 64.04.010, et seq.; Dickson v. Kates, 132 Wn.App. at 733). Failure to include land in the deed is fatal to the transfer of that land. Bigelow v. Mood, 56 Wn.2d 340, 341 (1960). The terms of the deed where clear, are dispositive as to what property is actually transferred. Newport Yacht Basin Ass'n of Condo. Owners v. Supreme Nw., Inc., 168 Wn.App. 56, 65 (2012).

The Johns' deed clearly delineated the described land that was actually included in their purchase. (CP 122). There is no question their deed **never included the disputed property**. Indeed, the Johns' own subsequent survey matched the Judds' previous survey, both of which clearly show the disputed strip of land as not included in the deed acquired by the Johns. (CP 114, 122, 516). This is critical in that a deed does not work to transfer land not described therein. As such, the Johns never acquired title to the disputed strip by deed, and their assertion otherwise is quite untrue. Any contrary contention is either based on an attempt to mislead this court or a complete lack of understanding of the fundamental

principle that land is transferred by deed only if it is actually described in that deed. RCW 64.04.010, et seq.; Dickson v. Kates, 132 Wn.App. at 733.

Consequently, the trial court erred in concluding the disputed strip was transferred from the Nendls to the Johns merely because “*privity is undisputed.*” (CP 420). Privity is a concept germane to adverse possession and whether burdens on land bind subsequent owners - not to whether land was actually transferred in a deed. Here the trial court simply announced that the Johns acquired title by adverse possession, but in doing so ambiguously failed to address whether it rested its opinion on “tacking”, or on the theory that the Johns acquired the disputed strip by deed. (CP 420-21). Either way, the Court’s conclusion was erroneous. To defeat Judds’ claim, the Johns had the burden of showing they had acquired title. They failed to bring forward any evidence of an actual conveyance of the strip in dispute. In fact, the evidence clearly shows there was no conveyance of the disputed strip. The Judds’ “*failure to challenge privity*” is irrelevant because privity concerns tacking, which unequivocally was challenged at trial insofar as tacking was not available to the Johns legally or factually. Ultimately, the Johns did not prove they owned title to the strip by adverse possession, much less by deed. Consequentially, the Johns’ taking defense lacks merit and the Judds as a

matter of law as holders of legal title necessarily prevail against the Johns in this action. Anderson v. Hudak, 80 Wn.App 398, 401 (1995).

D. Washington Neither Recognizes Nor Allows Bad Faith “Tacking” To Achieve Adverse Possession Ownership.

Respondents erroneously suggest the argument against bad faith tacking was first raised on appeal. This too is not true. RP 534. Further, without any citation whatsoever, Respondents argue “*the privity rule suggested by the Judds is contrary to law.*” (Respondents’ Brief, 18). Not only is there no citation backing this claim, Respondents’ Brief makes no attempt to show how or why the rule of law cited by every appellate court in Washington is to be ignored.

Similarly, the Johns failed to dispute the rationale behind disallowing bad faith taking. As Appellants’ Opening Brief notes, a rule disallowing bad faith tacking promotes the settling of known disputes at the time of sale. This furthers (1) the policy underlying the statute of frauds that ownership of land should be recorded, (2) the policy driving adverse possession that disputes to land should be settled, and (3) Chief Justice Madsen’s concurring opinion in Gorman v. City of Woodinville, 175 Wn.2d at 75, essentially discouraging the whole concept of bad faith conduct related to adverse possession. “[T]he 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. Rather than attempting to refute the benefits of prohibiting bad faith taking, the Respondents’ Brief merely offers Respondents’ own overstated, unsupported policy concerns.

For instance, Respondents’ Brief opines that a rule preventing bad faith tacking would cause significant problems with property transfers. (Respondents’ Brief, 18-19). Yet, Respondents Johns’ purported objections to a rule against bad faith tacking are not grounded in reality and completely ignore the actual facts before this Court. Here, there was no frivolous claim to the disputed strip affecting a sale. Instead, the Johns, despite knowledge of a disputed boundary line and a record survey verifying the lines decided to proceed with their purchase anyway. The rule against bad faith tacking contemplates that a seller and a buyer in the event of an adverse possession claim, would address the issue head on - either agreeing to have the seller pursue a quiet title action to remove the cloud, or agreeing that the buyer assumes the risk that the elements of adverse possession may not exist. Where there is no issue raised as to a property’s boundary prior to a sale/purchase, the rule against bad faith tacking simply never becomes an issue. That of course is not the situation involving the Johns who purchased in spite of their knowledge of a boundary dispute and then never did anything about it.

E. Judds' Statute of Limitations Defense Was Wrongfully Denied.

Respondents assert that the Judds did not argue below that they had re-acquired title to the disputed strip by adverse possession after September 1999 and failed to challenge on appeal the trial court's failure to make such a finding. (Respondents' Brief, 15). This too is an incorrect assertion. The Judds raised the statute of limitations defense below and argued the Judds re-acquired title by adverse possession under RCW 7.28.080. (CP 19-20, 399-400; RP 542). The Judds' Opening Brief clearly addresses this issue, with citations. (Appellants' Opening Brief, 38). Respondents' claims to the contrary are frankly inexcusable.

The fact is Respondents' Brief does not even address the issue. No attempt was made to show otherwise how Judds' clear claim of ownership supported by a deed, tax records, and recorded survey, unchallenged for over ten years, does not amount to treating the land as one's own against the world—the ultimate test underlying each element of adverse possession. Respondents' assertion that hostile possession may not be turned into permissive possession by a mere protest, is inapposite. (Respondents' Brief, 10). First, Respondents' possession against the Judds was not hostile in its inception *against the Judds*, and certainly not proven as to Williams – the predecessor owner. Second, assuming arguendo title to the strip had ripened in Healy before 1999 by means of

adverse possession, Healy held as owner, not adverse possessor despite the fact that he had no deed, and paid no taxes for the disputed strip. As such, his use of the land was not hostile against the Judds.

The Judds' "adverse possession" against the Respondents however began when the Judds in 1999 made an unequivocal ownership claim to the disputed strip at issue and clearly advised Healy of that ownership claim and of the recorded survey that supported their claim. That ownership claim, which included payment of yearly property taxes, went unrebutted and unchallenged by Healy for 12 years. When Respondents finally made a claim of their own against the Judds, which was precipitated by their ripping down the Judds' newly constructed fence, the Judds defended their ownership claim by filing for quiet title. If Respondents actually believed they had acquired ownership of the disputed strip, they should have refuted the Judds' claim of ownership in 1999 but did not. Transferring land from one who fails to assert ownership to one who does is the underpinning behind adverse possession. As such, assuming *arguendo* title to land ripened in Healy and Nendl before 1999, the Judds re-acquired title by adverse possession having proved all the necessary elements.

F. **Alternatively, the Judds Were Entitled To A RCW 7.28 et. seq. Property Tax Reimbursement.**

Respondents misrepresent to this Court that the only time the issue of property taxes being paid by the Judds was post-trial. (Respondents' Brief, p. 19). This misstatement ignores the following:

"17. Plaintiffs have paid any and all taxes on their entire property, including the portion at issue since purchasing the property in 1999.

18. Defendants have not at any time paid any taxes on the property at issue."

(CP 6 - Complaint; CP 387).

Further, the issue of taxes including RCW 7.28, et seq. was addressed in Plaintiffs' pre-trial memorandum (CP 387; 399-400), specifically to RCW 7.28.083 which provides for the reimbursement of real estate taxes on adversely possessed land. (CP 403). There was also testimony at trial that specifically and directly related to the Judds' payment of taxes. (CP 242-3; 263-4; Ex 14).

Likewise, in closing arguments to the trial court, it was abundantly clear that the Judds were requesting the "*such other and further relief as the court deems just and equitable*" which they asserted in their Complaint's **Prayer for Relief**. (CP 8, ¶ 5). Arguing on behalf of the Judds, counsel concluded:

"And if the Court deems that for some reason they're [Judds] not -- they're not legal title owners because there

was adverse possession, then I think you get to decide that they were -- they became adverse possessors for the necessary prescriptive period of time. They meet all the elements. And if for some reason you decide that, no, they're not even adverse possessors, that they lose the property that they've had -- they -- they paid for, that they've got a mortgage on, that they paid taxes on, then I believe that based on these facts they're entitled to be compensated for the dirt that is going to be taken from them. And we have a valuation of the -- the acreage. And we -- and they're certainly entitled to be reimbursed for all the taxes they've paid for the entire period of time that they've owned it. But I don't believe you have to go there. I don't believe that that would be the -- the decision that's appropriate in this case. I believe the decision that's appropriate is to identify them as the legal title owner. Thank you, Judge."

RP 544-5 (Emphasis added).

Based on the record before this Court, it is clear that the trial court simply ignored or misunderstood the evidence and pleadings before it regarding the Judds' statutory right to be reimbursed pro rata taxes they paid on the disputed strip. The trial court's failure or refusal to consider the facts, evidence and law presented constituted reversible error on this issue.

IV. RAP 18.1 MOTION FOR ATTORNEY FEES AND COSTS

Appellants Judd respectfully request an award of reasonable attorney fees and costs incurred on appeal. RAP 18.1; RCW 7.28.083.

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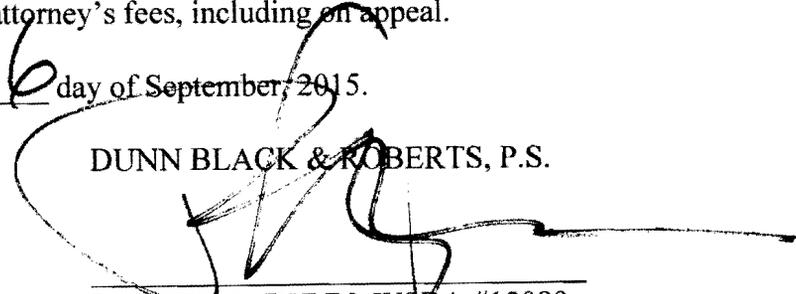
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V. CONCLUSION

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

DATED this 16 day of September, 2015.

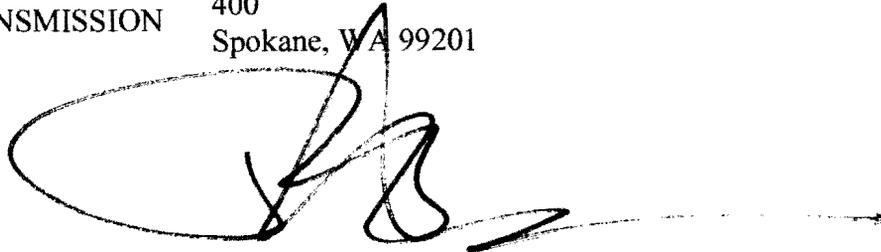
DUNN BLACK & ROBERTS, P.S.


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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 16 day of September, 2015,
I caused to be served a true and correct copy of the foregoing document to
the following:

- | | | |
|-------------------------------------|------------------|-------------------------|
| <input checked="" type="checkbox"/> | HAND DELIVERY | Richard D. Wall |
| <input 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 |



ROBERT A. DUNN

RCW 4.84.185

Prevailing party to receive expenses for opposing frivolous action or defense.

In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense. This determination shall be made upon motion by the prevailing party after a voluntary or involuntary order of dismissal, order on summary judgment, final judgment after trial, or other final order terminating the action as to the prevailing party. The judge shall consider all evidence presented at the time of the motion to determine whether the position of the nonprevailing party was frivolous and advanced without reasonable cause. In no event may such motion be filed more than thirty days after entry of the order.

The provisions of this section apply unless otherwise specifically provided by statute.

[1991 c 70 § 1; 1987 c 212 § 201; 1983 c 127 § 1.]

APPENDIX A

RCW 64.04.010

Conveyances and encumbrances to be by deed.

Every conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed: PROVIDED, That when real estate, or any interest therein, is held in trust, the terms and conditions of which trust are of record, and the instrument creating such trust authorizes the issuance of certificates or written evidence of any interest in said real estate under said trust, and authorizes the transfer of such certificates or evidence of interest by assignment by the holder thereof by a simple writing or by endorsement on the back of such certificate or evidence of interest or delivery thereof to the vendee, such transfer shall be valid, and all such assignments or transfers hereby authorized and heretofore made in accordance with the provisions of this section are hereby declared to be legal and valid.

[1929 c 33 § 1; RRS § 10550. Prior: 1888 p 50 § 1; 1886 p 177 § 1; Code 1881 § 2311; 1877 p 312 § 1; 1873 p 465 § 1; 1863 p 430 § 1; 1860 p 299 § 1; 1854 p 402 § 1.]

APPENDIX B

RCW 7.28.080

Color of title to vacant and unoccupied land.

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.

[1893 c 11 § 4; RRS § 789.]

APPENDIX C

RCW 7.28.083

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

(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.

[2011 c 255 § 1.]

APPENDIX D