

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION 1

NO. 64595-1-I

GARY F. KARLBERG and SHARON KARLBERG,
a married couple,

Respondent

v.

STEVEN L. OTTEN,
a single man,

Appellant

BRIEF OF APPELLANT
STEVEN L. OTTEN

RECEIVED
COURT OF APPEALS
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CP

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ORIGINAL

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I. INTRODUCTION

In this consolidated appeal of three separate trial court actions regarding the same disputed real property, Appellant Steven L. Otten (“Otten”) seeks to overturn three erroneous judgments¹ that deprived him of his real property.

Otten and Respondents Gary F. and Sharon Karlberg (“Karlberg”) own adjacent parcels of real property. While living on the Otten Property² since 1981, Otten obtained title ownership to that property in 1996. Shortly before Otten obtained title to the Otten Property, a dispute between Karlberg and Otten arose over a strip of the Otten Property running the length of the boundary between the Otten Property and Karlberg Property³ which varies between approximately 50’ and 82’ wide (the “Disputed Property”).⁴

In 2008, Karlberg filed the 2008 Lawsuit seeking to quiet title to a 45’ wide strip of the 50’ to 82’ wide Disputed Property. The trial court made two glaring errors of law in the 2008 Lawsuit before entering a judgment quieting title to the 45’ wide strip of the

¹ This appeal consolidates three different trial court actions all of which are based on the same facts and circumstances, namely: *Karlberg v. Otten*, Cause No. 08-2-00445-3 (the “2008 Lawsuit”); *Otten v. Karlberg*, Cause No. 09-2-02890-3 (the “2009 Otten Lawsuit”); and *Karlberg v. Otten*, Cause No. 09-2-03432-6 (the “2009 Karlberg Lawsuit”).

² Defined in Section III(A)(2), *infra*.

³ Defined in Section III(A)(1), *infra*.

⁴ The Disputed Property is more particularly described in Section III(A)(5), *below*.

Disputed Property in Karlberg: 1) the trial court erroneously denied Otten's motion to amend his answer to include counterclaims for adverse possession; and 2) the trial court failed to enter a judgment conforming Otten's pleadings to the facts tried by the parties and quieting title to the Disputed Property in Otten.

After the trial court erroneously denied Otten's motion to amend in the 2008 Lawsuit, Otten filed the 2009 Otten Lawsuit seeking to quiet his title to the Disputed Property based on adverse possession of the same. Subsequently, Karlberg filed the 2009 Karlberg Lawsuit seeking to quiet title to the *remaining* portions of the Disputed Property to which Karlberg did not seek title to, and therefore was not awarded title to, in the 2008 Lawsuit. The trial court erroneously granted Karlberg summary judgment in both 2009 Lawsuits despite the fact that the 2009 Karlberg Lawsuit clearly constitutes impermissible claims splitting and should have been dismissed pursuant to *res judicata*.

Accordingly, Otten seeks review of the three erroneous trial court judgments. The Court should reverse the trial court's judgments, amend Otten's pleadings in the 2008 Lawsuit to conform to the evidence tried by the parties and either quiet title to the Disputed Property in Otten or remand for further proceedings.

Alternatively, the Court should reverse the trial court's judgment in the 2009 Karlberg Lawsuit pursuant to the doctrine of collateral estoppel, thereby limiting Karlberg to the 45' strip of the Disputed Property originally requested in the 2008 Lawsuit.

II. ASSIGNMENTS OF ERROR

- 1) In the 2008 Lawsuit, the trial court erred by denying Defendant's Motion to Amend its Answer CR 15, seeking to quiet title to the Disputed Property in Otten based on claims of Adverse Possession, Mutual Recognition and Acquiescence and Adverse Possession under Color of Title; the Court of Appeals should vacate the trial court's Order Denying Defendant's Motion to Amend its Answer CR 15.
 - i) Otten's Motion to Amend its Answer CR 15 should have been granted as a matter of law. Failure to so grant constitutes reversible error.

- 2) In the 2008 Lawsuit, the trial court erred by entering the following Findings of Fact and Conclusions of Law which the Court of Appeals should vacate:
 - i) Findings of Fact 6, 9, 10, 11, 12, 13; and
 - ii) Conclusions of Law 5, 6, 7, 8, 9. CP 279-284.
 - a) To the extent Karlberg or their predecessors in interest obtained titled to the Disputed Property, Otten adversely possessed that property back under a claim of right from 2000 through 2008, which argument the trial court erroneously failed to consider.

- 3) In the 2008 Lawsuit, the trial court erred by entering the Judgment; the Court of Appeals should vacate this Judgment. CP 277-278.

i) To the extent Karlberg or their predecessors in interest obtained title to the Disputed Property, Otten adversely possessed that property back under a claim of right from 2000 through 2008, which argument the trial court erroneously failed to consider.

4) In the 2009 Otten Lawsuit, the trial court erred by entering the Order Denying Otten's Motion for Summary Judgment; the Court of Appeals should vacate the Order Denying Otten's Motion for Summary Judgment. CP 336-337.

i) To the extent Karlberg is entitled to any of the Disputed Property, Karlberg is limited by *res judicata* to the 45' strip of the Disputed Property they originally sought in the 2008 Lawsuit.

5) In the 2009 Otten Lawsuit, the trial court erred by entering the Order Granting Karlberg's Motion for Summary Judgment Dismissing Otten's Complaint; the Court of Appeals should vacate the Order Granting Karlberg's Motion for Summary Judgment Dismissing Otten's Complaint. CP 334-335.

i) To the extent Karlberg is entitled to any of the Disputed Property, Karlberg is limited by *res judicata* to the 45' strip of the Disputed Property they originally sought in the 2008 Lawsuit.

6) In the 2009 Karlberg Lawsuit, the trial court erred by entering the Order Granting Karlberg's Motion for Summary Judgment; the Court of Appeals should vacate the Order Granting Karlberg's Motion for Summary Judgment. CP. 353-356.

i) To the extent Karlberg is entitled to any of the Disputed Property, Karlberg is limited by *res judicata* to the 45' strip of the Disputed Property they originally sought in the 2008 Lawsuit.

7) In the 2009 Karlberg Lawsuit, the trial court erred by entering the Order Denying Otten's Motion for Summary Judgment; the Court of Appeals should vacate the Order Denying Otten's Motion for Summary Judgment. CP. 351-352.

i) To the extent Karlberg is entitled to any of the Disputed Property, Karlberg is limited by *res judicata* to the 45' strip of the Disputed Property they originally sought in the 2008 Lawsuit.

III. STATEMENT OF THE CASE

A. Property Line Dispute History.

1. The Karlberg Property.

The Karlberg Property is that real property commonly referred to as 4444 Y Road, Bellingham, Washington. On or about May 19, 1975, Karlberg purchased the Karlberg Property by real estate contract which was later fulfilled, thereby transferring full title to the Karlberg Property to Karlberg.

2. The Otten Property.

The Otten Property is that real property commonly referred to as 4418 Y Road, Bellingham, Washington. RP 373. The Otten Property is located directly east of, and adjacent to, the Karlberg Property. RP 373 and Plaintiff's Exhibit 27.

Otten first became familiar with the Otten and Karlberg Properties in 1975 when Mr. Karlberg hired Otten and Otten's father to hay portions of the Karlberg Property. RP 375-376. Otten moved onto the Otten Property in 1981 while it was still owned by Mrs. Penn, Otten's predecessor in interest, and has lived there

since. RP 385. In 1996, Otten obtained legal title to the Otten Property after Mrs. Penn passed away. RP 418, Defendant's Exhibit 46.

3. Karlberg's Construction of the Pole Shop Building.

Shortly after purchasing the Karlberg Property, Karlberg hired Mr. Aarstol to construct a shop building (the "Shop") on the Karlberg Property. RP 140-142. In 1977, after the Shop was constructed, a survey conducted by Dale Rocky located the property line between the Karlberg and Otten Properties. That survey revealed that the surveyed property line ran north-south through almost the exact middle of the Shop. RP 143.

4. The Survey Property Line, Cattle Fence Line and Disputed Property.

A subsequent survey conducted by Mrs. Penn in 1994 confirmed that the surveyed property line dividing the Otten Property and the Karlberg Property (the "Survey Line") runs down the middle of the Shop, as originally revealed in Mr. Rocky's 1977 survey. Defendant's Exhibit No. 19.

It is undisputed that for many years a cedar post fence (the "Cattle Fence") existed on the Otten Property and was used to contain cattle. Defendant's Exhibit No. 19, RP 374, 388-389, 438,

442. The Cattle Fence ran generally north-south roughly parallel to the Survey Line. At its southern-most point the Cattle Fence stood approximately 82' east of the Survey Line and at its northern-most point the Cattle Fence stood approximately 49.4' east of the Survey Line. Defendant's Exhibit No. 19. The property at dispute in this lawsuit is that property located between the Survey Line and the Cattle Fence (the "Disputed Property"), as depicted on Defendant's Exhibit No. 19.

5. The 1996 Property Dispute Lawsuit.

On December 18, 1996, Karlberg filed a complaint against Otten to quiet title to a 45' strip of the Disputed Property in Karlberg by adverse possession (the "1996 Lawsuit"). RP 486. The 1996 Lawsuit was disputed by Otten and ultimately dismissed without prejudice on March 27, 2000 for want of prosecution. RP 487 and Defendant's Exhibit 51.

B. The 2008 Lawsuit.

1. Pre-Trial Procedural Filings.

In February of 2008, almost eight years after the 1996 Lawsuit was dismissed, Karlberg filed the 2008 Lawsuit seeking to quiet title to a discreet 45 foot (45') portion of the Disputed Property by adverse possession and/or mutual recognition and

acquiescence. CP 318-330. Importantly, the 2008 Lawsuit sought to quiet title only to the Disputed Property lying 45' east of the Survey Line (the "45' Strip"). *Id.* at Paragraphs 2.6 and 3.4.

In April of 2008, Otten filed his Answer wherein he set forth an affirmative defense based on Otten's use of the 45' Strip which prevented any exclusive adverse possession of that strip by Karlberg. CP 314. Otten's Answer claimed true ownership to the entirety of the Disputed Property including the 45' Strip. CP 315-316.

Approximately a month before the scheduled trial in the 2008 Lawsuit, Otten filed the Defendant's Motion to Amend Its Answer CR 15 (the "Motion to Amend"). CP 300-311. The Motion to Amend sought to formally amend Otten's Answer to add counterclaims seeking to quiet title to the 45' Strip in Otten on theories of boundary by mutual recognition and acquiescence, adverse possession, and title by possession under color of title as well as an additional affirmative defense of statute of limitations. *Id.*

The counterclaims Otten sought to add through the Motion to Amend were all based on the exact same facts that Otten planned to, and indeed did, admit at trial in defense against Karlberg's adverse possession claim. *Id.* Otten expressly noted that the

requested amendments would rely on the same facts previously alleged and discovered in the lawsuit, and no new witnesses would be called at trial to support Otten's adverse possession counterclaims. CP 293-294. The Proposed Amended Answer to Complaint and Counterclaim attached to the Motion to Amend set forth the basis for Otten's counterclaims, i.e. that since at least 1994 Otten had used the Disputed Property, including the 45' Strip, under color of title by paying taxes on that property, staking the property line, connecting wire to the staked property line and haying the Disputed Property. CP 300-311.

Karlberg opposed the Motion to Amend on the unsupported claim that it was made too late. Karlberg did not allege or substantiate any undue prejudice that it would suffer by inclusion of Otten's counterclaims based on the same facts previously alleged in Otten's Answer. CP 376-409. Despite Karlberg's failure to substantiate any undue prejudice it would suffer by inclusion of Otten's counterclaims, the trial court denied Otten's Motion to Amend on October 16, 2009. CP 290-291.

On October 23, 2009, Otten filed Defendant's Additional Affirmative Defenses alleging as follows:

1. Otten has possessed most of the disputed

property for more than ten years so that under RCW 4.16.020(1) Karlberg is barred from recovering such property.

2. Otten has been in actual, open, and notorious possession under claim and color of title, made in good faith, and for more than seven successive years paid all taxes legally assessed on such lands or tenements so Karlberg cannot eject him from this property.

CP 288-289. Karlberg did not object to nor move to strike this pleading.

2. Karlberg Limited Their Requested Relief to the 45' Strip.

As discussed in Section B(1), *supra*, Karlberg's 2008 Lawsuit sought to quiet title to *only* the 45' Strip and not all of the Disputed Property. Despite alleging that the true boundary line was the Cattle Fence due to mutual recognition and acquiescence and/or adverse possession, Karlberg's counsel made it abundantly clear in his opening statement that Karlberg expressly waived any claim to the Disputed Property beyond the 45' Strip. During opening statement Karlberg's counsel stated:

All we are moving in this case to do is to quiet title to this 45 feet. And there is no law that says we have to sue for everything we own. **I mean, if a personal injury litigant wants to waive damages over 50 thousand and go to district court or mandatory arbitration, they have a right to do that...**

In the Complaint we just plead to the 45 feet. So we are pleading that...

RP at Pg. 8, Lines 10-16 and Pg. 9, Lines 21-23 (emphasis added).

During Mr. Karlberg's direct examination he likewise acknowledged that the 2008 Lawsuit sought only to quiet title to the 45' Strip and not the entirety of Disputed Property, to wit:

Q: ...Where do you think your eastern boundary is?

Mr. Karlberg: I think my eastern boundary to the property is the old fence line.

Q: Okay. But in this suit you are moving to quiet title to this [45'] strip, right?

Mr. Karlberg: **Yes.**

RP Pg. 167, Lines 18-24 (emphasis added).

Upon finding for Karlberg, the trial court entered a judgment quieting title in Karlberg *solely* to the 45' Strip and *not* the entirety of the Disputed Property. CP 277-278.

3. Trial Testimony Supporting Otten's Adverse Possession of the Disputed Property By Color of Title.

i. Otten's Use of the Disputed Property.

Despite erroneously denying Otten's Motion to Amend, the trial court admitted, without objection from Karlberg, substantial testimony supporting the counterclaims Otten sought to raise in his Motion to Amend. Otten testified to his substantial use of almost all

of the Disputed Property from well before he owned the Otten Property through filing of the 2008 Lawsuit. Moreover, it is undisputed that Otten paid property taxes on the Disputed Property from 1996 through filing of the 2008 Lawsuit. RP 419-420, 437.

Otten began using the Disputed Property as a true owner would in 1981 when he moved onto the Otten Property. Being familiar with the 1977 survey pipes which located the Survey Line along the same location as the 1994 Survey Line, Otten began maintaining the Survey Line as soon as he moved onto the Otten Property. RP 385-387. Otten first began maintaining and using the Disputed Property by walking the Survey Line and undertaking maintenance activities such as pulling weeds approximately four times per year. *Id.* After 1992, Otten maintained the Survey Line by using a weed-whacker and brush hog rather than hand-pulling the weeds. RP 452.

In the fall of 1981, Otten began pruning limbs off of the trees located on the Disputed Property. RP 385-387, 455-458. Otten had to prune the trees in order to see traffic on Y Road as he entered and exited the Disputed Property through the driveway. RP 458-459.

In late 1981 or early 1982, Otten began removing all of the

cattle fences from the Otten Property including the Cattle Fence. RP 388-389. At that same time, Otten began using the driveway located on the Disputed Property to access the Disputed Property. RP 421-422. That driveway provided the easiest access to the Cattle Fence and Disputed Area, so Otten used that driveway numerous times throughout the years including each year he hayed the Disputed Property. *Id.* and RP 456-457.

In 1982, a year after moving into the Otten Property, Otten began haying the Disputed Property. RP 388. Otten hayed the entire Otten Parcel, including the Disputed Property up to the Survey Line. RP 104. In 1983, Otten hayed west of the Survey Line onto the Karlberg Property and Karlberg informed Otten he had hayed part of the Karlberg Property. Karlberg pointed out a Western Larch tree planted at the north end of the Karlberg Property near the Survey Line, indicating that the tree represented the north end of the property line and told Otten he should hay up to that line. RP 424-425, 496 and Defendant's Exhibit No. 31.

From 1983 forward, when Otten hayed the Disputed Property he hayed along the Survey Line to the Western Larch tree. After haying the Disputed Property in 1982 and 1983, Otten took a break from haying the Disputed Property, haying it again in 1988

and 1993. RP 426-429.

In 1994, Mrs. Penn surveyed the Otten Property confirming the Survey Line's location and Otten immediately installed wooden stakes along the Survey Line to the Western Larch Tree. RP 428. Those stakes were installed from the middle of the Karlberg Shop north to the Western Larch tree. RP 430. Additionally, in 1994, Otten installed a single strand barbed wire fence running from the survey stake located south of the Karlberg Shop to the edge of the driveway. RP 431.

Over the years, Otten (when haying the Otten Property and Disputed Property up to the east edge of the Survey Line) or Don Florence (when haying the Karlberg Property up to the west edge of the Survey Line for Karlberg) would run over one of the wooden stakes installed along the Survey Line north of the Shop, requiring Otten to replace the stake. RP 431. In 2004, Otten tired of replacing the stakes and improved the stake fence by installing a barbed wire fence from the survey stake just north of the Karlberg Shop to the Western Larch tree. RP 431. Mr. Karlberg admitted that this improved fence excluded the Karlbergs from the Disputed Property. RP Pg. 259, Lines 13-17.

It is undisputed that Otten was the only individual to hay the

Disputed Property after 1993. RP 494. From 1994 through 1999 Otten, and only Otten, hayed the Disputed Property all the way west to the stakes (and the eventual barbed wire fence) installed along the Survey Line. RP 426-429. Mr. Karlberg directly testified that he ceased haying of the Disputed Property after 1993. RP 144, Lines 17-21; Accord RP 235, Line 23 through RP 236, Line 12 and Defense Exhibit 29. Likewise, Mr. Florence, who hayed the Karlberg Property for Karlberg, stopped haying the Disputed Property west of the survey line in 1994. RP Pg. 155, Lines 21-25 and Pg. 156, Lines 1-12.

While exclusively haying the Disputed Property from 1993 onward, Otten took a break from haying the Disputed Property in 2000 only to let the ground replenish its nutrients. Otten resumed haying the Disputed Property in 2006 and hayed through 2008. RP 429-430. No one else hayed the Disputed Property during the 2000 to 2006 soil regeneration period. *Id.*

In addition to haying the Disputed Property, Otten began storing remains of the Cattle Fence he tore out and other farm equipment on the Disputed Property in 1992. RP 448-452. For example, he began storing posts and bundled wire north of the Karlberg Shop and near the retaining wall located on the Disputed

Property. RP 450. In 1994, Otten began storing vehicles on the Disputed Property. RP 451-453. Otten stored vehicles on the Disputed Property from 1994 through the 2008 Lawsuit's filing. RP 451-454.

ii. Karlberg's Failure to Use the Disputed Property After 1994.

All of the evidence and testimony reveals that after 1994 Otten solely and exclusively used the Disputed Property while Karlberg abandoned that property to Otten's use. In addition to Mr. Karlberg's admission that he ceased haying the Disputed Property after 1994, Mr. Karlberg testified that he treated the Disputed Property as his own only from 1977 through 1994, implying that he did not use the entire Disputed Property as his own after 1994. RP 145-146. This is supported by Mr. Karlberg's testimony that they only mowed an approximately 45' by 200' area surrounding the Shop building, having never mowed up to the Cattle Fence line. RP 151, Lines 11-21 and Plaintiff's Exhibit 18; RP 236, Line 22 through RP 237, Line 10 and Defense Exhibits 18 and 30.

Mr. Karlberg admitted that he seldom, if ever, accessed or used the Disputed Property once he and his agents stopped haying that property in 1994. Mr. Karlberg testified that he and his wife

“decided to walk to the northern end of our property and just check it out” after Otten installed barbed wire along the stakes he previously located along the Survey Line. RP 239, Lines 16-25. Mr. Karlberg stated that he and his wife “rarely, we don’t go down there in five years. We have no reason to go down there.” *Id.*

In fact, Mr. Karlberg testified that the barbed wire installed by Otten “excluded and kept [Karlberg] from the property on the side yard, the strip of grass that we had mowed and enjoyed. And kept us away from that area” of the Disputed Property. The record is devoid of any evidence that Karlberg used the Disputed Property as a true owner would after 1994.

4. The 2008 Lawsuit Judgment and Appeal.

At the conclusion of the 2008 Lawsuit trial, the court issued a ruling in favor of Karlberg. In rendering its oral decision the trial court emphasized that Karlberg sought only to quiet title to the 45’ Strip noting “if that’s what [Karlberg] request, they are entitled to damages of that request.” RP 579-580. Thus, On November 20, 2009 the trial court entered a judgment quieting title to the 45’ Strip in Karlberg. CP 277-278. Otten timely filed his Notice of Appeal on December 9, 2009. CP 245-248, 264-275.

C. The 2009 Lawsuits.

On October 23, 2009, shortly after the court denied Otten's Motion to Amend in the 2008 Lawsuit, Otten filed the 2009 Otten Lawsuit. CP 344-347. The 2009 Otten Lawsuit sought to quiet title to the Disputed Property based on, among other facts, Otten's adverse use of the Disputed Property for a period in excess of seven years under color of title by paying taxes on that land. *Id.*

On December 29, 2009, Karlberg filed the 2009 Karlberg Lawsuit which sought to quiet title to the property lying between the 45' Strip and the Cattle Fence (the "Remaining Disputed Property"). CP 363-369. Karlberg based its claims in the 2009 Karlberg Lawsuit on the same facts and circumstances previously litigated in the 2008 Lawsuit. *Id.*

On April 9, 2010, the trial court consolidated the 2009 Otten Lawsuit, 2009 Karlberg Lawsuit and the 2008 Lawsuit. CP 338-339, 342-343, 357-358, 361-362. Subsequently, appeal of the 2008 Lawsuit was stayed pending resolution of the 2009 Otten and 2009 Karlberg Lawsuits (the "Consolidated 2009 Lawsuits").

Otten and Karlberg each filed motions for summary judgment in the Consolidated 2009 Lawsuits. CP 226-231, 234-239. Otten expressly objected to Karlberg's motion on the basis it

sought to improperly split claims in violation of *res judicata*, i.e. Karlberg sought to quiet title to the Remaining Disputed Property based on the same facts and circumstances previously litigated in the 2008 Lawsuit. CP 232-233, 240-244. On August 27, 2010, the trial court denied Otten's motion for summary judgment and granted Karlberg's motion for summary judgment. CP 351-356.

Based solely on the same findings of fact and conclusions of law entered in the 2008 Lawsuit, the trial court quieted title to the Remaining Disputed Property in Karlberg despite Karlberg's express and implied waiver of their alleged right to have title quieted in that property in the 2008 Lawsuit. CP 353-356. Otten timely appealed the trial court's rulings in the Consolidated 2009 Lawsuits. CP 196-217.

IV. STANDARD OF REVIEW

When reviewing the Assignments of Error set forth in Section II, above, the Court must apply two separate standards of review, both of which are briefly addressed below.

A. Motion to Amend Reviewed for Abuse of Discretion.

The Court reviews a trial court's denial of a motion to amend brought under CR 15 for an abuse of discretion. *Quality Rock Products, Inc. v. Thurston County*, 126 Wn. App. 250, 272, 108

P.3d 805 (2005) (“*Quality Rock*”). When reviewing a motion to amend, the Court must bear in mind that CR 15 expressly states that “leave shall be freely given when justice so requires.” CR 15(a). CR 15’s purpose is to “facilitate proper decisions on the merits” and denial of such a motion is only appropriate where the opposing party demonstrates real and actual prejudice. *Quality Rock*, 126 Wn. App. at 272-273.

B. Summary Judgment Reviewed *De Novo*.

When reviewing a trial court’s order granting summary judgment, the Court of Appeals “engage[s] in the same inquiry as the trial court.” *Marthaller v. King County Hosp. Dist. No. 2*, 94 Wn. App. 911, 915, 973 P.2d 1098 (1999). This Court can only affirm summary judgment if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law after considering all facts and reasonable inferences drawn therefrom in the light most favorable to the nonmoving party, here Otten. *Id.* All questions of law are reviewed by the Court *de novo*. *Id.*

V. ARGUMENT

A. Despite Admitting Extensive Evidence Proving Otten’s Adverse Possession of the Disputed Property, the Trial Court Erroneously Refused to Entertain Otten’s Adverse Possession Claim.

Otten claimed good title and true ownership to the Disputed Property in his Answer to Complaint and Counterclaim (“Answer”) to Karlberg’s Complaint in the 2008 Lawsuit. CP 315-316. While Otten’s Answer did not explicitly allege a counterclaim based on adverse possession, the Answer did establish and allege Otten’s ownership of the Disputed Property, Otten’s exclusive use of the Disputed Property and sought to have title to the Disputed Property quieted in Otten. CP 312-317. Otten’s claimed ownership of the Disputed Property was further set forth in the Defendant’s Additional Affirmative Defenses filed on October 23, 2009 in the 2008 Lawsuit, to which Karlberg did not object. CP 288-289.

Despite the abundance of testimony admitted without objection at trial proving that from 2000 through 2008 Otten adversely possessed any ownership interest Karlberg may have had in the Disputed Property, the trial court erroneously refused to consider or rule on Otten’s adverse possession claim. In fact, the trial court expressly rejected Otten’s request to amend his pleadings prior to trial to include a counterclaim for adverse possession. CP 290-291. As discussed below, the trial court’s failure to permit the amendment and/or otherwise consider Otten’s adverse possession claim constitutes a reversible error of law.

1. Evidence Admitted Without Objection at Trial Proves Otten Adversely Possessed the Disputed Property Under Color of Title Between 2000 and 2007.

i. Adverse Possession Under Color of Title When Paying Taxes.

Any person who for a period of seven years is in actual, open and notorious possession of property under claim and color of title and who also pays taxes assessed on such property shall be adjudged to be the legal owner of said property. RCW 7.28.070; Accord *Daubner v. Mills*, 61 Wn. App. 678, 681, 811 P.2d 981 (1991) (“*Daubner*”). To have color of title, one must have a document purporting to pass title which the holder believes is a valid title. *Daubner*, 61 Wn. App. at 682.

To adversely possess property, one must use the property as a true owner would use similar property. Important in this consideration is the nature and location of the disputed land. *Crites v. Koch*, 49 Wn. App. 171, 174, 741 P.2d 1005 (1987) (“*Crites*”); Accord *Stokes v. Kummer*, 85 Wn. App. 682, 693, 936 P.2d 4 (1997) (“*Stokes*”) and *Heriot v. Lewis*, 35 Wn. App. 496, 504, 668 P.2d 589 (1983) (“*Heriot*”). In *Crites*, the court indicated that “cultivation, planting and harvesting a crop are superior indicia of possession.” *Id.* Moreover, farming lands on an every other year

rotation is a sufficient use to establish adverse possession. In *Stokes*, the adverse claimant farmed wheat on the disputed property every other year, allowing the property to remain fallow during off years. Such use was sufficient for adverse possession given the nature and location of the land. *Id.*

In *Heriot*, Lewis claimed ownership to a wedged shaped piece of property based on adverse possession while Mr. Heriot claimed legal title to the same property based on a 1979 survey which revealed it was part of Heriot's parcel. In 1933 the original property owner installed a series of stakes upon what was believed to be a surveyed property line. The eventual purchasers of the two parcels installed a barbed wire fence built along the staked line. *Heriot*, 35 Wn. App. at 499. The fence was located in a relatively unused section of the properties. *Id.*

Mr. Heriot purchased his lot knowing the location of the barbed wire fence differed from the true property line. On two occasions Mr. Heriot attempted to stake what he believed to be the true property line, a line further east of the fence, but those stakes were removed both times. Mr. Heriot admitted he did not take any other action to lay claim to the disputed property from the time he purchased the property until he filed the lawsuit, some 15 years. *Id.*

at 503. Mr. Heriot admitted that Mr. Lewis cleared brush up to the fence line, which the court held was indicative of true ownership.

Id. at 504. The *Heriot* court noted:

If one asserting ownership of a vacant lot goes on it at reasonable intervals, marks its limits or corners with visible monuments, clears it of brush, grass and weeds to the limits so indicated, and points it out as his property to his neighbors and friends, it constitutes adverse possession within the meaning of the law.

Id. at 505, citing 2 C.J.S. Adverse Possession § 42 (1972).

The *Heriot* court was “particularly comfortable” holding that Lewis had adversely possessed up to the fence line simply by clearing brush on an occasional basis because “Heriot was well aware of his neighbors adverse possession claim” and chose not to take action until well past the 10 year statute of limitations. *Id.* at 505.

ii. Otten’s Use of the Disputed Property from 2000 through 2007 Constituted Adverse Possession.

The undisputed trial testimony revealed that Otten paid taxes on the Disputed Property from 1996 through the 2008 Lawsuit trial. RP 419-420, 437. It was likewise undisputed at trial that Otten had color of title to the Disputed Property by holding the deed which purported to, and Otten believed did, transfer title to the Disputed Property from Mrs. Penn to Otten. RP 418, Defendant's Exhibit 46.

The undisputed testimony admitted at trial proves that Otten actually, openly and notoriously possessed the Disputed Property for a seven year period running from March 27, 2000 (the date the 1996 lawsuit was administratively dismissed) through February 25, 2008 (the date the 2008 Lawsuit was filed). CP 318 and Defendant's Exhibit 51.

From well before the 2000 through 2008 period Otten used the Disputed Property as a true owner would. In 1981 Otten began storing property, including portions of the Cattle Fence and vehicles, on the Disputed Property. In 1994 Otten installed wooden stakes along the Survey Line north of the Shop and a barbed wire fence along the Survey Line south of the Shop. RP 428-430. In 2004 Otten improved the stake fence into a barbed wire fence which restricted Karlberg's access to the Disputed Property. Section III(B)(3), supra. Approximately four times per year Otten cleared the Survey Line, whether maintaining it by hand or utilizing machinery such as a weed-whacker or brush hog. RP 452.

The *Heriot* Court clearly held that staking, fencing and clearing activities such as those taken by Otten are sufficient to constitute possession of land, especially given the relatively open and undeveloped nature of the Disputed Property. *Heriot*, 35 Wn.

App. at 503-505. On this basis alone, Otten adversely possessed the Disputed Property.

Moreover, Otten laid claim to the Disputed Property as a true owner would by haying the Disputed Property in a manner consistent with that of a true owner. Having been actively haying the Disputed Property since well before 2000, Otten stopped haying from 2000 through 2006 to let the ground's nutrients regenerate. In 2006 Otten recommenced haying. Section III(B)(2), *supra*. As discussed in *Stokes*, intermittent farming activities substantiate adverse possession so long as that intermittent use is consistent with how a true owner would use the property. *Stokes*, 85 Wn. App. at 693.

Furthermore, Karlberg admittedly abandoned use of the vast majority⁵ of the Disputed Property in 1994 *after* Otten took these unmistakable actions to mark his claim of ownership to all property west of the Survey Line. See Sections III(B)(2) and (3), *supra*. Much like *Heriot*, Karlberg's abandonment of the Disputed Property in the face of Otten's use of that property further evidences Otten's ownership claim to that property.

⁵ Karlberg continued to mow a small portion of the Disputed Property after 1994, as depicted in Plaintiff's Exhibit 18.

Given these uncontroverted facts, Otten's exclusive use of the Disputed Property as a true owner from 2000 through 2008 constitutes adverse possession of that property under a claim of right for seven years while paying taxes on that land. Pursuant to RCW 7.28.070, *Daubner*, cited supra, and *Heriot*, cited supra, Otten demonstrated, as a matter of law, that he established legal title to the Disputed Property. Despite the overwhelming and undisputed testimony that Otten exclusively and openly used the Disputed Property from 2000 through 2008 (in excess of the seven years required), the trial court refused to consider Otten's adverse possession claim. As discussed below, that refusal constitutes error requiring this Court to reverse and remand this matter.

2. Otten's Pleadings Alleging He Had Good Title to the Disputed Property Included, As a Matter of Law, a Claim of Adverse Possession.

It has long been held in Washington that one who pleads ownership in fee to a disputed parcel of property is "entitled...to introduce proof of any title, including that acquired by adverse possession." *Rogers, et al. v. Miller*, 13 Wn. 82, 84, 42 P. 525 (1895) ("*Miller*"). As further stated by the *Miller* Court:

It would only have been necessary for them to allege that they were the owners in fee, and lawfully seised and possessed of [the property], in order to state a

good title in themselves. **They could then have proved upon the trial that their title was based upon an adverse possession maintained for the requisite period, since such possession is now generally held to confer upon the possessor the absolute legal title in fee of the estate.**

Id. (emphasis added) (citing *Raymond v. Morrison*, 9 Wn. 156, 37 Pac. 318 (1894)).

The *Miller* holding was affirmed by the Supreme Court's holding in *Metropolitan Bldg. Co. v. Fitzgerald, et al.*, 122 Wn. 514, 210 P. 770 (1922) ("*Metropolitan*")⁶. *Metropolitan* involved a dispute over a fifty (50) foot strip of land. The plaintiff's complaint alleged merely that it was the true owner of the land, but did not specifically state it claimed title under adverse possession. *Id.* at 516. The defendant, who had paper title to the property, sought to dismiss the complaint for failure to allege adverse possession. *Id.* The Supreme Court dismissed this request, holding that "**under a general allegation of ownership proof may be made of the title by adverse possession.**" *Id.* (emphasis added)

Otten made a general claim of ownership to the Disputed Property in his Answer. CP 312-317. Under *Miller* and *Metropolitan*, Otten's general claim of ownership to the Disputed

⁶ Overturned on other grounds by *Chaplin v. Sanders*, 100 Wash.2d 853, 676 P.2d 431 (1984).

Property entitled Otten to present evidence that he derived title either through paper title or adverse possession. Given the long-standing Supreme Court precedence, the trial court should have permitted Otten to argue adverse possession to the Disputed Property at trial based solely on the allegations in his Answer.

Rather than permit Otten to argue adverse possession as required by *Miller* and *Metropolitan*, the trial court dismissed Otten's request to formally plead adverse possession and refused to consider that Otten acquired title to the Disputed Property via adverse possession as supported by the evidence admitted at trial.⁷ This constitutes reversible error pursuant to *Miller* and *Metropolitan* and this Court should remand to the trial court for consideration of Otten's adverse possession claim.

3. The Trial Court Erroneously Denied Otten's Motion to Amend.

i. CR 15 Requires Liberal Amendments to Ensure Cases are Property Decided on the Merits.

Under CR 15(a), leave to amend pleadings *shall* be freely given when justice so requires. *Caruso v. Local 690, Int'l Bhd. of*

⁷ As discussed in Sections III(B)(3) and IV(A)(1) above, the trial court admitted extensive evidence demonstrating that, assuming Karlberg obtained title to the Disputed Property prior to 1994, Otten adversely possessed that property back from 2000 through 2008 under claim of title.

Teamsters, 100 Wn.2d 343, 349, 670 P.2d 240, 243 (1983) (“*Caruso*”); *Accord Quality Rock*, 126 Wn. App. at 272-273. CR 15(a) mandates liberal amendment to “facilitate proper decisions on the merits” and to prevent erection of formal and burdensome impediments to the litigation process. *Caruso*, 100 Wn.2d at 349; *Accord Quality Rock*, 126 Wn. App. at 273. The Court of Appeals summarized the purpose and intent of CR 15 by stating:

If the underlying facts or circumstances relied upon by a [party] may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits.

Tagliani v. Colwell, 10 Wn. App. 227, 233, 517 P.3d 207 (1973) (“*Tagliani*”).

In light of CR 15’s liberal allowance of amendments, denial of a motion to amend is only proper when such an amendment would cause the nonmoving party undue prejudice. *Quality Rock*, 126 Wn. App. at 273; *Accord Caruso*, 100 Wn.2d at 350. Courts must freely grant a motion to amend where the amended claim pertains to the same facts and circumstances already before the court, as there is little likelihood of undue prejudice to the opposing party. *Herron v. Tribune Publishing Co.*, 108 Wn.2d 162, 166-167 736 P.2d 249 (1987) (“*Herron*”).

In *Herron*, the Supreme Court opined that:

When an amended complaint pertains to the same facts alleged in the original pleading, denying leave to amend may hamper a decision on the merits.

Id. at 167. Granting a motion to amend in such circumstances meets CR 15's underlying policy to adjudicate each matter on its merits. *Id.* Likewise, this Court previously stated that when a new claim relies on "essentially the same proof as the allegations in the existing" pleadings the opposing party is "not...prejudiced by the late addition of the [new claim]." *Kirkham v. Smith*, 106 Wn. App. 177, 181, 23 P.3d 10 (2001) ("*Kirkham*").

Delay in asserting a claim or defense, whether excusable or not, is not sufficient grounds to deny the motion to amend. *Herron*, 108 Wn.2d at 166; *Haberman v. WPPSS*, 109 Wn.2d 107, 173, 744 P.2d 1032, 1073 (1987). A trial court's refusal to grant leave to amend "without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion...". *Tagliani*, 10 Wn. App. at 233.

ii. Otten's Motion to Amend Alleged Counterclaims Based on the Same Facts and Circumstances Already Before the Court; Therefore Trial Court Erred by Denying Motion to Amend.

Otten's original defense set forth in the Answer to Karlberg's adverse possession claim relied on Otten's frequent and continued use of the Disputed Property from 1981 onward. CP 288-289, 314-315 and Section III(B)(3), supra. Otten's Answer originally pled his use of the Disputed Property as an affirmative defense which would, when proven, negate any claim by Karlberg to the exclusive and continuous possession required for adverse possession. CP 312-317.

The exact same facts supporting Otten's affirmative defense pled in his Answer formed the basis of the counterclaims Otten sought to plead via the Motion to Amend. CP 300-301, 304-309. The Motion to Amend sought solely to argue new legal theories based upon previously alleged and discovered facts (which were ultimately admitted at trial without objection). See Section III(B)(3), supra; CP 300-301. Otten would not have had to call any new witnesses or allege any previously un-alleged facts to argue adverse possession at trial; nonetheless, the trial court erroneously denied Otten's Motion to Amend.

While leave to amend must always be freely granted as justice requires, that imperative is especially present where the amendment seeks only to add a new legal theory based upon the same facts and circumstances contained in the original pleadings. *Herron*, 108 Wn.2d at 166-167; Accord *Kirkham*, 106 Wn. App. at 181. The Motion to Amend should have been freely granted in light of the fact that Otten's new legal theories were based on the exact same evidence previously pled and discovered. The trial court's denial of the Motion to Amend constitutes an abuse of discretion as it directly violated the spirit and intent of CR 15 by denying Otten the opportunity to have the property dispute tried on its merits; thus, the trial court's refusal to grant the Motion to Amend constitutes reversible error on this basis alone.

iii. Karlberg Failed to Demonstrate Any Prejudice Arising out of Otten's Motion to Amend, Therefore Denial of Motion Constitutes an Abuse of Discretion.

Moreover, the trial court's denial of Otten's Motion to Amend constitutes a reversible abuse of discretion in light of the fact that Plaintiff failed to allege or substantiate any prejudice it would suffer if the trial court granted the Motion to Amend, let alone any undue prejudice. Karlberg did not allege nor prove any undue prejudice it

would endure for the simple reason there would be no undue prejudice.

As discussed above, Otten's counterclaims were based on the exact same evidence and testimony regarding his use of the Disputed Property that had been disclosed through discovery and would, eventually, be admitted at trial. The facts underlying that argument were already known to Karlberg and were ultimately admitted at trial without objection. Permitting Otten to argue a new legal theory based on those same facts, i.e. that he had adversely possessed any portion of the Disputed Property which Karlberg was deemed to have acquired, could not possibly unduly prejudice Karlberg. *Herron*, 108 Wn.2d at 166-167; *Accord Kirkham*, 106 Wn. App. at 181.

Karlberg's objection to the Motion to Amend was not based on any undue prejudice they would face. Rather, Karlberg simply argued it was too late to allege counterclaims. CP 376-409. As has been long settled, Karlberg's objection that the Motion to Amend was untimely is insufficient grounds to deny that motion and a similar argument was denied in *Tagliani*. *Herron*, 108 Wn.2d at 166; and *Tagliani*, 10 Wn. App. at 228-229 and 232.

In *Tagliani* the plaintiff filed a motion to amend seeking to

add two new legal theories based on the same facts pled in the original complaint. *Tagliani*, 10 Wn. App. at 228-229 and 232. The plaintiff filed its motion for leave to amend *after* the court had issued an oral ruling granting defendant summary judgment but before entry of a written order on the summary judgment. *Id.* at 232-233. The trial court denied leave to amend, stating it would be improper to grant leave to amend after an oral decision dismissing plaintiff's claims on summary judgment. *Id.* at 233.

In reversing the trial court's denial, the Court of Appeals noted that the only proper grounds to deny leave to amend would be reasons such as undue delay, bad faith or undue prejudice. *Id.* The trial court's only reason for denying leave was that the motion was made after its preliminary oral ruling granting summary judgment, which was not a proper basis for denial since there was no undue prejudice, dilatory practice or any other consideration supporting denial where it must be freely granted. *Id.* at 234. Therefore, the *Tagliani* Court reversed the trial court's order and granted the plaintiff leave to amend its complaint. *Id.*

In *Tagliani* it was an abuse of discretion not to permit an amendment *after* summary judgment had been granted to the opposing party where there was no evidence of undue prejudice on

the record. Much like *Tagliani*, the record before this Court is devoid of any undue prejudice Otten's requested amendment would have imposed on Karlberg. Karlberg's allegation that it was "too late" to amend the pleadings holds no water in lieu of the fact they failed to allege and prove any undue prejudice. *Id.*

The trial court's denial of the Motion to Amend without a demonstration or record showing any prejudice to Karlberg constitutes a manifest abuse of discretion which this Court must vacate. As such, Otten respectfully requests that this Court vacate the Order Denying Defendant's Motion to Amend Answer and remand for further proceedings on the amended pleadings.

4. Alternatively, This Court Should Amend the Pleadings to Conform to the Evidence Tried Before the Trial Court.

i. CR 15(b) Mandates Amendment of the Pleadings to Conform to the Issues Tried Expressly or Impliedly by the Parties.

CR 15(b) states:

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. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment...

This rule must be liberally construed and applied to avoid a multiplicity of suits between the same parties arising out of the same transaction. *O'Kelley v. Sali*, 67 Wn.2d 296, 298-299, 407 P.2d 467 (1965) ("*Sali*"). Pursuant to CR 15(b):

When the evidence, introduced with the express or implied consent of the parties, fairly raises compatible, though alternative, issues, the trial court is **duty bound** to adjudicate the issues so presented even though such issues may not have been directly raised by the pleadings.

Id. (emphasis added).

Failure by the trial court to adjudicate issues tried by express or implied consent of the parties is grounds to vacate a judgment and remand for further proceedings consistent with the amended pleadings. *Id.* at 299-300; Accord *Abbott Corporation v. Warren*, 53 Wn.2d 399, 403, 333 P.2d 932 (1959) ("*Warren*").

ii. The Trial Court Admitted Evidence Regarding Otten's Adverse Use of the Disputed Property, Mandating Amendment of Pleadings.

As discussed in Sections III(B)(3) and IV(A)(1), *supra*, Otten used the Disputed Property as a true owner for well in excess of seven years while holding color of title and paying taxes on the property. Such use constitutes adverse possession under a claim of right giving Otten title to the Disputed Property. Evidence of

Otten's adverse use was admitted without objection by Karlberg and Karlberg expressly testified to facts supporting Otten's adverse possession claim, therefore the parties expressly and/or impliedly tried Otten's claim of adverse possession to the Disputed Property. Despite the plethora of evidence admitted supporting Otten's claimed ownership of the Disputed Property through adverse possession, the trial court refused to consider Otten's adverse possession argument after denying Otten's pre-trial Motion to Amend.

Pursuant to *Sali* and *Warren*, cited supra, the trial court's failure to adjudicate Otten's claimed adverse possession of the Disputed Property is grounds to vacate the judgment and remand for further proceedings. Accordingly, this Court should vacate the judgments entered herein and remand for further proceedings on Otten's adverse possession claim which the parties tried by implication.

B. The Trial Court Erred by Granting Plaintiff's Motion for Summary Judgment in the Consolidated 2009 Lawsuits in violation of *Res Judicata*.

As discussed in more detail below, the 2009 Karlberg Lawsuit constitutes impermissible claims splitting in violation of *res judicata*. The trial court erroneously granted Karlberg's Motion for

Summary Judgment in the 2009 Karlberg Lawsuit despite this impermissible claims splitting. CP 353-356. This Court must vacate the trial Judge's order granting Karlberg's Motion for Summary Judgment in the 2009 Karlberg Lawsuit and dismiss that lawsuit under the doctrine of *res judicata*.

The relief requested by Karlberg in the 2009 Karlberg Lawsuit was clearly precluded as a matter of law under the doctrine of *res judicata*. Karlberg waived their right to claim any portion of the Remaining Disputed Property by expressly seeking title only to the 45' Strip during the 2008 Lawsuit. As such, this Court must vacate the trial court's erroneous Order Granting Karlberg's Motion for Summary Judgment and dismiss the 2009 Karlberg Lawsuit as a matter of law as further discussed below.

1. *Res Judicata* Precludes Claims Splitting.

It is axiomatic under long established Washington case law that claims splitting is barred by the doctrine of *res judicata*, to wit:

There can be no splitting of causes of action. A party cannot in one action sue for a part of that which he is entitled to recover, and in a subsequent action sue for the remainder, when the right of recover rests upon the same state of facts.

Kinsey v. Duteau, 126 Wn. 330, 334, 218 P. 230 (1923) ("*Kinsey*") (emphasis added). *Res judicata* serves the interests of society and

the parties by bringing an end to litigation of a given claim by holding judgments final. *Columbia Rentals, Inc. v. State, et al.*, 89 Wn.2d 819, 821, 576 P.2d 62 (1978).

Res judicata occurs when a prior judgment shares a concurrency of identity of 1) the subject matter; 2) the cause of action; 3) the persons and parties; and 4) the quality of the persons for or against whom the claim is made. *Rains v. State*, 100 Wn.2d 660, 663, 674 P.2d 165 (1983) ("*Rains*"). To determine whether or not the causes of action are the same, courts examine the following criteria:

- 1) Whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; 2) whether substantially the same evidence is presented in the two actions; 3) whether the two suits involve infringement of the same right; and 4) whether the two suits arise out of the same transaction nucleus of facts.

Id. at 664.

2. *Res Judicata* Applied in Property Disputes.

Two Washington cases discussed below illustrate *res judicata*'s application in property disputes to prevent the award of additional relief based on the same facts and circumstances litigated to final judgment in a prior action.

i. Seeking to Expand Scope of Easement Right is Barred by *Res Judicata*: *Kemmer v. Keiski*.

Keiski filed suit against adjacent property owner Kemmer seeking an easement implied by necessity over Kemmer's property. *Kemmer v. Keiski*, 116 Wn. App. 924, 926, 68 P.3d 1138 (2003) ("*Kemmer*"). After trial, the court found that Keiski was entitled to an easement by necessity across Kemmer's property which "may not exceed 12 feet in width." *Id.* at 927. Neither Kemmer nor Keiski timely appealed the final judgment entered in the dispute (the "First Judgment"). *Id.*

Some five months after the trial court's judgment, Keiski filed a motion for contempt claiming that Kemmer had fenced both sides of the easement "tight against the easement line." *Id.* Keiski alleged that he was unable to get into his property with a pickup truck, dump truck, farm truck or log truck. He went on to state that he planned on using the access easement to access and develop his 13 treed acres, but due to the 12' width of the easement would be unable to do so. Keiski argued that the court should not have limited the access width to twelve feet and requested that the court "clarify" its judgment by "expanding the easement road to the original twenty feet requested." *Id.* at 928.

Pursuant to Keiski's request, the trial court entered an order "clarifying" its judgment by expanding the easement from 12 to nearly 30 feet in portions (the "Second Judgment"). *Id.* at 931. This Second Judgment ordered, for the first time, that the easement be open to log trucks and dump trucks. *Id.* at 934.

On appeal, the court noted that a final judgment precludes any further proceedings in the same case and collaterally precludes all other suits based on the same claims. *Id.* at 932. The court held that the First Judgment precluded entry of the Second Judgment, because the Second Judgment was a substantial and significant modification of the First Judgment and not a mere "clarification." *Id.* at 934. The final preclusive effect of the First Judgment prevented any expansion of the easement from its original 12 feet established by the court's First Judgment. *Id.* at Pgs. 934 and 937. For those reasons the court vacated the Second Judgment, restraining Keiski to the originally adjudicated 12 foot wide easement.

ii. Change in Amount of Property Sought Does Not Preclude Application of *Res Judicata*: *Kinsey v. Duteau*.

Kinsey involved a property dispute between Mr. Duteau and Mr. Kinsey. Mr. Duteau contracted to purchase the disputed

property in 1904 and, when he planned to leave the country, gave Mr. Kinsey enough cash to complete the remaining monthly payments for that property. *Kinsey*, 126 Wn. at 331. When Mr. Duteau decided not to leave the country, Mr. Kinsey claimed ownership to the disputed property despite the fact that Mr. Duteau's money, and not Mr. Kinsey's, paid for that property. *Id.* at 331-332.

Mr. Duteau filed suit seeking to recover a one-half interest in the disputed property from Mr. Kinsey in 1920. *Id.* Mr. Kinsey filed a motion on the merits to dismiss the 1920 case and the court granted that motion when Mr. Duteau failed to respond to the motion. Mr. Duteau did not appeal the 1920 judgment in Mr. Kinsey's favor. *Id.* at 332-333.

In 1921 Mr. Kinsey filed a complaint to quiet title to the entire disputed property, alleging that Mr. Duteau claimed an unfounded interest in that property. On cross-complaint Mr. Duteau alleged that he was entitled to the entire parcel of property as his money had paid for that property. The trial court found that while the facts were in Mr. Duteau's favor, the 1920 judgment in Mr. Kinsey's favor barred further litigation of the issue. Because the 1920 lawsuit was entered on a motion on the merits, Mr. Duteau was barred by *res*

judicata from asserting any ownership in the property. *Id.* at 332-333.

On appeal, Mr. Duteau attempted to differentiate the 1920 and 1921 complaints based on the fact that the 1920 complaint sought only a one-half interest in the property while the 1921 cross-complaint sought full title to the property. *Id.* at 333-334. The Supreme Court held that changing the amount of property sought in a lawsuit was insufficient grounds to overcome the preclusive *res judicata* affect of the 1920 case's dismissal, holding:

A party cannot in one action sue for a part of that which he is entitled to recover, and in a subsequent action sue for the remainder, when the right of recovery rests upon the same state of facts.

Id.

3. The 2009 Karlberg Lawsuit Constitutes Impermissible Claims Splitting Barred by *Res Judicata*.

To the extent that this Court upholds the judgment entered in the 2008 Lawsuit (the "2008 Judgment")⁸, that judgment constitutes the final adjudication of the parties' rights regarding the Disputed Property. Any further judgment regarding the Disputed Property based on the same facts and circumstances as previously

⁸ CP 277-278.

adjudicated by the 2008 Lawsuit, such as the 2009 Karlberg Lawsuit, is barred by *res judicata*.

i. 2008 Lawsuit and 2009 Karlberg Lawsuit Satisfy *Res Judicata* Test.

There can be no real debate that the 2008 Lawsuit and the 2009 Karlberg Lawsuit meet the four part test for *res judicata* given Karlberg's overt reliance on the 2008 Lawsuit's Findings of Fact and Conclusions of Law and 2008 Judgment as the sole basis for the 2009 Karlberg Lawsuit's request for the Remaining Disputed Property. CP 353-356. The lawsuits were identical in subject matter, cause of action and parties and Karlberg directly cited to and relied on the 2008 Findings of Fact and Conclusions of Law and the 2008 Judgment as the sole basis for the summary judgment motion granted in the 2009 Karlberg Lawsuit. CP 353-356, 364-369. The trial court expressly acknowledged that the sole basis for the 2009 Karlberg Lawsuit was those facts previously litigated in the 2008 Lawsuit by citing to the 2008 Findings and Judgment in the Order Granting Karlbergs' Motion for Summary Judgment in the 2009 Karlberg Lawsuit. *Id.*

Clearly the rights and interests established by the 2008 Judgment are impaired by the prosecution of the 2009 Karlberg

Lawsuit. *Rains*, 100 Wn.2d at 664. The 2008 Judgment quieted title in Karlberg only to the 45' Strip, leaving the Remaining Disputed Property as part of the Otten Property. The 2009 Karlberg Lawsuit would throw out those rights and award Karlberg the Remaining Disputed Property.

The 2009 Karlberg Lawsuit relies exclusively on the same evidence presented in the 2008 Lawsuit, involves the same rights as the 2008 Lawsuit and arises out of the same exact transaction and nucleus of facts. *Id.* There can be no plausible argument that the 2009 Karlberg Lawsuit does not share these key *res judicata* factors, thereby requiring dismissal under that doctrine.

ii. *Kemmer* and *Kinsey* Mandate Vacation and Dismissal of the 2009 Karlberg Judgment and Lawsuit.

Further supporting dismissal of the 2009 Karlberg Lawsuit pursuant to *res judicata* is the fact that this case is indistinguishable from *Kemmer* and *Kinsey*, cited *supra*.

Much like in *Kemmer*, the 2009 Karlberg Lawsuit is an impermissible attempt by Karlberg to modify the 2008 Judgment to encompass more than the 45' Strip quieted in Karlberg pursuant to Karlberg's request. Karlberg seeks to obtain a larger portion of the Disputed Property than the final 2008 Judgment quieted in him after

a final judgment,⁹ which is indistinguishable from Keiski's attempt in *Kemmer* to expand the easement from 12 feet to 30 feet after final judgment. See Section V(B)(2)(i), *supra*.

Similarly, as in *Kinsey*, Karlberg can not avoid *res judicata's* preclusive effect simply by seeking a larger strip of property in the 2009 Karlberg Lawsuit than they did in the 2008 Lawsuit. The court in *Kinsey* denied Mr. Duteau's request to quiet title to the property even though the court acknowledged that the facts likely supported Mr. Duteau's claim. Thus, *even if* this Court finds that the facts support Karlberg's claims to the Remaining Disputed Property,¹⁰ as a matter of law Karlberg can not quiet title to that property based on the same facts and circumstances previously tried in the 2008 Lawsuit. Pursuant to *Kinsey*, the fact that the 2008 Lawsuit sought roughly half of the Disputed Property while the 2009 Karlberg Lawsuit seeks the remaining portion does not negate *res judicata's* preclusive effects. See Section V(B)(2)(ii), *supra*.

iii. Karlberg Knowingly Waived Their Right to Seek the Entire Disputed Property.

Finally, it bears emphasizing that Karlberg sought limited

⁹ Karlberg failed to timely appeal the 2008 Judgment quieting title solely to the 45' Strip.

¹⁰ Otten refutes any such finding based on his adverse possession of the entire Disputed Property under color of title, as discussed *infra*.

relief in the 2008 Judgment knowing that such strategy waived their right to seek title to any portion of the Disputed Property beyond the 45' Strip. As discussed in Section III(B)(2), above, Karlberg time and again acknowledged that they were seeking title to only the 45' Strip in the 2008 Lawsuit. Karlberg's attorney struck the proverbial nail on the head when he acknowledged that Karlberg was waiving its right to any further relief on the facts and circumstances alleged in the 2008 Lawsuit, to wit:

All we are moving in this case to do is to quiet title to this 45 feet. And there is no law that says we have to sue for everything we own. **I mean, if a personal injury litigant wants to waive damages over 50 thousand and go to district court or mandatory arbitration, they have a right to do that...**

RP at Pg. 8, Lines 10-16 (emphasis added).

Karlberg's analogy could not be more apt. Assume a hypothetical personal injury lawsuit where Karlberg suffered \$60,000.00 of damages and sued in district court for the statutory maximum of \$50,000.00. In such a case Karlberg *clearly* would be barred by *res judicata* from bringing an additional lawsuit in any venue for the remaining \$10,000.00 in damages, as those damages arise out of the same facts and circumstances and between the same parties as would have been litigated in the initial district court

action. *Res judicata* applies equally to real property disputes, and prevents a multiplicity of lawsuits on the exact same facts and circumstances previously tried. Karlberg's counsel correctly stated that Karlberg waived its right to seek quiet title to the entirety of the Disputed Property when they sought only the 45' Strip in the 2008 Lawsuit.

Under Karlberg's theory of this case, i.e. if *res judicata* does not apply to the judgment entered in the 2008 Lawsuit, Karlberg could have sought only an additional foot of the Disputed Property in the 2009 Karlberg Lawsuit and then, a year later, filed a subsequent lawsuit for yet another foot of the Disputed Property. That process could continue with a separate lawsuit each year until Karlberg gained judgment to each foot of the Disputed Property one foot at a time. To uphold the judgment entered in the 2009 Karlberg Lawsuit would expose the judiciary to an abuse of its resources by allowing litigants to parse out their adverse possession claims, seeking a small portion of their alleged property in numerous different lawsuits over time. *Res Judicata* was implemented to prevent this exact abuse and waste of valuable and limited judicial resources.

The preclusive effect of the 2008 Judgment mandates, as a

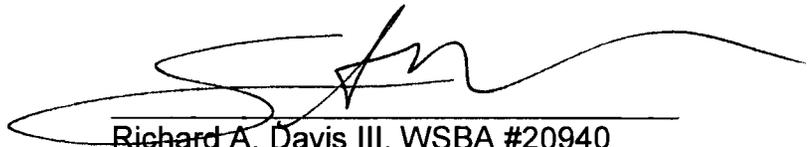
matter of law, that this Court vacate the 2009 Order Granting Karlberg's Motion for Summary Judgment and dismiss the 2009 Karlberg Lawsuit as a matter of law.

VI. CONCLUSION

For these reasons, Otten respectfully requests that the Court vacate the trial court's judgments in the 2008 Lawsuit and the 2009 Otten and Karlberg Lawsuits and remand for further proceedings on Otten's adverse possession claim consistent with this Court's ruling herein. Alternatively, Otten respectfully requests that the trial court vacate the judgment entered in the 2009 Karlberg Lawsuit pursuant to *res judicata*.

DATED this 10th day of January, 2011.

CHMELIK SITKIN & DAVIS P.S.



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Attorneys for Appellant Steven L. Otten

**IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION ONE**

STEVEN L. OTTEN, a single)	
man,)	
)	
Appellant,)	No. 64595-1-I
)	
vs.)	
)	
GARY KARLBERG and)	CERTIFICATE OF SERVICE
SHARON KARLBERG, a)	
married couple,)	
)	
Respondents.)	
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I, AMY SHELKIN, certify under penalty of perjury under the laws of the State of Washington that the following is true and correct:

1. I am over the age of twenty-one (21) years, not a party to the above entitled action, not interested therein, and competent to be a witness in such action.
2. On the date set forth below, I caused to be served, via hand delivery, a true and correct copy of the BRIEF OF APPELLANT STEVEN L. OTTEN on the following party:

Counsel for Respondents

John C. Belcher, WSBA #5040
BELCHER SWANSON LAW FIRM
900 Dupont Street
Bellingham, WA 98225

DATED this 10th day of January, 2011, at Bellingham,
Washington.



AMY M. SHELKIN

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