

COA NO. 69051-5-I

**COURT OF APPEALS, DIVISION I  
FOR THE STATE OF WASHINGTON**

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PAUL COLVIN AND PATRICIA GUERTIN,

*Petitioners,*

v.

KRISTINE SMITH & JAMES AND CAROLYN YOUNG

*Respondents.*

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On Appeal from Snohomish County Superior Court

Snohomish County Superior Court Cause No. 11-2-06646-9

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**PETITIONERS' REPLY BRIEF**

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## I. PETITIONERS' REPLY ARGUMENT

A. COLLATERAL ESTOPPEL DOES NOT APPLY TO THE INSTANT CASE AS THE ISSUES CONTAINED IN THE SETTLEMENT AGREEMENT WERE NOT LITIGATED NOR RAISED AS AN AFFIRMATIVE DEFENSE. MOREOVER, THERE IS NO RELEASE OF RESPONDENT AS SETTLEMENT AGREEMENT WAS NOT CONSIDERED IN RESPONDENT'S MOTION FOR SUMMARY JUDGMENT OR CONSIDERED BY THE TRIAL COURT.

The party asserting collateral estoppel bears the burden of proving each of the following elements: (1) the issues decided in the prior action are identical with those presented in the case at bar; (2) the prior action ended in a final judgment on the merits; (3) the party against whom the doctrine is being asserted, was a party to, or in privity with, the party to the prior action; and (4) the application of the doctrine in the case at bar would not work an injustice against whom it is applied. In order to prevail, the Respondent must establish all elements of the test. *Lemond v. State Dept. of Licensing*, 143 Wn. App. 797, 180 P.3d 829 (2008). “[F]ailure to establish any one element is fatal.” *Id.*

Here, Respondent never raised this as a defense and even though the settlement occurred after the proceeding, it is not judicially ripe for consideration. That said, Respondent cannot satisfy her burden, as she cannot establish all elements of collateral estoppel, and their argument should fail. First, the issues decided in case against the Respondent are not identical to those raised by the Youngs. Simply put, these cases of actions are based on different theories of law. For collateral estoppel to apply, the issues presented between the Youngs and Respondent must have been ***identical in all respects*** to the issues, including the applicable legal

rules. *Lemond*, 143 Wn. App. at 806; *Cloud v. Summers*, 98 Wn. App. 724, 991 P.2d 1169 (1999); *emphasis added*. Further, the courts have determined that collateral estoppel is only appropriate if the issue raised "involves substantially the same bundle of legal principles that contributed to the rendering of the first judgment" even if the facts and issues were identical. *Lemond*, 143 Wn. App. at 805; *see also*, *Standalee v. Smith*. 83. In this case this is not the case as one is based on Quiet Title and the other based on the Tort for Fraud.

Here, the legal theories not identical, moreover they were never litigated. Traditionally, Washington courts have required mutuality in collateral estoppel claims, meaning, there had to be the same antagonistic parties in both proceedings for the doctrine to apply. *State v. Mullin*, 152 Wn.2d 107, 95 P.3d 321, 324 (2004). In the context of civil cases, Washington courts have retreated from the strict application of the traditional rule. *Id.* A party asserting collateral estoppel in a civil case need only establish the party against whom preclusion is sought was a party, or in privity with a party, in the prior case, commonly referred to as "non-mutual collateral estoppel." *Id.* at 114. Nevertheless, the mutuality of parties is still certainly recognized element in determining if collateral estoppel is available. After all, how can the issues of two parties be "identical" when even the parties are different?

Collateral estoppel simply cannot apply to the case at bar as it is well settled that an issue must be "necessarily litigated" for that doctrine to apply. *Henderson v. Bardahl Int'l Corp.*, 72 Wn.2d 109, 119, 431 P.2d 961 (1967).

Since this was never fully litigated, a Settlement Agreement does not invoke collateral estoppel.

Finally, both co-defendants were joint and severally liable. Respondent's brief is silent on the divisibility of harm to the Petitioners, which would be required before appellate court could decide whether a settlement would have any impact on a co-defendant. *See, U.S. Fire Insurance Co. v. Northern Pac R. Co.*, 30 Wn. 2d 722, 193 P.2d 868 (1948). Moreover, the fact that this was not raised in Summary Judgment or the defense raised, makes Respondent's argument not properly before the Court.

**B. RESPONDENT'S STATUTE OF LIMITATION ARGUMENT IS MERITLESS BECAUSE RESPONDENT DID NOT PROVIDE EVIDENCE ARGUING SURVEY AT TRIAL COURT AND THE TIMEFRAME WHEN SURVEY WAS CONDUCTED AND RECEIVED IS A GENUINE ISSUE OF MATERIAL FACT.**

Although the standard for review for the present appeal is *de novo*, it does not vitiate Respondent's underlying evidentiary basis to overcome the factual contentions contained in Petitioner, Paul Colvin's Declaration in Response to Respondent's Motion for Summary Judgment. Respondent has not provided any evidentiary criteria to overcome this issue other than mere legal conjecture. In fact, Respondent's reliance on *Douglas v. Visser*, 295 P.3d 800 (Wash. App. 2013) is misguided as this dealt with a "construction defect" a party had knowledge of. A boundary line dispute if a far departure and additionally there are disputed facts, as acknowledged by Respondent whether she did or did not participate in the sale or communicate with the Petitioners. Moreover, there are disputed fact whether there was communication between the parties.

As reflected in in **Appendix A** attached hereto when the Petitioners actually received the Surveys; at no point during the sales process did Respondent, by comments, actions, or documents, ever give Petitioners pause to question that the purchase wasn't what was represented. And no one, until May of 2011, ever came to Petitioners to notate otherwise. See Declaration of Paul Colvin attached hereto and incorporated herein by reference.

Because of issues along the northern boundary with the developers who were building out on the short plat mentioned earlier, Petitioners asked for a complete survey to be done by the same people, Group 4, who originally did the survey work for Sundquist Homes on the Red Oak Condominium project. The survey was done late 2007 but not provided to me until 2008 and it showed nothing in regards to the southern boundary, including fences or roadways, and, other than the encroachments along the northern boundary, it matched exactly what was in the original plat surveys and sales documents. At this time, as since the close of sale, Petitioners still had nothing to alert Petitioners to any southern boundary issues.

Because of a 2008 lawsuit against the developers at the northern edge, Petitioners had Allied Surveying, in May of 2009, revalidate the Group 4 survey and correct any errors in it. Allied found that the northern encroachments had been misidentified by Group 4, and it was also at this time that the southern edge of the property was accurately documented and it then showed that the fence was not wholly on our

property, as Petitioners had always thought. It was also the first time that a surveyor placed monuments to fully designate the southern boundary line.

December 2010 was the first time, when PUD did massive tree cutting along the southern edge of the property and the adjacent Trac 992 wetlands, that a question was called as to actual ownership of a much more extensive amount of the southern areas, including the areas that Petitioners had been using freely since 2006 without intervention by any 3<sup>rd</sup> party, the very same areas that Respondent represented that Respondent owned and sold to Petitioners.

At all times since Petitioners moved in, from May of 2006 through December 2010, Petitioners always had a good relationship with the Youngs, who, until that time, never once mentioned anything about the southern property. At no time did Petitioners ever discuss the fence, the gardens, or anything else as being amiss.

It wasn't until May of 2011, when the Youngs made a formal demand that Petitioners get off of their property, that Petitioners property became an issue. This demand began the suit in question in July of 2011 as an adverse possession suit because Petitioners firmly believed that there must have been a mistake made, because Respondent never mentioned anything about permissions, licenses, or anything during the sales (as for which Respondent noted as having no issues on the Form 17) in regards to what Respondent sold Petitioners, and if there

was a question about property that, since the Rotary Club of Lynnwood first build on it in 1998, that adverse possession would have been had, especially in light of the County Assessor noting that the Youngs had never paid taxes on the property in question.

It wasn't until during discovery in 2012 that Petitioners found out that Respondent knew in 1999 that Respondent was having the fence built onto property Respondent didn't own (addressed in an earlier declaration noting question/answer/and page) and didn't care. At the same time, in 2012, Petitioners also found out that Respondent had also extensively remodeled in 2000, again contrary to her Form 17 representations.

Based on the foregoing factual issues raised below, Respondent's Statute of limitation argument on the date of discovery and whether Petitioners should have discovered the true boundary line, does not hold water. Additionally, these are new arguments were not based on evidence adequately and should not be considered now.

**C. GENUINE ISSUES OF MATERIAL FACT EXIST AS THERE ARE DISPUTED FACT RELATED TO THE REPRESENTATIONS MADE BY RESPONDENT IN HER SALES MATERIALS AND COMMUNICATION WITH PETIONERS.**

The proposal that genuine issues of material fact do not exist in the proceeding is ludicrous. The very fabric of the claim for fraud and misrepresentation relate to whether there were or were representations made by Respondent. Even respondent's Response brief contests whether

there were or were not communications that took place. Form 17 is in itself a material fact wherein Respondent claims she is not liable, yet there is contradictory evidence showing otherwise. The boundary dispute, contrary to what Respondent believes, is not the only issue at point here. The prima facie element of Fraud and Misrepresentation are the issues to be considered by a finder of fact. Accordingly, such argument needs little discussion as such factual contentions were disputed on summary judgment and in the light most favorable to Petitioners' Respondent has done nothing to overcome that genuine issues of disputed fact exist warranting a trial.

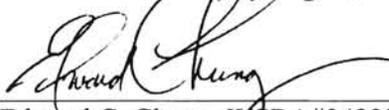
D. THE TRIAL COURT ERRED IN NOT APPLYING THE IDENPENDENT DUTY DOCTRINE *JACKOWSKI v. BORCHELT*.

For sake of brevity, Petitioners have already briefed the trial court's failure to properly apply the Independent Duty Doctrine. Respondent has raised no new argument, not already addressed in Petitioners' brief for which any argument may be made to overcome the applicability how the independent duty doctrine applies.

**II. CONCLUSION**

- A. Attorney's Fees Should Be Awarded Pursuant to RAP 18.1
- B. Relief Requested on Remand.

*Respectfully submitted this 26<sup>th</sup> day of August, 2013.*

  
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Attorney for Respondent

Court of Appeals, Division 1, of the State of Washington  
*Paul Colvin, et al. v. Kristine Smith, et al.* – Case No. 69051-5-1  
Petitioner's Reply Brief

# APPENDIX A

**Declaration of Paul Colvin Dated 06/29/2012**



CHUNG, MALHAS, MANTEL & ROBINSON  
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF SNOHOMISH

PAUL COLVIN AND PATRICIA GUERTIN )  
Plaintiffs, ) CAUSE NO. 11-2-06646-9  
v. )  
DECLARATION OF PAUL COLVIN  
JAMES AND CAROLYN YOUNG, )  
KRISTINE K. AND JOHN DOE SMITH, )  
Defendants. )

I, Paul Colvin, hereby declare:

1. I am over the age of 18, competent to testify, and I make this declaration upon my personal knowledge.
2. I purchased my home at 15014 Old Manor Way in Lynnwood, Washington in May of 2006.
3. Prior to that, Defendant Kristine K. Smith owned the property since 2000 and she maintained the disputed property as well.
4. Ms. Smith acquired the property from the Rotary Club of Lynnwood, who owned and maintained the property since 1998.
5. Young's property was originally subdivided in 1991.

COLVIN DECLARATION  
| 1

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STATE OF WASHINGTON  
SUPERIOR COURT  
SNOHOMISH COUNTY

- 1 6. 1998 was the last recorded survey of the area performed by Sundquist Homes, which  
2 developed parcels in the general area, but only in regards to their "Red Oaks" development  
3 until I had Group 4 prepare one for my property in 2008 at which time they placed a  
4 monument at the southwest corner.
- 5 7. In 2009 I had Allied Land Surveying complete another survey, at which time they placed a  
6 monument at the southeast corner.
- 7 8. No other recorded survey exists of the Young property beyond the 1991 plat and no  
8 markers for it were ever placed along my property.
- 9 9. In fact, in early 2011 Mr. Young told me that he had no knowledge of where the property  
10 boundaries were.
- 11 10. As a result, the Defendants Young could not have known the legal extent of their parcel,  
12 when the alleged permission was granted to Smith.
- 13 11. During the entire time I have owned the property, from May 2006 forward, I was never  
14 advised, either by Defendant Smith or Defendants Young, that the property I was  
15 maintaining did not belong to me until April 2011, when I received a letter from the Young's  
16 attorney,
- 17 12. At no time either prior to, during, or since the sale to us did Smith ever advised me of the  
18 "permissive" use claimed by Defendants Young.
- 19 13. In fact, Smith marked that she did not know if there were any issues associated with  
20 encroachment on her Real Property Disclosure Statement (Form 17) when she sold the  
21 property to me.  
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24 COLVIN DECLARATION

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1 14. It was only recently discovered by me that property I had maintained and exclusively used  
2 since moving in was purportedly owned by Defendants Young.

3 15. I have mowed the grass, occupied a portion of the disputed property with my deck and  
4 fence, engaged and paid for landscaping services, and have generally used and maintained all  
5 of the disputed property since I moved in.

6 16. The fence and deck/patio have been in existence since at least the beginning of 2000, close  
7 to three years prior to the Youngs taking possession of their property in late 2002.

8 17. Smith has recently admitted that she had the deck/patio constructed, on property that she  
9 knew belonged to another, as a condition of her purchase in early 2000. (Smith interrogatory  
10 answers 12, 15, 16, 17 & 18, Exh. 2). She has also admitted that she I have not changed any  
11 landscaping she installed since my purchase.

12 18. I have paid approximately \$5,000, just in the last four years, for yard maintenance service  
13 companies, materials, supplies, and labor I personally provided in maintaining the disputed  
14 portion of the property.

15 19. Attached as Exhibit One is a true and correct copy of the disclosures provided by Defendant  
16 Smith to me in the purchase and sale of the residence.

17 20. Attached as Exhibit Two is a true and correct copy of Defendant Smith's Answers to  
18 Interrogatories.

19 I make the foregoing declaration under penalty of perjury under the laws of the State of  
20 Washington.  
21

22 Dated June 29, 2012 at Lynden, Washington.

23  
24 COLVIN DECLARATION

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Paul Colvin

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**COLVIN DECLARATION**

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