No. 45596-0-II

Jefferson County Cause No. 11-2-00206-2

IN THE COURT OF APPEALS, DIVISION II

FOR THE STATE OF WASHINGTON

BRAD A. CLINEFELTER AND SUSAN CLINEFELTER

Husband and Wife

Appellants

v.

DENNIS SEVERSON, a single person, and KENNETH D. UPHOFF and CHRISTINE S. BURNELL, Husband and Wife,

Respondents.

RESPONDENTS' BRIEF

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Plm 8/22/14

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A. INTRODUCTION

Appellants Clinefelter attempt to fend off neighbors' adverse possession claims to quiet title to a portion of the fee underlying an implied private easement, between an ancient fence and the disputed centerline of a statutorily-vacated platted street in an 1889 plat.

The Clinefelters base defense of title to the fee of the disputed area on an expansive definition of "parties" to a 1983 Stipulation in a Jefferson County lawsuit, and attempt to apply *res judicata* to that prior litigation.

No present party participated in the 1983 litigation. None of them were signators to the 1983 Stipulation, which was never reduced to a judgment or recorded (for "record notice" purposes). None of them knew of it from any source until 2011, long after the Respondents' acts of adverse possession occurred (for "actual notice" purposes).

Appellants also argue that Respondents Uphoff/Burnell cannot use a predecessor's (Hubbard) possession of the disputed area as "tacking" for their claim of adverse possession, and that estoppel bars Hubbard from claiming adverse possession. These issues arose because we erred in our Finding of Fact (FF) 7, CP 066, in referring to tacking of uses by Uphoff and Burnell to the acts of predecessors "from 1977 to 2011", and reference to predecessor Hubbard, because from 1983 to 1990 Hubbard was bound

by a Stipulation to recognize their neighbor's rights. However, the error in that Finding has no effect on the remainder of the Finding which should read "from 1990 to 2011" and omitting reference to Hubbard, and a Finding so corrected established elements of adverse possession for well over ten years by actors not bound by Hubbard's 1983 Stipulation.

Unchallenged Findings of Fact and Conclusions of Law, together with challenged ones on which there was substantial trial evidence, support the trial court's entry of judgment to each of the Respondents for their respective quiet titles to disputed portions of the fee of a vacated street adjacent to their properties. This court should affirm.

B. STATEMENT OF THE CASE

Our Statement of the Case is drawn largely from unchallenged Findings of Fact (unless noted otherwise).

All parties are adjacent property owners of lots in Jefferson County, abutting on vacated Swan Street in an 1889 plat in which the public right of way was vacated by the "non-user" statute. All parties are descendants in title from a common original owner, the late Ted Thompson, who acquired the properties in 1936 and had it all surveyed in unrecorded surveys known to current surveyors. (FF 1 - 6, CP 062; FF 10, CP 064).

The late Ted Thompson fenced what is now the Clinefelters'

property sometime prior to 1977, including the fence in vacated Swan Street which now separates the Clinefelter property from that of each of the Respondents (FF 7 CP 063). It is a straight fence running North-South across the width of both Respondents' properties from a found (in 2011) existing 3/4" steel post at its South end (Ex. 10).

Until Appellant built a walking gate, after asking express permission of Respondent Uphoff some time after 2000 (FF 15, CP 064), there had never been an opening in the fence from Appellants' property (RP I-30, ll. 10-16; RP I-34 ll. 13-18).

Respondent Severson bought his property from Ted Thompson in 1977 (Ex. 2, FF 1 CP 062). Ted Thompson told him that the fence was the boundary line (RP-41 line 6-7). For 36 years he exclusively occupied the portion of platted, vacated, Swan Street up to the fence while the Thompson side had been left un-maintained. (Appellants challenge FF 8, CP 063, but see RP I-26 l. 11-13). Ted Thompson showed him the former survey stakes, some of which are still there and he had relied on them since 1977. (RP I-23, ll. 7-13). He was also shown stakes for the present Uphoff/Burnell property, some of which are still there. (RP I-54 ll. 16-22.)

Witness Florence Hubbard ("Hubbard") testified that when Ted Thompson sold the present Uphoff/Burnell lots to her in 1977 (Ex. 3),

there was an old barbed wire fence (RP I-109 line 14) about ten feet (RP I-110 line 9) from where she developed a garden (RP I-109 line 22) on the corner (RP I-110 line 4) where she later put in a greenhouse (RP I-110 line 12). Although she was uncertain where the fence was then, she identified Exhibit 12, a photo she took in 1982-83 (RP I-112 l. 9) with her greenhouse next to the old fence visible behind it which both she and Mr. Severson said was within a couple feet of the greenhouse (RP I-26 line 20). She testified that when a 1983 dispute arose with Thompson about the use of the property, the Hubbards then stayed away "from his property line" (RP 114, line 3) and that after the 1983 Stipulation no-one said anything to them about the greenhouse or garden (RP 117, lines 20-24). On cross-examination, Ms. Hubbard said that the fence in Exhibit 12 between her property and Thompson's was "on our property line" (RP I-134 line 3-4, from which it is inferred that she believed that to be the line at the time of a 1983 Stipulation (about which more follows) she signed. (Appellants challenge a portion of FF 9 CP 063, but the above is substantial evidence in the record to support it.)

After Ted Thompson died, litigation between his Estate and witness Hubbard *et ux* over use of vacated Swan Street resulted in those parties executing a "Stipulation" in Jefferson County Superior Court #10880 (Ex.

4) in which the parties agreed each owned half of the vacated street, each gave the other an easement for drainage, access, egress and utilities over their respective portions of the vacated street, neither would use the vacated street for purposes not related to exercise of the easement, etc., that the lawsuit would be dismissed with prejudice, and that the agreement would be "binding on heirs, successors and assigns" (Ex. 4).

The Stipulation was not reduced to judgment of record, was not recorded in public records (FF 11, CP 064), was not disclosed in the Clinefelters' Title Insurance Policy in 2000 (Ex. 8), and was not known to exist by the Clinefelters or Respondents Uphoff/Burnell until 2011. (FF 11, CO 064). The lawsuit had been dismissed by Clerk's action in 1985, not dismissed with prejudice as the parties had stipulated.

Ms. Hubbard testified that she had repossessed her property from one Kronquist and re-sold it to Myers (the documents disagree somewhat) but was sure that in 1992 the area where the greenhouse and garden had been were still being kept clear by her former brother-in-law Dennis Severson (RP I-125 ll. 7 to I-126 line 1).

From the trial testimony of Appellants' surveyor ("Olsen") it is known that no recorded survey of these specific properties was available at the time of the 1983 Stipulation, because he found none among the 15-20

prior area surveys he reviewed for his survey project (RP II-95 line 17 et. seq.) [From that, the trial court could reasonably infer that the pre-1977 fence was the only structure of reference for that 1983 Stipulation, which did not define where the centerline was, we note for argument.]

Respondent Severson was not a party to, nor bound by, the 1983 Stipulation (FF 12, CP 064).

Witness Hubbard, a party to the 1983 Stipulation, sold her property to one Kronquist in 1990 (Ex. 5), who sold to Myers in 1992 (Ex. 6), who sold to Uphoff/Burnell in 2003 (Ex. 7). Respondent Severson testified to uses of that property from 1990 to the time of this lawsuit by the owners subsequent to Hubbard . (Appellants challenge FF 13, CP 064, but see RP RP I-29 ll. 9-17, describing Kronquist's occupation of the disputed area with a travel trailer where a chicken coop was at time of trial and somewhat of a garden although he left the property a trashy mess; Myers kept it up well, cleared as lawn which Mr. Severson could see from his home (RP I-29 l. 21 to I-30 Lines 4-5), and no one from the Thompson property ever came across the fence (RP I-30 ll. 10-12). There was no contradicting testimony from other witnesses at trial.

There was no testimony or evidence that the Thompson Estate or the Clinefelters used any portion of vacated Swan Street for ingress, egress

or drainage, from 1990 (the end of the Hubbard ownership of the Uphoff/Burnell lots) until some time after 2000 when the Clinefelters got permission from Uphoff/Burnell to put a walking gate in the fence and occasionally walked on the easement thereafter. (FF 14 and 15, CP 064).

There is no testimony or evidence that the Thompson Estate or the Clinefelters had attempted to use any portion of the vacated street adjacent to the Severson property from 1977 until the gate was built after 2000.

As to both Respondents' portion of the disputed property, there was no evidence that utilities existing as of the 1983 Stipulation had ever been installed or altered from what existed at the time of the 1983 Stipulation. (FF 14 is challenged by Appellants, but it remains that there is no such evidence as might affect active use of the disputed property.)

When the Clinefelters bought the old Thompson Estate property, the existing fence was in bad repair so they repaired it in place, installed a gate for walking purposes onto the easement, and built a chicken coop for Respondents Uphoff/Burnell in the disputed area, with permission (FF 16).

In 2011, the Clinefelters employed a survey ("Olsen") of their property, leading to disputed relocation of the boundaries of the parties and of the centerline of vacated Swan Street (EX. 10; FF 16-18). This litigation followed, with each Respondent claiming adverse possession of

the fee underlying the vacated Swan Street from the centerline, adjacent to their properties, whether as originally platted or as surveyed by Olsen, to the old existing fence. FF 19, CP 065.

The trial court found the 1983 Stipulation effective only as a contract between the parties (Thompson Estate and Hubbard) to it, not as a deed conveying an interest in real property under RCW 64.04.010, for lack of record notice to third parties and the public by recording, or by entry as a judgment. (CL 2, CP 065).

Because the present parties had neither actual nor record notice of the 1983 Stipulation at the times they obtained their present properties, or prior to the 2011 Olsen survey, the Stipulation was held not binding on them. (CL 3, CP 065-066). Appellants challenge that legal conclusion solely because the 1983 Stipulation said that it bound "heirs, successors and assigns".

After trial in April, 2013, the trial court issued its "Memorandum Opinion After Trial" (CP 052-061) on April 16, 2013.

On August 7, 2013, Respondents noted Presentation of Findings of Fact and Conclusions of Law, and Judgment (CP 074).

On September 18, 2013 the parties appeared in open court with counsel, and held argument on the proposed documents (CP 075).

Neither party has submitted copies of the original proposed Findings, Conclusions, etc. on appeal. There is no record that Appellants filed objections to Respondents' proposed documents.

At open hearing (Clerk's Minutes, CP 075, See Appendix 1), the Clinefelters' counsel objected on the record to only: proposed Findings #6 on page 2 (objection overruled and the Finding is not challenged on appeal), #12 on page 3 (which was replaced with the present #12, to which no objection has been made on appeal), and #19 on page 4 (objection was overruled and the same Finding is not challenged on appeal), and to Conclusion of Law #9 on page 6 (objection overruled and there is no challenge to that Conclusion on appeal). The Court also struck then-Conclusion of Law #3, which was replaced with the present one which Appellants challenge although it is not clear that it is the one challenged below. Counsel for Respondents was directed to prepare final orders, get them to counsel for Appellants for his approval and have them entered by the trial court. (CP 075)

Accordingly, both counsel signed off the revised Findings of Fact, Conclusions of Law, and Judgment, which were entered by the trial court on October 25, 2013 without further hearing or argument. (CP 062-071)

Conclusion of Law #2 (CP 065), that the 1983 Stipulation was

effective only as a contract between the parties thereto, not as a deed of conveyance for lack of record notice to the public, challenged here, was not challenged in the trial court.

Conclusion of Law #3 (CP 065-066), (that none of the present parties were bound by the 1983 Stipulation, for lack of actual or record notice of the 1983 Stipulation when they acquired their properties and when acts of occupation occurred), which the Clinefelters challenge here, was entered without objection in the trial court.

Conclusions of Law 6-7 (CP 066) setting out the acts of the respective Respondents in the trial court's conclusions of adverse possession (although containing the error noted of including Hubbard's actions 1983-1990 in the tacking) clearly established more than ten years of the elements of adverse possession, were not challenged in the trial court by Appellants, and were entered there without objection.

Conclusion of Law 9 (CP 067), that Appellant asked permission of Respondents Uphoff/Burnell to put a gate through the fence, to access the Uphoff/Burnell side, evidencing recognition of Respondents' occupation of the disputed strip, was not challenged in the trial court nor on appeal.

Conclusions of Law 10 and 11 (CP 067) ruling quiet title to the disputed property to the respective Respondents, subject to the unresolved

easement rights of the Appellants but not subject to the 1983 Stipulation, were not preserved by challenges on the record in the trial court, were entered without objection there, and support the Judgment of Quiet Title also entered on October 25, 2013.

This appeal followed.

C. ARGUMENT AND AUTHORITIES

First, in advance answer to each of Appellants' four "Issues Pertaining to Assignments of Error":

1. Does a written stipulation, signed by the parties who are adjoining landowners and filed in court in resolution of a lawsuit over title to a vacated street between them, wherein the parties recognize and accept each others' title ownership to half of a vacated street, bind their successors in interest? **Answer**: No, where the stipulation was not recorded, not reduced to judgment nor otherwise entered in public records, and the successors in interest had no actual nor record notice of it.

2. May a party who signed a Stipulation which recognized title ownership to half a vacated street be allowed, in violation of the agreement, to claim that same half by adverse possession? **Answer**: No, but the party, Hubbard, who signed a 1983 Stipulation, was not a party claiming adverse possession in the present litigation. The issue is moot

where successors in interest without actual or constructive notice of the stipulation established substantial evidence supporting the trial court's findings of adverse possession independently of Hubbard's prior ownership of the property.

3. Can adverse possession be supported by the acts of a neighbor who maintained the disputed area of vacated Swan Street as a non-exclusive right of way? **Answer:** Yes, when the fee under the right of way was maintained for uses exclusive of the true title owner for the requisite period of time, all other elements being met.

4. What is the level of proof required to show adverse possession of a vacated street which is used as an easement and right of way? **Answer:** The burden assumed by the claimants, briefed in their trial brief at CP 030, and found to have been met by Respondents by the trial court at CP 059, is "preponderance of the evidence", as it affects quiet title to the fee underlying the easement as per Erickson Bushling v. Manke Lumber, 77 Wn.App. 495, 691 P.2d 750 (1995) and Kiely v Graves, 173 Wn.2d 926, 271 P.3d 226 (2012).

This appeal is without merit.

RAP 9.2 provides that the party seeking review should send up only that portion of the verbatim report of proceedings necessary to present the

issues raised on review. The Clinefelters have sent up the entire 445 page transcript of the trial below, in order to challenge five Findings of Fact, and six Conclusions of Law - - without a record that any of the challenged Findings and Conclusions were preserved for review in the trial court.

Much of this appeal is based on the theory that Appellants and Respondents are bound by a 1983 Stipulation in which none were participants or parties, with no actual or record notice of the 30-year old Stipulation which was never entered as a judgment nor recorded.

Appellants produce no authority for the theory that non-parties can be bound to others' civil contracts without either actual or record notice, or even an implied duty to inquire, during the operative period of time.

Appellants contend that the 1983 litigation was *res judicata* as to the issues and parties herein, without having pleaded that affirmative defense in the trial court, and without having argued the theory in the trial brief below.

The Clinefelters challenge the trial court's discretion to decide the sufficiency of a set of facts generated over thirty-three years (as to Respondent Severson 1977-2011) and more than twenty-one years (as to Respondents Uphoff/Burnell 1990-2011) of acts of adverse possession, essentially without controverting evidence and testimony of their own.

a. Appellants' Assignments of Error Findings of Fact and Conclusions of Law

Appellants open their brief with Assignments of Error to five (5) Findings of Fact and six(6) Conclusions of Law, itemized below. As noted in the Statement of the Case above, there is no record on appeal that Appellants challenged the same Findings and Conclusions in the trial court.

Rather, their objections to Respondents' original proposed Findings and Conclusions were oral to the trial court. CP 075 shows that each objection was ruled upon, that those on which their objections were granted were stricken from the draft and replaced with currently-numbered items, all of which counsel signed off for entry without objection to the trial court (CP 067). There is no record of what they objected to below.

None of their Assignments of Error relating to Findings of Fact and Conclusions of Law should be considered here, for Appellants' failure to challenge them below and to preserve them for review on appeal.

Their Assignments of Error do not set out the challenged Findings *verbatim* in accordance with RAP 10.4(c). Instead, they argue isolated issues with the facts, without challenging the remainder of each Finding, which remain as verities on appeal. They would leave it to this Court to separate the challenged from the unchallenged portion of each Finding, then laboriously figure out from the entire record what remains a verity,

and what might be argued, from a 445-page transcript.

The purpose of rules which require separate assignments of error for each challenged finding, and require a party to set out the material portions of the challenged finding in its brief or an appendix thereto, is to add order to and expedite appellate review by eliminating the laborious task of searching the record for such matters as are claimed to be in error. In re Marriage of Stern, 57 Wn.App. 707, 789 P. 2d 807 (1990). Where the challenged findings are not set out *verbatim*, the Court may treat all the challenge15d findings as established facts of the case. Steele v. Queen City Broadcasting Co., 54 Wn.2d 402, 341 P.2d 499 (1959).

Where a party challenges a trial court's findings of fact, appellate courts will review only whether substantial evidence supports the findings of fact, and whether those findings support the conclusions of law. State v. McEnry, 124 Wn.App. 918, 924, 103 P.3d 857 (2004). Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding. State v. Halstien, 122 Wn.2d 109, 129, 857 P.2d 270 (1993).

Findings of fact are presumed to be supported by substantial evidence, and the party challenging them has the burden of proving to the contrary. Thom v. McDearmid, 63 Wn.App. 193, 205, 817 P.2d 1380

(1991).

In reviewing a challenged finding of fact, a reviewing court views the evidence in the record in the light most favorable to the reviewing party. Pilcher v. Dep't of Revenue, 112 Wn.App. 428, 435, 49 P.3d 947 (2002).

Trial court findings of fact to which no error is assigned are verities on appeal. Tomlinson v. Clarke, 118 Wn.2d 489, 825 P.2d 706 (1992); State v. Levy, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006).

Findings of fact based on substantial, if disputed, evidence and the trial court's view of the credibility of the witnesses, are within the trial court's discretion and ought not be disturbed on appeal. Boeing v. Heidy, 147 Wnl2d 78, 87, 51 P.3d 793 (2002). Appellate courts defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence. State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). An appellate court will not substitute its judgment for that of the trial court, even if it might have resolved the factual dispute differently. Mairs v. DOL, 70 Wn.App. 541 at 545, 854 P.2d 665 (1993).

Challenged conclusions of law are reviewed *de novo.* State v. Levy, supra, 156 Wn.2d at 733. But a reviewing court will not review a conclusion of law to which no error has been assigned. Kershaw v.

Yakima Interurban, 121 Wn.App. 714, 91 P.3d 104 (2004).

And, in this case, having assigned error to certain Findings of Fact and Conclusions of Law, Appellants set out four (4) "Issues Pertaining to Assignments of Error". Although not specifically required by the Rules, it is traditional practice to number the issues presented (which Appellant has done), and then to indicate in parentheses the assignments of error to which each issue pertains (which Appellant has not done). It will be difficult and laborious for the Court (as it has been for Respondent) to determine which challenged Findings and Conclusions relate to which Issue is set out on page 12 of Appellants' Brief.

1). Appellants challenge Finding of Fact (FF) #8 (See CP 063), arguing that the fence in Swan Street was not the common boundary between Appellants' predecessor Thompson and Respondent Severson; and that Severson did not exclusively occupy Swan Street (in the disputed strip). **Answer**: They do not challenge the portion of FF #8 that as between Thompson and Severson, the old fence was recognized by both as the common boundary, or that Severson occupied the disputed portion up to the fence while Thompson left property on the other side of the fence un-maintained.

2). Appellants challenge FF #9 (CP 063), arguing that

Uphoff/Burnell predecessor Florence Hubbard was uncertain where the old fence was, and that she did not testify that she recognized the fence as the common boundary with Appellants' predecessor Thompson. **Answer**: They do not challenge the portions of the Finding that when Thompson sold Hubbard the property in 1977, she treated the old fence as the common boundary including building a greenhouse and installing a garden in the disputed strip.

3). Appellants challenge FF #10 (CP 063-064), arguing that Uphoff/Burnell predecessor Florence Hubbard testified she did not apply to the County to open the platted street. **Answer**: It is undisputed that in 1983, when the Thompson Estate had sued the Hubbards regarding uses of the vacated Swan Street, Florence Hubbard signed the Stipulation (Ex. 4) settling the litigation; whether she had applied with her late husband to vacate the street, starting that 1983 litigation, is irrelevant to the operative portion of the finding that the street was vacated by operation of law, and that a stipulation was entered to settle that litigation.

4). Appellants challenge FF #13 (CP 064), arguing that Severson did not testify that the disputed area was used exclusively by anyone; and that he also testified that he recognized it as a right of way. **Answer**: Appellants do not challenge the portions of the Finding that

Hubbard sold her property in 1990, that it went through other owners until Appellants Uphoff/Burnell bought it, during which the uses and maintenance of the property were as described by Severson, by the then-owners, and that it was never used in any manner by owners of the Thompson property.

5). Appellants challenge FF#14 (CP 064) , arguing that there are utilities in Swan Street and are maintained, and that the Clinefelters occasionally used Swan Street for taking walks. **Answer**: Appellants do not challenge the portions of the Finding that there was no evidence that the Thompson Estate or the Appellants ever used the disputed area for ingress, egress or drainage, nor that the utilities had been unaltered since the 1983 Stipulation. The Judgment sought and obtained by Appellants quieting title to the fee leaves Appellants' utility easement undisturbed, and the Clinefelters' walks started after both adverse possessions accrued.

6). Appellants challenge Conclusion of Law #2 (CP 065), arguing that it was not necessary for the 1983 Stipulation between Thompson and Hubbard to be recorded to be binding on those parties and their successors in interest. **Answer**: They do not challenge portions of the Conclusion that the Stipulation was a contract between Thompson and Hubbard, but was not effective as a deed conveying an interest in real

property IAW RCW 64.04.010 with record notice to third parties nor the public by recording, or by entry as a judgment. This raises their issue of whether non-parties to a stipulation in a court file are bound, without actual or record notice. There is no legal authority for this position.

7). Appellants challenge CL #3, arguing that the 1983 Stipulation bound the parties to it, as well as the present parties as successors in interest, despite that no present party had actual or record notice of a civil contract bewteen parties to a litigation thirty-some years before. **Answer**: As briefed below, there is no reliable authority for this position.

8). Appellants challenge CL #6, arguing that Severson did not exercise exclusive "ownership" of the disputed portion of vacated Swan Street. **Answer**: Unchallenged Findings set out that no occupant of the Thompson-Clinefelter property ever made any use of the disputed strip claimed by Severson, from 1977 until the Clinefelters may have taken occasional walks some time after 2000, by which time Severson's adverse possession had long since accrued unaffected by the 1983 Stipulation. The test is "use", not "ownership".

9). Appellants challenge CL#7, arguing that there is insufficient evidence to show that prior owners of the Uphoff-Burnell property (Cf.

Kronquist 1990-1992, Myers 1992-2003, in addition to the Uphoff-Burnell occupation 2003-2013, per unchallenged portions of FF #13) exercised open, notorious, actual and uninterrrupted and exclusive possession of the disputed area. **Answer:** The Clinefelters had no evidence contradicting the facts of occupation set out by the trial court, only the conclusion that they do not constitute adverse possession, a discretionary ruling of the trial court in light of all the evidence. Absent designation of which Findings are insufficient to support his Conclusion of Law, the Court should not consider it nor search the record to consider strength of the evidence.

10). Appellants challenge CL #10, arguing that the 1983 Stipulation in Jefferson County Superior Court $10880 should be enforced and that the disputed portion of vacated Swan Street should not be awarded to Severson and to Uphoff-Burnell. **Answer:** Appellants extend argued application of the 1983 Stipulation not only to Uphoff-Burnell, as descendants in title to Hubbard although they were not parties to it and had neither record nor actual notice of it twenty years later, but also to Severson who was not a party to the prior litigation nor to the Stipulation, which arose out of litigation which did not affect him in any way. This is so far beyond reasonable application of any established law or theory as to be patently frivolous. The effect of the Stipulation on these parties is more

fully briefed below.

11). Appellants challenge CL #11, without argument or authority, inferentially arguing that judgment should not be entered in favor of the Respondents, but rather to them.

b. Effect of the 1983 Stipulation on these parties.

Appellants' Brief at pages 21-26, sets out their argument that the 1983 Stipulation (Ex. 4) between the Thompson Estate and Hubbard should be enforced as binding on the present parties. The last sentence of the Stipulation, which the Clinefelters ask this court to apply here, reads: "This agreement shall be binding upon the heirs, successors and assigns of the parties hereto".

No parties' signature was notarized; the document did not convey an interest in real property, as the Clinefelters contend, for failure to comply with the Statute of Frauds, RCW 64.04.020, by lack of acknowledgment in the form required of deeds.

The document was not recorded as required by RCW 65.08.070, which provides in relevant part:

> "A conveyance of real property, when acknowledged by the person executing the same (the acknowledgment being certified as required by law) may be recorded in the office of the recording office of the county where the property is situated. Every such conveyance not so recorded is void as against any subsequent purchaser or mortgagee in good faith and for a valuable consideration from the

same vendor, his or her heirs or devisees, of the same real property or any portion thereof whose conveyance is first duly recorded. - - "

Unchallenged Findings of Fact 11 and 12 (CP 064) are verities on appeal, and set out that: neither the Clinefelters nor Uphoff/Burnell were aware ("actual notice") of the 1983 Stipulation prior to 2011; that the Stipulation was not reduced to judgment; and that the Stipulation was not recorded (for "constructive", or "record", notice).

It must also be remembered that until 2011, no owner of property abutting vacated Swan Street (including in 1983) had a contemporary survey on which to base their application of the 1983 Stipulation, had they known of it, and there remains an irreconcilable question whether the 1983 Stipulation was based on the ancient fence as marked by an existing survey monument found precisely at its South end in the 2011 survey (Ex. 10, page 1, at Vol. 35, p. 421), or the unrecorded ancient survey, or some other reference point lost in history for lack of recording.

Unchallenged Findings of Fact 16-18 (CP 065) clarify that the Clinefelters' 2011 Olsen Survey (Ex. 10) placed in dispute just where the old fence was in reference to the disputed centerline of vacated Swan Street (which the trial court was unable to resolve at this trial (CL 4, CP 066)), and thus there was a basis for the trial court to rely on the known location of the fence, rather than on the disputed centerline marking the

disputed area, as a point of resolution of the dispute. In that sense, the 1983 Stipulation is of no use to anyone in interpreting what the 1983 parties to litigation agreed upon.

The Clinefelters argue caselaw to points of the binding effect of stipulations in litigation on the parties thereto, none of which have any application here. We have reviewed each case, and observe before we review them that none of them, and no other authority we have found, is on point with the Clinefelters attempt to bind Mr. Severson, Mr. Uphoff and Ms. Burnell to the 1983 Stipulation.

Simply, none of the Clinefelters' authorities, and no other authority we have found, bound subsequent owners of property to a prior stipulation in court of which no present party was individually a party or signator and had neither actual nor constructive notice of the prior litigation or the stipulation which settled it.

Each of the Clinefelters' cited cases on stipulations involved the very same parties to a prior stipulation and a present dispute, and/or present parties with actual or record notice of the prior stipulation and its application to the claims in present litigation.

Baird v. Baird, 6 Wn.App. 587, 494 P.2d 1387 (1972): Cited at Appellant's Brief (App.Br.) pp. 24, 25 for the general rule that the function

of the trial court is to implement stipulations conforming to CR 2A and RCW 2.44.010, and that only if fraud, mistake misunderstanding or lack of jurisdiction is shown will a judgment by consent be reviewed on appeal. FACTS: Divorce case; husband and wife reached agreement at trial on property distribution, which was entered in Findings of Fact, Conclusions of Law and Divorce Decree. The wife then challenged the stipulation. Denied, affirmed on appeal. There were no questions of fraud, mistake misunderstanding or lack of jurisdiction involved. Distinction from the present case: There, the same parties were involved in both the stipulation and the litigation over it, and there was an entry of judgment of record.

Cook v. Vennigerholz, 44 Wn.2d 612, 269 P.2d 24 (1954): Cited at App. Br. 23, 24 and 25 for general rules that even oral stipulations made in open court and entered in the court record are binding upon the parties and the court. FACTS: Partnership dissolution; an oral stipulation made in open court and assented to by the parties was held binding on those parties and the court. Distinction: There, the same parties were involved in the stipulation, and in the subsequent litigation over its enforceability.

DeLisle v. FMC Corp., 41 Wn.App. 596, 705 P.2d 283 (1985): Cited at App. Br. 23 and 24 for the general rule that stipulations conforming to CR2A are binding absent fraud, mistake, misunderstanding or lack of

jurisdiction and are binding on the parties to them. FACTS: Wrongful termination suit. Erroneous oral stipulation that a 2-year statute of limitations applied when it was actually within a 3-year statute. It was not a stipulation enforceable under CR 2A. Distinction: There the same parties were involved in making the stipulation and in the litigation over its effect.

Eddleman v. McGhan, 45 Wn.2d 430, 275 P.2d 729 (1954): Cited at App. Br. 22 for the rule that CR 2A's purpose is to avoid disputes and give finality and certainty to settlements and compromises. FACTS: A disputed agreement of compromise and settlement was not enforceable, because it did not comply with the rule requiring writing and subscription by the parties. The case is not authority for any argument made by Appellants Clinefelter, other than as a headnote cite of a general rule. Distinction: Again, parties were the same to the underlying case and the stipulation.

In Re Feree, 71 Wn.App. 35, 856 P.2d 706 (1993): Cited at App. Br. 23 for the general rule that CR 2A supplements, but does not supplant, the common law of contracts. FACTS: In a dissolution action, a structured settlement was not reduced to writing nor put on the record of the trial court. The parties then disputed the settlement, and the trial court upheld it and entered the findings and decree adopting the structured settlement. On appeal, Division 2 affirmed holding that the settlement conformed to CR2A.

Distinction: The parties disputing the settlement were the same people who entered into the agreement.

Howard v. Dimaggio, 70 Wn.App. 734, 855 P.2d 335 (1993): Cited at App.Br. 23 for the general rule that CR2A and RCW 2.44.010 give certainty and finality to settlements and compromises. FACTS: Personal injury case; attorneys for plaintiff and defendant negotiated a settlement (subject to Plaintiff's approval). Defendant's insurance carrier paid Plaintiff's carrier for subrogated claims but Plaintiff then refused to sign the settlement, and Defendant's counsel filed a motion to enforce the settlement which the trial court granted, ordered Plaintiff to sign the documents, and dismissed the case with prejudice. The Court of Appeals reversed, as the settlement did not conform to CR2A. Distinction: There, the litigants were the same parties to the stipulation and the litigation to enforce or withdraw it. Case is not on point.

In Re Estate of Jussaud, 71 Wn.2d 87, 426 P.2d 602 (1967): Cited at App. Br. 25 for the general rule that a comprehensive stipulation dictated into the record, with a judgment entered and no appeal taken from the judgment, was binding on the parties. FACTS: Partition action with a detailed stipulation of partition of a large land holding was dictated into the record, and heirs and attorneys agreed to it in court. It was later transcribed

and signed by all attorneys. A decree (judgment) was entered of record and approved by counsel and no one appealed it. A party to the agreement filed a petition to correct the decree, dismissed in the partition action and denied in the probate matter on the same basis. Affirmed. Distinction: There, the same parties in the partition action, the probate, the stipulation and entry of the judgment based on the settlement, were bound by it.

Lasell v. Beck, 34 Wn.2d 211, 208 P.2d 139 (1949): Cited at App.Br. 24 for authority that a stipulation entered into open court providing for the sale of real property may be held binding. FACTS: Plaintiff got a $390.00 default against defendants. Defendants moved to vacate the judgment on lack of service. Trial court found that defendants had been served but that the default judgment should be set aside and the case sent to trial on the merits. Both counsel demanded a jury trial and prepared, but neither ever submitted an order setting aside the judgment. At trial it was discovered that the default had not been set aside, and plaintiff moved to reinstate the default judgment. The court entered an order denying the motion to vacate the default judgment, and defendant appealed. The default judgment was affirmed, because the oral ruling that the default should be set aside was never entered with an order, was not final until an order was entered, and plaintiff's counsel had never assented on the record to having it

set aside. There was no stipulation to enforce under Rule 10. Distinction: The case had nothing to do with a stipulation to sell real property. Again, the parties to attempted enforcement of the alleged stipulation were the same people as those alleged to have made it, not subsequent parties thirty years later without notice of it. The case is simply not on point.

Mayo v. Mayo, 75 Wn.2d 36, 448 P.2d 926 (1968): Cited at App.Br. 23 in a string cite with Washington Asphalt Co. V. Harold Kaeser Co. (Infra, full citation below) for the general rule that stipulations are construed as a contract between the parties to them. The case does not seem to stand for the proposition asserted, even as a headnote cite. In an unsuccessful appeal of a bitterly disputed divorce, objecting to the trial court's valuation and distribution of property, we do not find any reference to a stipulation, a contract, an agreement or settlement on any point in controversy between the parties, let alone attempted enforcement of a stipulation of record. It was the same parties at trial and on appeal.

In Re Estate of Stockman, 59 Wn.App. 711, 800 P.2d 1141 (1990): Cited at App. Br. 24 for the argument that neither RCW 11.96.070 pertaining to judicial proceedings for determination of rights, nor RCW 11.96.130 (now repealed) pertaining to judgments and probate or trust proceedings, provide a means for bypassing the Rule approving stipulations

in open court requiring conveyance of real property despite the provisions of the Statute of Frauds. FACTS: Probate case involving distribution of property; the trial court determined that real property was separate property of deceased husband, and the widow appealed. Reversed and remanded. A son contended there had been a stipulation to a resolution of the matter at a hearing on affidavits, while the widow (who had lost on a motion on affidavits) contended there had been no such stipulation. There was no record of such a stipulation, and resolution of the factual issues at hearing was held improper under CR 2A. Distinction: There was no valid stipulation to convey property without compliance with the Statute of Frauds under the Rule between the original parties to enforce, even between the original parties; the citations to the statutes were in a footnote explaining the cause of action there, and the case does not stand as precedent for the concept that an unrecorded stipulation (not reduced to judgment) entered in a dismissed case 30 years old, involving different litigants, would be binding on subsequent litigants of a disputed parcel of land where none of them had actual or record notice of the ancient stipulation and were not parties to it.

Shine v. Nabob Silver Lead Co., 163 Wn. 577, 1 P. 2d 864 (1931): Cited at App. Br. 25 for the general rule that when the language of a

stipulation is plain, there is no need for judicial construction. The case is not on point here. FACTS: Action for recovery for services and money advanced on three causes of action, and cross-claims for money allegedly owed, and for an accounting and judgment. The matter of judicial construction had to do with reservation to the parties of some of their claims and defenses, and the rule was applied to result in an open-ended right to defend by respondent. It had nothing to do with conveyance of land. Distinction: The case involved the same parties, in the same series of claims and cross-claims, and in the stipulation to which both had been bound by agreement of their counsel in open court, etc.. There was no issue of third-party descendants in title without actual or record notice of the predecessor's stipulation.

Smythe Worldwide Movers Inc. v. Whitney, 6 Wn.App. 176, 491 P.2d 1356 (1971): Cited at App. Br. 22 for the general rules that CR 2A recognizes the right of parties to an action to resolve the action by stipulation, that stipulations are favored and will be enforced if reasonable, and as a case upholding a stipulation between the parties regarding sale of real property on foreclosure (without adherence to the Statute of Frauds, we assume being the point): FACTS: The action had to do with the attempted enforcement of a right of redemption by the assignee of one of

the original parties, under a judgment of record, where there was a stipulation between the original parties permitting the right of redemption. The Court of Appeals upheld the stipulation to a right to redemption by the assignee. It was valid for the parties to the original litigation to stipulate to amendment of the judgment. **Distinction:** There, although the buyer at the foreclosure sale who challenged the stipulation was not a party to the original litigation, everyone else was a party to the stipulation, which had been entered as a judgment for record notice to the buyer, who was in direct contract privity with one of the parties to the stipulation. Distinction: Here, the parties were all different, the stipulation was not reduced to judgment nor recorded, and the current parties had no knowledge of the thirty-year old stipulation in a dismissed case.

Snyder v. Tompkins, 20 Wn.App. 167, 579 P.2d 994, *rev. den.* 91 Wn.2d 1001 (1978): Cited at App. Br. 21, 24, for the general rule that courts favor settlements, and arguing that the rule prevails despite the Statute of Frauds in RCW 64.04.020. FACTS: Executor of estate sought unsuccessfully to set aside a judgment directing her to convey property of the estate to the plaintiff, based on a compromise and settlement between the opposing attorneys. Distinction: There, it was the same parties in the settlement, and the litigation over it, and there was a judgment of record

incorporating the settlement.

Washington Asphalt Co. V. Harold Kaeser Co., 51 Wn.2d 89, 316 P.2d 126, 69 A.L.R. 2d 752 (1957). Cited at App. Br. 23, 25 for the rules that a stipulation of parties is construed as a contract between them embodying the terms thereof, and that only if there is fraud, mistake, misunderstanding or lack of jurisdiction will a judgment by consent be reviewed on appeal. FACTS: Litigation between a subcontractor and its general; the trial court entered a finding of fact that there had been a stipulation between those parties in open court to entry of a judgment in favor of the subcontractor in a sum certain with an award of attorney's fees, and such a judgment was entered. On appeal, the primary issue was whether the appeal was brought only for the purpose of delay, as there were no indicia of fraud, mistake, misunderstanding or lack of jurisdiction and the judgment was upheld with an award of damages on appeal to the respondent subcontractor. Distinction: Again, the very same parties were involved in the litigation, the settlement/stipulation/entry of judgment, and in the subsequent litigation over enforceability of the judgment.

Despite all the above on the binding effect of stipulations, there is no caselaw found binding non-parties without actual or record notice of past stipulations to the agreements of their predecessors, despite language in the

prior agreement that it be binding on heirs, successors and assigns. The Clinefelters cannot overcome the long-standing effect of the rules on record notice.

c. Constructive, or "record", notice

The purpose of recording instruments relating to title to real property is to provide constructive ("record") notice to subsequent purchasers and owners of interests in the property, to bind them to the information revealed in the record whether or not the subsequent claimant in fact has actual knowledge of that information. Lincoln County State Bank v. Martin, 112 Wn. 186, 191 P. 815 (1920). A purchaser of real property who is without actual or constructive ("record") notice of another's claimed interest in the property is not bound by that other party's interest. Tomlinson v. Clarke, 118 Wn.2d 498, 825 P.2d 706 (1992).

There is nothing in the trial record to give Respondents Uphoff and Burnell even constructive notice, let alone actual or record notice, of the 1983 Stipulation, and they are not bound by it.

And try as they might by confusing the issues, there is no legal basis for the Clinefelters to try to apply the 1983 Stipulation to Dennis Severson, who may arguably have known of some thirty-year-old easement agreement between two of his past neighbors, one of whom was his sister-in-law, but

he was never a party to it, nor was there evidence that even he knew where the disputed boundary would be when surveyed for the Clinefelters in 2011.

The argument regarding binding effect of the 1983 Stipulation fails as a matter of law, based on undisputed fact.

d. Res judicata

Appellants Clinefelter frivolously attempt to bar Respondents Severson and Uphoff/Burnell from litigating their adverse possession claims in this case, based on a distorted argument that they are parties to the prior 1983 litigation by privity to the original litigants thirty years ago when the present claims ought to have been litigated, or were litigated and were settled with the Stipulation. We believe they even attempt to apply the doctrine of *res judicata* to Dennis Severson, a non-party to the Stipulation, but it fails as against either Respondent.

Res judicata is a specific affirmative defense, which "shall" be pleaded in the parties' trial court pleadings (CR 8(c). It was not pleaded in the Clinefelters' trial "Answer and Counterclaims" (CP 016) and was not preserved as a trial issue. It was not briefed in Defendants' Trial Brief (CP 040-051.

An appellate court may refuse to review any claim of error which was not raised in the trial court, unless the party alleging error for the first

time on appeal can raise: (1) lack of trial court jurisdiction; (2) failure to establish facts upon which relief can be granted; or (3) manifest error affecting a constitutional right. RAP 2.5(a)

The Clinefelters have not, and cannot, establish any of those exceptions, and this Court must preclude review of the issue as one raised for the first time on appeal. Hoflin v. Ocean Shores, 121 Wn.2d 113, 131, 847 P.2d 428 (1993).

In the opening colloquy of the trial, at RP I-4 through I-7, Appellants' counsel made an oral motion for a ruling on the pleadings under CR 12 on the grounds that the present parties should be bound by the 1983 Stipulation, but the trial court considered it as an oral motion for summary judgment and denied it; *"res judicata"* does not appear in the transcript.

Again, in final argument, at RP III 20- 32, Appellants' counsel argued that the present parties should be bound by the 1983 Stipulation (although none of them had ever heard of it before the dispute arose in 2011), and again *"res judicata"* was not mentioned. It does not appear in the Defendants' Trial Brief (CP 40-51).

The trial court must have an opportunity to consider and rule upon a litigant's theory of the case before the appellate court will consider it upon appeal. A failure to preserve a claim of error by presenting it first to the

trial court generally means the issue is waived. Bellevue Sch. Dist. No. 405 v. Lee, 70 Wash.2d 947, 950, 425 P.2d 902 (1967); RAP 2.5(a).

A party who does not plead a cause of action or theory cannot insert the theory into later and contend it was in the case all along. In determining whether the parties impliedly tried an unpleaded issue, the appellate court will consider the record as a whole, including whether the issue was mentioned before the trial and in opening arguments, the evidence on the issue admitted at trial, and the legal and factual support for the trial court's conclusions regarding the issue. Dewey v. Tacoma Sch. Dist. No. 10, 95 Wash.App. 18, 26, 974 P.2d 847 (1999).

Appellants wholly failed to preserve the issue of *res judicata* for review on appeal, and although we have reviewed all cases cited in "Appellants' Brief" on appeal, we find no authority permitting them to raise that issue here.

Out of an excess of caution, we will respond to the Clinefelters' citations of authority for *res judicata*, and distinguish their citations from the case on review.

Application of *res judicata* requires identity between a prior judgment and a subsequent action as to (1) persons and parties, (2) causes of action, (3) subject matter, and (4) the quality of persons for or against

whom the claim is made. *Res judicata* also requires a final judgment on the merits. Karlberg v. Otten, 280 P.3d 1123, 167 Wn.App. 522 (Wash.App. Div. 1 2012).

There was never a judgment in the 1983 Stipulation case, Jefferson County Superior Court #10880; the causes of action were different (for instance, the present case was largely dependent on acts of occupation occurring between 1983 and 2011 and involved a new disputed survey) and there was no transactional relationship between the 1983 parties and the parties owning the properties in 2011.

Godfrey v. Dep't of Labor and Industries, 198 Wn. 71, 86 P.2d 1110 (1939), is cited at App.Br. 28, for the rule that a judgment dismissing an action based upon a stipulation of the parties, settling and adjusting the subject matter of the action and agreeing to its dismissal, is a bar to subsequent action on the same cause. It is distinguished on its facts from the present case: It involved the very same people, the very same claim, and was a subsequent action for the same cause as was being prosecuted in the case which the parties had stipulated to dismissing as being settled. There was a judgment entered based on the settlement. In the present case, none of the same people were involved, none of them knew about the ancient settlement, and the 1983 case was not dismissed based on the settlement nor

was there a judgment or anything of record to give present parties actual or record notice of it.

Kuhlman v. Thomas, 78 Wn.App. 115, 897 P.2d 365 (1995), is cited at App. Br. 27 for the headnote rule that different defendants between suits are viewed as the same party as long as they are in privity. (Cf.: Omitted from Appellants' citations are the court's other rulings that dismissal of an action on the basis of res judicata is appropriate where the moving party proves a concurrence of identity between the two actions in four respects: (1) persons and parties, (2) cause of action; (3) subject matter; and (4) the quality of the persons for or against whom the claim is made.) Also, there must be a concurrence of identity between the parties to two actions where privity exists between the parties so that the parties may be viewed as sufficiently the same, if not identical. And, the criteria to be considered in determining whether res judicata applies are: (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 transactional nucleus of facts.

In Kuhlman (involving three actions filed by the same plaintiff

against different sets of defendants, but all relating to the same fact pattern), the defendants in the various suits were considered to be in privity with each other because all the claims should have been litigated in one action, arising as they did out of one transactional situation; employers and employees are considered to be in privity on the same transaction. There was identity of causes of action because both lawsuits arose out of the "same transactional nucleus of facts" (78 Wn.App. at 123); the evidence to support each action was identical, and the suits alleged infringement of the same rights.

Distinction: In Kuhlman, all of the litigation had to do with the same situation in a given time period, involving the same parties and the same evidence of the same transactional nucleus of facts, so that all the parties would have known of the same set of facts and related claims. The rights or interests established in Kuhlman I would be impaired by prosecution of the second action.

Here, the 1983 Stipulation led the then-parties to settlement of their claims of ownership of underlying fees to a platted centerline of a publicly-vacated street, and agreement to continuing easement rights on the vacated street, but their action was not litigated to judgment and the stipulation was not recorded. Subsequent purchasers of both sides of the vacated street then had no actual or record notice of the prior litigation and settlement,

none of them were involved in the prior litigation or settlement, and the present claims had to do with claims of adverse possession against the underlying fee of land within the vacated public right of way based on facts arising after the 1983 Stipulation (subject to the remaining mutual easement rights, the scope and extent of which the trial court here declined to determine in this action). This case also involved a disputed 2011 survey which started the dispute over the location of the centerline of the vacated public street. This case involved a different transactional situation from the 1983 litigation, and *res judicata* does not apply.

Meder v. Meder, 7Wn.App. 801, 502 P.2d 1252 (1972), *rev. den.* 81 Wn.2d 1011 (1973): Cited at App.Br. 26 in a string cite with Schoeman, *infra,* for the doctrine that a plaintiff is barred from litigating claims that either were, or should have been, litigated in a former action. FACTS: An action to rescind a real estate contract was dismissed on conclusions and a judgment entered that there had been no showing of fraud on which to rescind the contract, appealed and affirmed on appeal. The same plaintiff then sued all the same defendants for accounting, cancellation and rescission of the contract setting forth new grounds for such relief, waste, etc. which had not been raised in the fraud rescission suit. Affirmed in part, remanded in part where different evidence would be required to resolve different

issues with no identity of facts to prove the grounds for the failed rescission (i.e., issues on which there was a lack of identity of cause of action). Distinction here: This case involved lack of identity of causes of action; it could not have been litigated before the 2011 survey.

The Meder case also noted that *res judicata*, based on the entry of a judgment in the prior case, is an affirmative defense which must be pleaded in the subsequent action." 7 Wn.App at 806

Schoeman v. New York Life, 106 Wn.2d 855, 762 P.2d 1 (1986): Cited at App.Br. 26 for the doctrine that a plaintiff is barred from litigating claims that either were, or should have been, litigated in a former action. FACTS: Widow of murdered artist sued insurer for wrongful death based on a claim that it negligently issued a keyman life insurance policy on her husband which led to his death; dismissed based on *res judicata* and affirmed. The insurer had filed an interpleader in USDC (W. Dist. WA) to resolve insurance proceeds, naming as possible claimants the widow, her husband's estate administrator, a promoter, a manufacturer of the artist's works and a creditor. Widow had filed cross-claims against the promoter and manufacturer, but not against the Insurer interpleader who sought and obtained discharge from the action as a party litigant, tendering the payment of the policy and interest etc.. After settlement of the interpleader, widow

sued the Insurer contending that its negligent issuance of a keyman policy when her husband no longer had an insurable relationship to the others led someone to hire a hit man to kill him. Held that the claim was barred by *res judicata*, as there was identity of the parties, causes of action, the same transactional situation, and a judgment in the prior case, noting at 106 Wn.2d at 860: "Res judicata requires a final judgment on the merits."

Sodak Distributing Co. v. Wayne, 77 S. D. 496, 93 NW (2d) 791 (1958): Cited at App.Br. 27 for the doctrine that where the parties to current litigation are successors in interest to the same real estate as in a prior litigated case, and the litigation is over the same subject matter, there is privity between successors in real estate ownership. Privity within the meaning of Res Judicata is privity as it exists in relation to the subject matter of the litigation and specifically includes parties claiming real estate under the same title. The binding effect of the former adjudication flows from the fact that when the successor acquires an interest in the property it is then affected by the prior adjudication in the hands of the former owner. The case is clearly distinguished from the present case in that, here, the facts the trial court found sufficient of the Respondents Uphoff/Burnells' adverse possession of the Clinefelters' underlying fee to the vacated street occurred after the 1983 Stipulation (and the parties were not in privity based on

knowledge of the earlier agreement either). And Respondent Severson was not a successor to anyone in the 1983 Stipulation or litigation.

And, Woodley v. Myers Capital Corp., 67 Wn.App. 328, 835 P.2d 239 (1992), *rev. den.* 212 Wn.2d 1003 (1993), cited at App.Br. 27 in a string cite for the rules on privity set out in Kuhlman above. "The identity of parties or privies element of the doctrine of res judicata is satisfied when each parties' interests regarding the dispute litigated in the later action were adequately represented in the earlier action." That case is distinguished from the present one, as nothing in the 1983 Stipulation addressed or resolved the subsequent adverse possession facts as to the Clinefelters' portion of the underlying fee West of the fence to the vacated centerline.

This court must deny Appellant any relief related to the *res judicata* issue, which was not presented to the trial court, was not preserved on appeal, and was clearly inappropriate in the present appeal in which it has no reasonable possibility of affecting the outcome.

d. Tacking, for adverse possession

At Appellants' Brief pp. 32-34, they note that Respondents Uphoff and Burnell may not use prior acts of occupation of their present land by Hubbard for tacking of uses for their own adverse possession, and that Hubbard should be estopped from asserting adverse possession because of

the 1983 Stipulation. They are correct on that non-controlling point. It was a drafting error for Respondents' counsel to insert the phrases "from 1977 to 2011", and "their predecessors Hubbard - - - " into our Conclusion of Law 7 (CP 066). As noted about, witness Hubbard had been a party to the 1983 Stipulation to a prior lawsuit and had agreed individually to be bound by it.

Correcting that error, the phrase in CL 7 (CP 066) should read: "By a preponderance of the evidence, Plaintiffs Uphoff and Burnell had, for more than ten years prior to litigation herein, from 1990 to 2011, by tacking to uses and occupations of their predecessors Kronquist and Myers - - -", and the same testimony on which the trial court relied for that Finding leaves it still intact for the elements of adverse possession.

f. Evidence of Adverse Possession

In addition to Exhibits 14, 15, 15A, 16, and 16A, Exhibit 14A is a particularly useful view of the disputed area at the time litigation commenced (See RP I-42 line 17 to RP I-55 line 23), looking West along the Severson property in the foreground, to the Uphoff/Burnell property in the background with the chicken coop built for Uphoff/Burnell with their permission by Mr. Clinefelter, and the utilities poles in the easement to the left. Objects to the right of the cleared area belong to Mr. Severson, and

the old pre-1977 fence is visible at the edge of the clearing to the right. Mr. Severson testified that the cleared area had been maintained so by him for over thirty years, except for some undergrowth left around the base of the large fir tree, and that the Thompson (now Clinefelter) property to the right of the old fence had been left un-maintained for all those years. No one from the old Thompson (now Clinefelter) property had ever used the disputed area for ingress, egress and drainage. He testified that in the thirty-plus years since he bought his property, the easement in the photo area had been used exclusively by occupants of his property and that of Uphoff/Burnell.

Mr. Severson testified without contradiction that the ancient fence had been built prior to 1977 by the late Ted Thompson when he owned all the land in present dispute, and treated it as common boundary with his neighbors thereafter.

Although the trial court did not rely on it for its final decision, there were facts before it on which it could have resolved this case based on Location by Common Grantor. The common grantor doctrine is based on the special relationship between the original grantee and the common grantor. The common grantor doctrine recognizes the original grantee's good faith reliance on the boundary description provided by the common

grantor who originally owned both lots in their entirety and thus had it completely within his power to determine the location of that boundary. Thompson v. Bain, 28 Wash.2d 590 at 592-93, 183 P.2d 785 (1947). It is for this reason that subsequent grantees of the common grantor are bound by the location of that boundary, as long as it is apparent by a visual examination of the property. Thompson, 28 Wash.2d at 592-93, 183 P.2d 785.

Where an agreed boundary was established between a common grantor and the original grantee, and a structure (usually a fence) has been erected to mark that boundary, that is sufficient to indicate to subsequent purchasers that its purpose is to demarcate the boundary line, and that boundary is binding on subsequent grantees. Levien v. Fiela, 79 Wn.App. 294, 902 P.2d 170 (1995); cf. Winans v.Ross, 35 Wash.App. 238, 240-41, 666 P.2d 908 (1983); Fralick v. Clark Cy., 22 Wash.App. 156, 159, 589 P.2d 273 (1978), review denied, 92 Wash.2d 1005 (1979).

A formal or specific agreement is not required. Winans, 35 Wash.App. at 241, 666 P.2d 908. Rather, agreement or meeting of the minds between the common grantor and the original grantee may be shown by the parties' manifestations of ownership after the sale. Winans, 35 Wash.App. at 241, 666 P.2d 908.

Based on only slightly different sets of facts (Mr. Severson was not a party to the 1983 Stipulation so that his occupation dates back to 1977 continuously to the present, and Uphoff/Burnell can tack their occupation only back to 1990 based on Kronquist and Myers as described by Mr. Severson), these parties have established the elements of adverse possession by a preponderance of the evidence.

In order to establish a claim of adverse possession, there must be possession which is:

(1) open and notorious;

(2) actual and uninterrupted;

(3) exclusive, and

(4) hostile in the legal sense to the rights of the true owner, and Possession of the property with each of the necessary concurrent elements must exist for the statutorily prescribed period of ten years. RCW 4.16.020. ITT Rayonier v. Bell, 112 Wn.2d 754, 774 P.2d 6 (1989).

And, although as a general rule, one cannot adversely possess against an easement, and the disputed portion of a vacated street retains an implied easement of right of way to an adjacent lotowner, the holder of the reversionary interest in a vacated street acquires a vested right in the land, and the fee of the underlying land is subject to adverse possession under

appropriate facts. Erickson Bushling v. Manke Lumber, 77 Wn.App. 495, 691 P.2d 750 (1995); Kiely v. Graves, 173 Wn.2d 926, 271 P.3d 226.

Thus, in the present case where the Thompson Estate, and the Clinefelters as successors, without actual knowledge of where the vacated street was until 2011, submitted to the continuous and exclusive occupation South of the ancient fence, gave the trial court the discretion to treat it as an adverse possession to Dennis Severson, Mr. Uphoff and Ms. Burnell, settling quiet title to the fee underlying the easement as established by use and need.

In the trial court, and here, Appellants fail to make the distinction between adverse possession of the underlying fee, and interference with the existing easement which has not occurred (although the scope and location of that easement was not determined by the trial court).

D. CONCLUSIONS

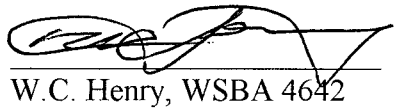
Appellants Clinefelter have not preserved valid challenges to the Findings of Fact and Conclusions of Law on appeal; unchallenged Findings of Fact support the Conclusions of Law together with substantial evidence to support the trial court's challenged Findings, and the Conclusions of Law support the trial court's judgment of adverse possession to Dennis Severson, and to Kenneth Upfhoff and Christine Burnell, husband and wife.

A 1983 Stipulation in Jefferson County Superior Court #10880, between the Thompson Estate as predecessor to the Clinefelters, and the Hubbards as predecessors to Mr. Uphoff and Ms. Burnell, is not binding upon any present party. Dennis Severson was never a party to it, and all other present parties had no actual nor constructive ("record") notice of it when they acquired their properties and until after the periods had accrued for the present causes of action

Res Judicata has no application to the present case and was not preserved as an issue in the trial court for review.

The Judgment of Quiet Title to Plaintiffs Severson, Uphoff and Burnell respectively should be affirmed, and costs and attorneys fees on appeal awarded to them against Appellants Clinefelter. RAP 18.1.

Submitted this 21st day of August, 2014.



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JEFFERSON COUNTY

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STEPHEN W. GILLARD
COURT COMMISSIONER

CAUSE NO. 11-2-00206-2

CD#. 191-2013 TIME: 10:33:20-10:53:50

CASE TITLE: Dennis Severson et al vs. Brad + Suzanne Clinefelter

W. C. Henry — Marion "Ted" Knauss

(Counsel for Plaintiff/Petitioner) (Counsel for Defendant/Respondent)

Findings of Fact Conclusions of Law

Court calls case all parties present.
Mr. Henry address court + Mr. Knauss.
Parties addressing Findings of Fact Conclusions of Law.
Page 2 #16, Page 3 #12, #19, Page 6 #9
Court strikes number 12 / also #3
Mr. Henry will prepare final Order, get it to Mr. Knauss for his approval and have it signed off recorded by the Court.

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SCANNED

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

DENNIS SEVERSON, et.al. **Respondents** **vs.** **BRAD A. CLINEFELTER et.ux.** **Appellants.**	**NO. 45596-II-0** **DECLARATION OF SERVICE**

I, W.C. Henry, declare as follows:

That I am a citizen of the United States of America, over the age of 18 years, and competent to be a witness.

That on the 22nd day of August, 2014, I deposited in the United States mail, postage prepaid, addressed as follows:

Ted Knauss, Attorney at Law
Peninsula Law Firm PLLC
203 W. Patison Street Suite A
Port Hadlock WA 98339-8701

copies of the following document entitled in the above cause:

Respondents' Brief on Appeal

I declare at Port Townsend, Washington, on August 22, 2014 under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

W.C. Henry, WSBA 4642
Attorney for Respondents

W.C. Henry and S. J. Allen
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