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Division I  
State of Washington

73457-1  
Case # 73457-1-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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VAN NHU HUYNH, *Respondent*,

v.

LEUNG HING LI, *Appellant*,

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BRIEF OF APPELLANT

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## **I. ASSIGNMENTS OF ERROR**

### **Assignment of Error No. 1**

The trial court erred by granting Respondent Van Nhu Huynh ("Huynh") 's motion for summary judgment on the ground that Huynh had acquired title to real properties jointly owned with Appellant Leung Hing Li ("Li") through adverse possession.

### **Issues Pertaining to Assignment of Error No 1**

Whether the trial court failed to apply the correct standard of proof, clear and convincing evidence, to Huynh's claim of adverse possession against her cotenant, Li.

Whether a co-tenant can acquire title through adverse possession to a jointly owned property by collecting rents and paying taxes.

Whether mere knowledge of a co-tenant out of possession of the fact of the other co-tenant's possession can be converted into proof of a hostile claim.

Whether the court relied on disputed facts in granting the motion for summary judgment.

Whether the ten year statute of limitations ran on Li's cross claim for partition and accounting.

### **Assignment of Error No. 2**

The trial court erred in denying Li's motion to continue the hearing on the motion for summary judgment so Li could complete discovery.

## **Issues Pertaining to Assignment of Error No 2**

Whether Li had a good reason for the delay in completing discovery prior to the hearing on the motion for summary judgment.

Whether Li identified additional evidence that could be obtained through Li's pending discovery.

Whether Li's pending discovery and anticipated second session of Huynh's deposition could raise genuine issues of material fact.

## **II. INTRODUCTION**

This case arises out of a dispute between Li, and his ex-wife, Huynh, over the ownership of three real properties jointly owned by Li and Huynh. Li and Huynh were married from 1980 to 1987. Li acquired the first jointly owned real property in 1979, before the parties' marriage, in his own name. After their divorce Li and Huynh continued to live together until 1997.

In 1988, Li and Huynh acquired the second jointly owned real property, as "husband and wife", despite the fact that they had been divorced. In 1991, Li and Huynh acquired the third jointly owned real property as "husband and wife". In 1997, Li left Washington State and moved to New York with his new wife. From 1997 to 2011 Huynh never took any overt action that put Li on notice that Huynh was claiming the three real properties as her own or that she did not recognize Li's interest in their jointly owned property. In 1998, Huynh sent Li a property expense break down for the subject real properties so he could report the property expenses on his tax return. In 2000 Huynh also shared the sales proceeds of one of their jointly owned real properties with Li.

In 2011 Huynh requested that Li transfer title to the three subject real properties to her. When Li refused, Huynh filed an action for quiet title against Li in September 2012 on the ground that Huynh had contributed all the money toward the purchase of the subject properties. Li subsequently filed a cross claim against Huynh for partition of the three subject real properties and an accounting.

In April 2015 the trial court granted Huynh's motion for summary judgment on Huynh's complaint and Li's cross claims on the grounds that Huynh had acquired title to the three jointly owned subject properties through adverse possession against Li.

Li now asks this Court to reverse the trial court's ruling on Huynh's motion for summary judgment and permit Li to complete his discovery regarding Huynh's adverse possession claim.

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

#### **A. LI purchases the Letitia Property in 1979 before Marriage**

On March 23, 1979, prior to the parties' marriage, Li purchased the real property located at 4431 Letitia Ave. S., Seattle, WA 98118 (the "Letitia Property") in his own name using his own income. See Declaration of Leung Hing Li ("Li Dec.") at paragraph 2, Clerk's Papers ("CP") transmitted under Appeal No. 07-01-2015I (235 pages) at page 54. Also see grant deed for the Letitia Property to Li attached to the Li Dec. as Exhibit "1", CP 64. The Letitia Property was the first of the three real properties acquired by the parties that are the subject of the above captioned action. Li married Huynh in September 1980 and they lived at the Letitia Property from 1980 to 1993. See Li Dec. at paragraph 3, CP 55.

**B. LI and HUYNH start Asia Discount Center during Marriage**

During their marriage, Li and Huynh started a wholesale grocery business called Asia Discount Center ("ADC") and a furniture store called United Imports. ADC began doing business in 1982 and United Imports began doing business in July 1987, four months before the parties' divorced in November 1987. See Li Dec. at paragraph 3, CP 55. During their marriage ADC was the community property of Li and Huynh. See Deposition of Huynh ("Huynh Depo.") at page 19, lines 1-12, attached as Exhibit "1" to the Declaration of Glyn E. Lewis ("Lewis Dec."), CP 112, and Li Dec. at paragraph 5, CP 55.

Although, the parties' divorce decree provided that the proceeds from the sale of ADC would be divided equally between Li and Huynh, ADC was never sold and the parties continued to live and do business together. See Divorce Decree attached as Exhibit "2" to the Li Dec, CP 66-70. To this very day ADC was never been sold and has never ceased operating. See Li Dec. at paragraph 5, CP 55.

**C. LI gives HUYNH a general power of attorney in April 1987**

In April 1987 Li gave Huynh a general power of attorney to handle his financial affairs. A true and correct copy of the general power of attorney is attached to the Li Dec. as Exhibit "11", CP 90-91. Li gave Huynh the general power of attorney because Li spent much of his time traveling to China on business and Huynh had more time to devote to handling Li and Huynh 's financial affairs. See Huynh Depo at page 45, lines 9-13, Ex. 1 to Lewis Dec., CP 121, and Li Dec at paragraph 25, CP 60-61.

After the parties divorce in 1987 Huynh continued to handle Li's financial affairs and Huynh was the point of contact with the parties' accountant until 1997. See Li Dec at paragraph

25, CP 60-61. The general power of attorney was still in effect when Huynh filed the above captioned complaint for quiet title in 2012. See letter from Huynh's former attorney, dated May 17, 2012, attached as Exhibit "9" to Li Dec., CP 85-86. Moreover, the power of attorney was never revoked by either party. See Li Dec at paragraph 25, CP 60-61, and Huynh Depo at page 134, lines 7-10, Ex. "1" to Lewis Dec., CP 136.

**D. LI and HUYNH acquire the Victoria and 13th Ave. Properties after divorce as husband and wife.**

After November 2, 1987, Li and Huynh continued to hold themselves out as husband and wife, and acquired two other real properties as husband wife using their joint income from ADC. From 1987 to 1993 the Li and Huynh both worked at United Imports, while Huynh 's sister, Jenny Law, managed ADC. See Huynh Depo at page 83, lines 19-24, Ex. 1 to Lewis Dec., CP 132, and Li Dec. at paragraph 4. Although Li primarily worked at United Imports during this time period he would also work at ADC when the furniture store was not open. See Li Dec. at paragraph 4, CP 55.

On September 6, 1988, less than a year after obtaining a divorce decree, Li and Huynh purchased the second jointly owned real property located at 1725 Victoria Avenue SW (the "Victoria Property") for \$178,000. The parties used their joint income from ADC to purchase the Victoria Property. A true and correct copy of the grant deed and settlement statement for the Victoria Property are respectively attached to the Li Dec as Exhibits "3" and "4", CP 72 and 74-75. Li and Huynh took title to the Victoria Property as husband and wife because they believed that there was still a prospect for re-marrying. See Li Dec at paragraph 6, CP 56.

Li and Huynh intended to build a new home on the Victoria Property as their future residence. However the process of building the home took much longer than expected and the parties did not move into the Victoria Property until 1993. Li personally participated in building the new home at the Victoria Property from 1990 to 1993 by supervising construction, installing marble floors, and hiring the general contractor, architect and engineer. Li had hired three different general contractors before the house at the Victoria Property was completed in 1993. See Li Dec. at paragraph 7, CP 56.

In October 1991 Huynh 's sister, Jenny Law, secretly applied to change the name of ADC's business license to Huynh 's name without the knowledge or consent of Li. Huynh Depo at page 108, lines 5-25, Ex. 1 to Dec of Lewis, CP 135. Li learned for the first time that Huynh 's sister changed the name on ADC's business license when Huynh responded to Li's document requests in August 2014. See Li Dec at paragraph 21, CP 59.

On November 1, 1991, Li and Huynh purchased the third jointly owned real property at 2367 13th Ave., Seattle WA 98144 (the "13th Ave. Property"). Li suggested that they purchase the 13th Ave. Property as an investment property and Huynh agreed.. See Huynh Depo. at page 71, line 23 to page 72, line 6, Ex. 1 to Lewis Dec, CP 130-131. The parties again took title as "husband and wife" because they still believed there was a possibility of reconciliation. See Huynh Depo. at page 70, lines 19 to page 71, line 5, Ex. 1 to Lewis Dec, CP 129-130. A true and correct copy of the grant deed for the 13th Ave. Property is attached to the Li Dec. as Exhibit "5", CP 77.

The parties used their income from ADC to purchase the 13th Ave. Property. See Huynh Depo at page 72, line 23-25, Ex. 1 to Lewis Dec, CP 131. The 13th Ave Property was rented out

for several years until a tree fell on the residence. After the tree fell the house was demolished and the 13th Ave. Property has been left vacant ever since. See Li Dec. at paragraph 8, CP 56.

**E. HUYNH is placed on the title of the Letitia Property in 1992 for the purpose of acquiring a construction loan**

In 1992 Li and Huynh applied for a construction loan for building the new home on the Victoria Property. Huynh convinced Li to secure the construction loan with the Letitia Property instead of the Victoria Property. In the process of securing the construction loan, Huynh's name was placed on the title of the Letitia Property as "husband and wife" with Li. See Li Dec at paragraph 9, CP 56-57, and grant deed for the Letitia Property, dated June 18, 1992, attached as Exhibit "6" to the Li Dec, CP 79.

In 1992, the proceeds from the construction loan were placed in joint bank account in the names of both Li and Huynh. Huynh did not close this joint bank account with Li until March 2014. Once the construction of the new home was finished in 1993 LI and Huynh moved into the Victoria Property and began renting out the Letitia Property. See Li Dec at paragraph 10, CP 57. The rental income from the Letitia Property was placed in the parties' joint account and was used to pay the property expenses. See Deposition of Huyhn at page 26, line 2 to page 27, line 5, page 28, lines 19-21, Ex. "1" to Lewis Dec., CP 113-115, and East West Bank Account statements attached to the Li Dec as Exhibit "14", CP 97-102. Huynh also deposited her income into the joint checking account with Li from 1991 to 1995. See Huynh Depo., page 28, line 19 to Page 29, line 7, Ex. 1 to Lewis Dec., CP 115-116.

**F. HUYNH incorporates Asia Discount Center in 1993 without the knowledge of LI**

In 1993 Huynh incorporated ADC without the knowledge of Li. See Huynh Depo at page 95, lines 2-5, Ex. 1 to Lewis Dec., CP 133. Huynh incorporated ADC because she was hurt and disappointed that LI had brought a live-in girl friend to live with them at the Victoria Property. See Declaration of Huynh at paragraph 7, CP 56. In the process of incorporating ADC, Huynh unilaterally and without LI's knowledge or consent, listed herself as the sole owner, director and officer of ADC. Li learned for the first time that Huynh had incorporated ADC in 2014 when Li contacted his current counsel. See Li Dec at paragraph 22, CP 59-60. ADC continued operating at the same location and same employees before and after incorporation. and Deposition of Huynh at page 102, lines 5-8 , Ex "1" to Lewis Dec. CP 134.

From 1993 to 1997 Li continued to work for ADC and built an office at ADC's warehouse. Li and Huynh also continued to live together and share expenses. See Li Dec at paragraph 11, CP 57. A true and correct copy of the Li and Huynh's joint auto insurance liability cards and credit cards from this time period are attached to the Li Dec as Exhibit "7", CP 81. Huynh continued to receiving utility bills in the name of Li for the Victoria and Letitia Properties until 2012. See utility bills, attached to the Li Dec as Exhibit "15", CP 104-105.

**G. LI marries another woman in 1995 and moves to New York in 1997**

In 1995 Li married his current wife in China. Although Li was married to another woman he continued living with Huynh because his new wife did not yet have authorization to immigrate to the United States. In 1996 Li sold his interest in United Imports for \$70,000 and began looking for other business opportunities. See Li Dec. at paragraph 12, CP 57.

Soon after LI sold his interest in United Imports, Li's brother-in-law invited him to come to California to join his furniture business. Li agreed and moved to California 1997 to join his brother-in-law's business. Shortly after moving to California in 1997 Li moved to New York with his brother and his new wife because they believed that the prospects for a furniture business were better in New York than in California. See Li Dec. at paragraph 13, CP 57. By contrast, Huynh falsely alleges that she began adversely possessing the three subject real properties in 1997 when she "refused to let him [Li] live in the home." See Declaration of Huynh at paragraph 8, CP 3.

In 1998, after Li had moved to New York, Li and Huynh decided to sell a jointly owned real property adjacent to the Letitia Property as a vacant lot and divide the proceeds. Li gave Huynh a special power of attorney to accomplish the sale and the proceeds were divided among Li and Huynh. See Special Power of Attorney, dated June 25 1998, signed by Li for Huynh and a letter from an attorney, dated May 5, 2000, confirming the distribution of the sales proceeds to Huynh and Li, are respectively attached to the Li Dec as Exhibits "12" and "13", CP 93 and 95.

In April 1998, more than a year after Li left Washington State, Huynh sent Li a breakdown of the property expenses for the Letitia Property and the Victoria Property in 1997 so Li could deduct half the property expenses on his tax return. See Li Dec at paragraph 26, CP 61-62. A true and correct copy of the property expense summaries Huynh sent to Li for the Letitia and Victoria Properties in 1997 are attached to the Li Dec as Exhibit "16", CP 107-108.

After the above sale of the jointly owned property adjacent to the Letitia Property, from 2000 to 2011, Li and Huynh spoke on the telephone briefly three or four times. Not once during these three or four phone conversations did the parties discuss the Subject real properties. See

Huynh Depo. at page 54, line 8 to page 57, line 10, Ex. "1" to Lewis Dec., CP 125-128, and Li Dec. at paragraph 14, CP 57.

**H. HUYNH requests LI to transfer the Subject Properties to her for the first time in 2011**

The first time that Huynh requested Li to transfer the Subject Properties to her was in 2011, when Li received a letter from Huynh 's attorney requesting Li to quitclaim his interest in the Subject Properties to Huynh. See Li Dec. at paragraph 15, CP 58, and Huynh Depo at page 53, lines 7-25, Ex. "1" to Lewis Dec., CP 124. A true and correct copy of the letter from Huynh 's attorney to LI, dated September 30, 2011, is attached to the LI Dec as Exhibit "8", CP 83.

Huynh hired another attorney in 2012 to write a letter to Li requesting that Li transfer title to the Subject Properties to Huynh purportedly to protect Li from non-existent judgment creditors. Li Dec. at paragraph 16, CP 58. A true and correct copy of the letter from Huynh 's second attorney, dated May 17, 2012, is attached to the Li Dec. as Exhibit "9", CP 85-86.

**I. Huynh files a complaint to quiet title in the three real properties and Li cross complains for partition and accounting.**

On September 11, 2012, Huynh filed a complaint to quiet title in the subject real properties on the ground that she had contributed all the money towards the purchase of the real properties. Huynh did not plead a claim for adverse possession of the three subject real properties in her complaint. Li subsequently filed a cross complaint against Huynh for partition of the subject real properties and for an accounting against Huynh.

**J. The court grants Huynh's motion for summary judgment on Huynh's complaint and Li's cross claim.**

On February 27, 2015, the court heard oral argument on Huynh's motion for summary judgment and granted Huynh's motion in its entirety based on Huynh's un-pled claim of adverse possession. See Order Granting Huynh's Motion for Summary Judgment, CP 181-182 . In the oral ruling granting summary judgment the court did not make any findings of fact or conclusions of law supporting the ruling. See transcript of oral argument at page 25. However, during the hearing the court did inquire about Huynh's failure to send Li the property expense breakdown for the subject real properties after 1998. See transcript of oral argument at page 10, lines 16-19 and 15, lines 22-23.

Huynh's counsel argued during the hearing and in the reply to Li's response that Huynh's failure to send the property expense breakdown for the Subject Properties after 1998 was evidence that Huynh was making a hostile claim to the parties' jointly owned properties. Huynh's counsel further argued that Li's failure to claim tax deductions for the property expenses for the subject properties on his federal tax return after 1998 was an admission that he did not own the subject properties. See transcript of oral argument at page 4, lines 17-25.

As evidence against Huynh's argument that the failure to send a property expense breakdown after 1998 constituted an adverse claim, Li's counsel specifically cited Huynh's agreement to share the sales proceed of one of their jointly owned properties in 2000, Huynh's complete silence from 1998 to 2011 regarding her alleged hostile claim to the parties jointly owned properties, and Huynh's deposit of the rental income in a jointly owned bank account with Li until March 2014. See transcript of oral argument at page 10, line 25 to page 12, line 12.

In the response to the motion for summary judgment and during oral argument Li's counsel informed the court that there was pending discovery regarding Huynh's un-pled claim of adverse possession. See Transcript of oral argument at page 8, lines 4-6. Li's counsel orally requested a continuance of the hearing on the motion for summary judgment on the grounds that Huynh hadn't responded to Li's discovery regarding adverse possession, which the court denied. See transcript of oral hearing at page 8, lines 9-15. Li then a made a written motion to reconsider the ruling on the motion for summary judgment and to continue the hearing on the motion for summary judgment so Li could complete discovery.

**K. The court denies Li's motion for reconsideration and to continue the hearing on the motion for summary judgment in order to complete discovery**

On March 4, 2015, Li filed a motion to reconsider the court's ruling on the motion for summary judgment and to continue the hearing on the motion for summary judgment so Li could complete discovery. CP 183-192.

Huynh's responses to Li's second discovery regarding adverse possession were due on February 27, 2015, the day of the hearing on the motion for summary judgment. A true and correct copy of Defendant's second set of discovery is attached to the declaration of Glyn E. Lewis as Exhibit "1", CP 197-207. Li's interrogatories directed Huynh to set forth the facts supporting her claim for adverse possession, and state the reasons why she agreed to share sales proceeds of a jointly owned real property with Li in 2000 and why she sent Li a property expense breakdown in April 1998. See Li's interrogatory No.s 1, 5 and 6, to Plaintiff, Ex. "1" to Lewis Dec, CP 201 and 203.

Several days prior to the hearing on the Motion for Summary Judgment, the court had granted Li's motion to compel Huynh to respond to Li's first set of discovery. Huynh has never complied with the court's order on the motion to compel due to the granting of summary judgment. Li's first set of discovery was primarily directed toward Huynh's allegation in her complaint for quiet title that she had contributed all the money toward the purchase and maintenance of the Subject Properties. Huynh's further responses to Li's first set of discovery could also refute Huynh's claim of adverse possession. Huynh had already admitted to depositing the rental income in a joint account at East West Bank with Li until March 2014. Li believed that there were more joint account bank accounts in addition to East West Bank that were maintained by Huynh after 1997. Huynh's failure to remove Li from their jointly owned bank accounts after 1997 could also be evidence that Huynh was not making a hostile claim to the Subject Properties.

On April 17, 2015, the court issued an order denying Li's motion for reconsideration and for a continuance of the hearing so Li could complete discovery. See Order Denying Motion for Reconsideration, CP 226-227. The instant appeal then followed.

#### **IV. ARGUMENT**

This appeal presents questions of law regarding the granting of summary judgment. An appellate court reviews a summary judgment by engaging in the same inquiry as the trial court and applying the standard of CR 56(c) to the facts and reasonable inferences therefrom as viewed most favorably toward the nonmoving party. The evidence in the case is reviewed *de novo*. *Lilly v. Lynch*, 88 Wn. App. 306 (Wash. Ct. App. 1997).

**A. The trial court failed to apply to the clear and convincing standard of proof to Huynh's claim of adverse possession against Li**

The elements of a claim of adverse possession are (1) actual possession, (2) that is uninterrupted, open, notorious, hostile and exclusive, and (3) under a claim of right made in good faith for the statutory period of ten years. *Diel v. Beekman*, 7 Wn. App. 139, 499 P.2d 37 (1979). Proof of adverse possession by a co-tenant must be stronger than proof of adverse possession against a stranger. A co-tenant must prove clear and unequivocal acts showing adverse possession. *Silver Surprise v. Sunshine Mining Co.*, 15 Wn. App. 1, 21 (1976 Wash.) Mere knowledge by a co-tenant out of possession of the obvious fact of possession by the other co-tenant cannot be converted into proof of knowledge that one in possession was claiming adversely. *Id.* at page 22. The higher standard of proof necessary to prove adverse possession as between co-tenants has been consistently applied by Washington courts. See, for example, *Thompson v. Whitlock*, 2004 Wash. App. LEXIS 2965 (Wash. Ct. App. Dec. 7, 2004).

The fact that Li and Huynh held title to the subject properties as a co-tenancy is undisputed. After their divorce Li and Huynh co-owned a car, and maintained joint car insurance and a joint bank account. See Huynh depo at page 41, lines 18 to page 42, line 2, Ex. "1" to Lewis Dec., CP 119-120. The money used to purchase the Victoria and 13th Ave. Property was from the parties' jointly owned business that was formed during their marriage. Li and Huynh even acquired title to the three subject real properties as "husband and wife". Therefore, when Li and Huynh acquired joint title to the three real subject properties, they had a marriage like relationship as defined by the court in *Gormley v. Robertson*, 120 Wn. App. 31, 38 (2004). In such an instance the community property acquired during the marriage like relationship will be

fairly divided between Li and Huynh. See *Soltero v. Wimer*, 159 Wn.2d 428, 150 P.3d 552, (Wash. 2007).

Possession of jointly owned real property by one ex spouse is not adverse to the other ex spouse. *Graves v. Graves*, 48 Wash. 664, 94 P. 481, (1908) - "The entry and possession of land under the common title by one cotenant will not be presumed to be adverse to the others, but will ordinarily be held to be for the benefit of all." *Id.* Also see *Hicks v. Hicks*, 69 Wash. 627 (Wash. 1912) - "When, by the dissolution of the marriage, the community property becomes property held in common, the possession of one is the possession of both".

The cases cited by Huynh in her motion for summary judgment and during oral argument, *Nicholas v. Cousins*, 1 Wn. App. 133 (Wash. Ct. App. 1969) and *Chaplin v. Sanders*, 100 Wn.2d 853 (Wash. 1984), are inapplicable to the case at hand. *Nicholas* involved a claim of adverse possession against persons who were not aware of the co-tenancy relationship and the clear and convincing standard of proof was not applied. Here, Li was on title and clearly was aware of the co-tenancy relationship. *Chaplin* didn't even involve a claim of adverse possession between co-tenants, but instead was a boundary dispute between neighbors.

*Graves v. Graves*, 48 Wash. 664, 94 P. 481, (1908) is directly analogous to the instant action. In *Graves*, Mrs. Graves brought an action against her ex spouse, Mr. Graves, to partition their jointly owned real property more than ten years after Mrs. Graves had abandoned the marriage and left Mr. Graves in sole possession of the parties' jointly owned property. Mrs. Graves abandoned her husband in 1889 and made no effort to enforce her interest in the parties jointly owned property for **fifteen years**, from 1891 to 1906.

Mr. Graves argued that he was adversely possessing the property against Mrs. Graves because he was collecting rent and paying taxes on the property. The court rejected Mr. Graves adverse possession claim. The court held that possession, receipt of rents and payments of taxes and without communication with the co-tenant will not constitute adverse possession. The court in *Graves* stated that

"The mere receipt and retention by one cotenant in possession of all the rents and profits does not of itself constitute an adverse possession, and will not ripen into title as against the others, though continued for the statutory period."

Like Mr. Graves, Huynh admitted that she did not communicate with Li regarding the three Subject real properties, but alleged that by collecting rents and paying taxes she was claiming the three Subject Properties as her own. Like Mrs. Graves, Li made no effort to enforce his interest in the jointly owned property for fifteen years. Therefore, the instant case is not distinguishable from *Graves* in any material way.

*Graves* has been followed by subsequent similar cases such as *Fritch v Fritch*, 53 Wn.2d 496 (1959). In *Fritch* the ex husband claimed adverse possession against his ex-wife to their jointly owned real property on the grounds that he had made improvements to their real property and paid the maintenance expenses and property taxes. The court rejected the ex-husband's argument, citing *Graves*. The court in *Fritch* stated:

" the claimant must show a definite and continuous assertion of an adverse right by **overt acts of unequivocal character** clearly indicating an assertion of ownership of the premises to the exclusion of the right of the other cotenants."

During oral argument, Huynh's counsel argued that *Graves* was distinguishable from the instant action because Mrs Graves had a filed a community property claim on the real property that was held by Mr. Graves in his name alone. See transcript of oral argument at page 20, lines

12-16. This is a distinction without a difference. Li had no need to record a community property claim on the Subject Properties because he was already on the title to the Subject Properties.

The trial court also implied through questions to Li's counsel, that Huynh's failure to send Li the property expense breakdown after April 1998 constituted notice of a hostile claim. Huynh's failure to send Li a property expense breakdown for the Subject Properties after 1998 does not constitute "unequivocal and clear" evidence of Huynh's hostile claim to the subject Properties. There was no evidence that Li requested a property expense breakdown from Huynh after 1998 and that Huynh refused to do so. Moreover, there would be no reason for Li to request the property expense breakdown for the subject properties after 1998 because he was not paying the property expenses out of his own pocket.

In her declaration at paragraph 2 Huynh stated that she didn't even "recall" sending Li the property expense breakdown for the Subject Properties in April 1998, essentially evading the question of why she would send Li a property expense breakdown in April 1998 in the first place after she allegedly started to claim the Subject Properties as her own in 1997. The only plausible explanation why Huynh sent Li the property expense break down in April 1998 is because Huynh still believed Li was an owner of the Subject Properties.

The property expense breakdown is in Huynh 's own hand writing and states that Li is a 50% owner of the Subject Properties. See Declaration of Li in support of this Reply at paragraph 2, CP 54-55, and Property expense Breakdown attached as Exhibit "16" to the Li Dec., CP 107-108. Moreover, the property expense breakdown was faxed from the company where Plaintiff works.

Any alleged implication that Huynh 's failure to send a property expense breakdown to Li after 1998 was a hostile claim to the subject properties is entirely negated by Huynh's agreement to share the sales proceeds of one of their jointly owned real properties with Li in May 2000.

Li's deposition testimony, which was extensively cited by Huynh in the motion for summary judgment, also did not constitute clear and unequivocal evidence of Huynh's hostile claim to the three subject properties. Those parts of the deposition where Li stated that he was upset with Huynh for taking the subject properties was not restricted to any point in time. See Deposition of Li at page 73, line 13 to page 74, line 3, Ex B. to Lam Dec. in Support of the Amended Motion for Summary Judgment, CP 31-32. After Huynh 's counsel asked Li when he became upset with Plaintiff for taking the Subject Properties Li testified that he trusted Plaintiff until she filed the instant complaint in 2012. See Deposition of Li at page 75, lines 6-8, Ex. 2 to the Lewis Dec. in support of the Amended Response to the Motion for Summary Judgment, CP 140.

Huynh did not present clear and convincing proof that her claim to the subject real properties was hostile for the requisite time period. The trial court essentially adopted the standard erroneously proposed by Huynh in *Nicholas v. Cousins*, 1 Wn. App. 133 (Wash. Ct. App. 1969), where actual possession of property was enough to demonstrate a hostile claim. Based on the foregoing, the trial court's decision granting Huynh's motion for summary judgment should be reversed because the trial court applied the wrong standard of proof to Huynh's claim of adverse possession against Li.

**B. The trial court relied on disputed facts by granting Huynh's Motion for summary Judgment.**

Summary judgment is proper under CR 56(c) where there is no genuine issue of material fact, the moving party is entitled to summary judgment as a matter of law, and a material fact is one upon which the outcome of the litigation depends, in whole or in part. *Hisle v. Todd Pac. Shipyards*, 2004 Wash. LEXIS 448, 151 Wn.2d 853, 93 P.3d 108 (2004). The court must consider all facts submitted and all reasonable inferences from the facts in the light most favorable to the nonmoving party in a summary judgment motion. Where undisputed facts are reasonably susceptible to more than one interpretation, summary judgment may be improper. *Hash v. Children's Orthopedic Hosp. & Medical Ctr.*, 49 Wn. App. 130, 741 P.2d 584 (1987), *aff'd*, 110 Wn.2d 912, 757 P.2d 507 (1988). Wash. CR 56.

In the motion for Summary Judgment Huynh alleged that in 1997 she refused to let Li live in the Victoria Property when Li brought his new wife to the United States. Huynh argued in her MSJ that this act constituted notice to Li that her possession of the Subject Properties was hostile to Li. See motion for summary judgment at page 4, lines 18-21, CP 8. In fact Li did not leave Washington State because Huynh "kicked him out of house". Li left Washington State because his brother-in-law invited him to start a new business in California. Moreover, Li's voluntary decision to leave the Victoria Property was entirely reasonable. Anyone would feel awkward living in the same house with their current wife and ex-wife together.

Huynh's allegation that she had a hostile claim to the Subject Properties since 1997 is also contradicted by the fact that in 1998, more than a year after Li left Washington State, Huynh asked Li if she could sell their jointly owned real property adjacent to the Letitia Property. Li agreed and gave Huynh a special power of attorney to negotiate the sale. Li and Huynh then split

the proceeds from the sale of the property in May 2000. See Special Power of Attorney and Letter from Attorney, Ex. 12 and 13 to Li Dec, CP 93 and 95. Asking a person if they can sell portions of jointly held property and then splitting the sales proceeds is manifestly not hostile to the other person.

After Huynh allegedly kicked Li out of the house in 1997 Huynh continued to deposit the rental income from the Letitia Property in a joint bank account in the name of Huynh and Li for the next seventeen years. Huynh also received monthly bank statements for the joint account for seventeen years. See Huynh Depo page 29, lines 19-25, CP 116. Huynh didn't close the joint bank account with Li until March 2014. See East West Bank statements, dated November 2013 and March 2014, Ex. "14" to Li Dec., CP 97-102. Placing money in a joint bank account is manifestly not hostile to other holder of the account.

In addition, Huynh continued to receive utility bills in the name of Li for the Letitia and Victoria Properties until at least 2012. See Utility Bills, Ex. "15" to Li Dec., CP 104-105. Huynh took no action to change the name on the utility bills between 1997 and 2012. See Huynh Depo at page 37, lines 16-19, and page 39, lines 9-17 Ex. "1" to the Dec. of Lewis, CP 117-118. Again such actions are not consistent with a person who is allegedly making a hostile claim to Property.

In April 1998, more than a year after Li left Washington State, Huynh sent Li a breakdown of the property expenses for the Letitia Property and the Victoria Property in 1997 so LI could deduct half the property expenses on his tax return. See Li Property Expense Summaries, Ex. 16 to Li Dec., CP 107-108. Huynh and Li's agreement to share the property expenses on their tax returns for 1997 is not consistent with Huynh's false allegation that she was

making hostile claim to the Subject Properties by refusing to let Li live in the Victoria property in 1997.

Between 1997 and 2011 Huynh never notified Li that she was claiming the Subject Properties as her own or that she did not recognize Li as a joint title holder with her on the three subject real properties. After Li left Washington State in 1997 the first time that Huynh requested Li to transfer the Subject Properties to Huynh was 2011. See letter from Huynh's attorney, dated September 30, 2011, Ex. 8 to Li Dec., CP 83.

Li did not even construe the letter from Huynh's attorney in 2011 as a hostile claim to the Subject Properties. Li testified at his deposition that he trusted Huynh to handle his financial affairs until Huynh filed the above captioned lawsuit against him to quiet title in August 2012. See Li Deposition Transcript at page 75, lines 6-8- "up until the point where she served me with the complaint, then her true self started to show. Because, before that, I still thought she was helping me.", attached as Exhibit "2" to the Declaration of Glyn E. Lewis, CP 140.

Even assuming that the letter from Huynh's attorney, dated September 30, 2011, constituted Huynh's notice of a hostile claim to the Subject Properties, Huynh's claim of adverse possession fails because the person asserting a hostile claim must assert that claim for at least ten years.

By granting summary judgment the court was relying on a disputed fact, the alleged hostile nature of Huynh's claim to the three Subject Real Properties for over ten years. Therefore, the trial court's ruling on the motion for summary judgment must be reversed.

**C. The Statute of Limitations did not run on Li's action for partition and accounting.**

In the motion for summary judgment Huynh also argued that the statute of limitations had run on Li's action for partition and accounting because Li was out of possession for more than ten years. Not coincidentally the ten year statute of limitations on Li's claim for partition matches ten year requirement for adverse possession by Huynh. The statute of limitations does not run in an action for accounting and division of joint real property where a co-tenant cannot show title by adverse possession because possession by one co-tenant is the possession of both. See *Hicks v. Hicks*, 69 Wash. 627 (Wash. 1912) . In *Hicks* the ex-wife sought division of the real property more than 10 years after being out of actual possession. The court in *Hicks* stated:

"The statute of limitations has no application to this phase of the case. During the coverture, the husband was entitled to the possession of the community property which he held, in a sense, as trustee for the community. When, by the dissolution of the marriage, the community property became property held in common, the possession of one was the possession of both."

The courts in *Fritch* and *Graves* also divided the real property more than ten years after the co-tenant had been out of possession. In *McKnight v. Basilides*, 19 Wn.2d 391 (Wash. 1943) the court ordered an accounting of the co-tenant's use of the real properties for thirteen years and a partition of the real properties where the other co-tenant had alleged he had been in adverse possession of the real properties for over ten years. The court in *McKnight* stated that "The statute of limitations does not begin to run in cases of this character until notice has been made of an adverse holding or claim on the part of one seeking title by adverse possession, and there has been an ouster." citing *Hicks*.

Moreover, an exception to the ten year statute of limitations for partition also exists where a property is held in trust. See *Hotchkin v. McNaught-Collins Improv. Co.*, 102 Wash. 161, 172 P. 864. The court in *Hotchkin* stated that:

"[t]he general rule is that the statute of limitations does not run between trustee and cestui que trust as long as the trust subsists, for the possession of the trustee is the possession of the cestui que trust, and the trustee holds according to his title.

An express trust arises because of expressed intent and involves a fiduciary relationship in which the trustee holds property for the benefit of a third party. *Goodman v. Goodman*, 128 Wn.2d 366, 907 P.2d 290. Huynh has alleged in her complaint at paragraph 12 and has stated in correspondence with Li that Huynh held a general power of attorney for LI to handle his financial affairs. See letter to Li from Huynh's former counsel, dated May 17, 2012, attached as Exhibit "9" to the LI Dec., CP 85-86 - "I understand you had given Ms. Huynh a power of attorney to transfer your interest in three parcels of real property to herself which was signed and notarized April 20, 1987."

Huynh's power of attorney for Li was never revoked by Huynh or Li. In fact, Huynh wanted to use the general power of attorney to transfer the Subject Properties to her name alone but could not do so. See letter from attorney, Ex. 9 to LI Dec, CP 85-86. Huynh's attorney further implied in the foregoing letter that Huynh wanted to protect Li from alleged judgment creditors of Li by transferring the three Subject real properties to herself.

A person holding a power of attorney owes a fiduciary duty to the principal. An attorney-in-fact is an agent to whom the principal has given authority to act in his or her stead for the purposes set forth in the power of attorney. In that role, the agent becomes a fiduciary who is bound to act with the utmost good faith and loyalty and to fully disclose all facts relating to his interest in and his actions involving the affected property; the agent must also deliver all benefits

derived from or inuring to the property from the agent's breach of the fiduciary relationship to the principal. *In re Estates of Palmer*, 145 Wn. App. 249, 187 P.3d 758, 2008 (Wash. Ct. App. 2008).

Li testified at his deposition that he trusted Huynh to handle his financial affairs until Huynh served the above captioned lawsuit against him to quiet title, in August 2012. See Deposition Transcript of Li at page 75, lines 6-8- "up until the point where she served me with the complaint, then her true self started to show. Because, before that, I still thought she was helping me." (emphasis added). See Li Deposition Transcript, Ex. "2" to Lewis Dec., CP 140.

Based on the foregoing the statute of limitation on Li's action for partition and accounting did not run and the granting of Huynh's motion for summary judgment on Li's cross claim s should be reversed.

**D. A continuance of the hearing on the motion for summary judgment should have been granted so Li could complete his discovery regarding Huynh's adverse possession claim.**

CR 56 (f) states in pertinent part:

"When affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

Under CR 56(f), a trial court may continue a motion for summary judgment if affidavits of the nonmoving party show a need for additional time to obtain affidavits, take depositions, or conduct other discovery; the trial court may deny a motion for a continuance when:

- (1) the requesting party does not have a good reason for the delay in obtaining the evidence;
- (2) the requesting party does not indicate what evidence would be established by further discovery; or
- (3) the new evidence would not raise a genuine issue of fact. *Butler v. Joy*, 2003 Wash. App. 116 Wn. App. 291, 65 P.3d 671, review denied, 150 Wn.2d 1017, 79 P.3d 446 (2003).

Here, Huynh had not even provided complete responses to Li's first set of discovery when Li propounded his second set of discovery on Huynh 's un-pled claim for adverse possession. Therefore, Li had a good reason for the delay in propounding his second set of discovery regarding Huynh 's un-pled claim for adverse possession. Li also never completed Huynh 's deposition because of the outstanding document production issues. Li's counsel specifically reserved the right to take another session of Huynh's deposition once Huynh's complete responses to Li's first set of discovery were received. See Declaration of Glyn E. Lewis at paragraphs 3 and 4, CP 164.

As stated of above, Li's second set of written discovery directly addresses the material facts in issue, namely why would Huynh send Li a breakdown in expenses in April 1998 after claiming that the properties were her own in January 1997 and why would Huynh agree to share of the proceeds of the sale of one of their jointly owned properties in 2000, after allegedly claiming that the other jointly owned properties were Plaintiff's alone in January 1997.

The further responses to Li's first set of written discovery which the court ordered Huynh to respond could have also raised genuine issues of fact. Huynh 's further responses may have

reveal evidence that Huynh had more than one joint bank account with Li after 1997 and that Huynh used the power of attorney that she held for Li. Therefore, Li's pending written discovery raised a genuine issue of fact.

Based on the foregoing, the trial court abused its discretion by failing to continue the hearing on the motion for summary in order to allow Li to complete his discovery. The trial court's ruling on the motion for summary judgment should be reversed so Li can complete his discovery.

## **V. CONCLUSION**

Based on the foregoing and in the interest of justice Li respectfully requests that the court reverse the trial court's ruling granting Huynh's motion for summary judgment and permit Li to complete his discovery on Huynh's adverse possession claim.

RESPECTFULLY SUBMITTED this 25th day of September, 2015.

By: /s/ Glyn E. Lewis

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**CERTIFICATE OF SERVICE**

The undersigned certifies that on the date written below, a true and correct copy of this document was served on each of the parties below as follows:

Via mail and email to:

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DATED this 25th day of September 2015

By: /s/ Glyn E. Lewis\_\_\_\_\_

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