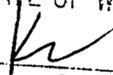


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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

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No. 46380-6-II

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COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

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WILLIAM M. McNEFF and ARACELI McNEFF,

Respondents.

vs.

MARIA C. JOYCE,

Appellant,

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**RESPONDENT'S OPPOSITION BRIEF**

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TABLE OF CONTENTS

I. Introduction..... 1

II. Response to Assignments of Error..... 1

III. Facts..... 2

IV. Argument..... 4

A. The Unchallenged Findings of Fact Are Verities on Appeal..... 4

B. The Appellant Waived or Abandoned the Claim for Adverse Possession..... 4

C. The Findings of Fact Support the Conclusions of Law Quieting Title to the Respondents as to An 87.5% Interest in the Property..... 5

D. There Was No Evidence Supporting Adverse Possession Presented at Trial.... 7

V. The Respondents Should be Awarded Costs and Reasonable Attorney Fees Because This Appeal is Frivolous Under RAP 18.9(a)..... 9

VI. CONCLUSION..... 10

## TABLE OF AUTHORITIES

### STATUTES

RAP 2.5.....	1, 5
RAP 18.1.....	10
RAP 18.9(a).....	9, 10
RCW 4.16.020.....	1, 2, 4, 5, 7, 8
RCW 7.28.070.....	1, 2, 4, 5, 8, 9
RCW 7.28.120.....	4

### CASES

<i>Eugster v. City of Spokane</i> , 139 Wash. App. 21, 156 P.3d 912 (2007).....	9
<i>Jensen v. Lake Jane Estates</i> , 165 Wash. App. 100, 267 P.3d 435 (2011).....	4
<i>Kinney v. Cook</i> , 150 Wash. App. 187, 208 P.3d 1 (2009) .....	9
<i>Nicholas v. Cousins</i> , 1 Wash. App. 133, 459 P.2d 970 (1969).....	9

I. Introduction.

This is an appeal based on legal theories that were never pled, not presented at trial, specifically waived at trial, and are inconsistent with unchallenged findings of fact. The Respondents request the Court of Appeal confirm that they own an 87.5% interest in 133 Loop Road, Grays River, Washington (sometimes referred to as “the property”), dismiss this frivolous appeal and award the Respondents costs and reasonable attorney fees.

II. Response to Assignments of Error.

The Appellant’s first assignment of error that she owns the property by adverse possession pursuant to RCW 7.28.070 must be denied because the Appellant 1) did not plead this claim in an affirmative defense or counterclaim; 2) did not raise the issue at trial as required by RAP 2.5; 3) specifically waived the claim at trial; 4) failed to challenge findings of fact that are inconsistent with the claim; and 5) cannot establish either she or her mother, Virginia ShirLee Badger, had color of title to the subject property.

The Appellant’s second assignment of error that she owns the property by adverse possession pursuant to RCW 4.16.020 must be denied because the Appellant 1) did not plead the claim in an affirmative defense or counterclaim; 2)

did not raise the issue at trial as required by RAP 2.5; 3) specifically waived the claim at trial; 4) failed to challenge findings of fact that are inconsistent with the claim; 5) cannot establish that her mother, Virginia ShirLee Badger, had hostile possession of the property; and 6) has not possessed the property for the required 10 years.

### III. Facts.

Over the course of several months, various descendants of Harold Badger quit claimed an 87.5% interest in 133 Loop Road, Grays River, Washington to the Plaintiffs, William and Araceli McNeff (“Respondents”). At the time the deeds were conveyed, the house was occupied by the Defendant, Maria Joyce, and she refused to give up possession, or recognize the Respondents’ interest in the property.

The Plaintiffs filed a Complaint to Quiet Title and Unlawful Detainer on April 16, 2012 (CP 295). The Defendant filed her Answer, Affirmative Defenses and Motion to Dismiss on May 7, 2012 (CP 264), and November 14, 2012 (CP 235). Neither Answer raises adverse possession as an affirmative defense, nor is adverse possession under 4.16.020 or 7.28.070 raised as a counterclaim.

Trial was held by the court without a jury on January 13, 2013. During the trial, the Appellant made several statements

that her mother, Virginia Badger's, possession was not adverse.

During opening statement, the Appellant stated:

"Mom's [Virginia Badger] possession was not adverse, although mine might be considered to be adverse since the McNeffs received the quitclaim deeds from the plaintiffs." (RP 18:22-25)<sup>1</sup>

During her testimony, the Appellant stated her mother's possession was not adverse.

"Okay. I want to say that at no time was my mom's possession adverse; that she – she had peaceful possession, she had exclusive use and she had quiet enjoyment." (RP 118:18-20)

The Appellant further testified she was not claiming adverse possession. On questioning from the court, the Appellant stated:

The Court: "I just want to make sure you're not claiming adverse possession."

Ms. Joyce: "I'm not." (RP 123:4-6)

At the end of the trial, the court ruled that the Respondents owned an 87.5% interest in the property, that Charlene Badger, the Appellant's sister, owned 6.25% and that

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<sup>1</sup> Appellant's mother passed away on June 13, 2011, after which  
RESPONDENTS' OPPOSITION BRIEF

Appellant owned a 6.25% interest. The Appellant does not challenge any of the court's findings of fact and conclusions of law (CP 61). The Appellant filed this appeal claiming two assignments of error. First, that "The trial court should have allowed my claim of title under Virginia ShirLee Badger's adverse possession." (RCW 7.28.070). Second, "Whether the trial court erred in not recognizing my mom's title as superior to the Badgers by adverse possession (RCW 4.16.020, RCW 7.28.120).

IV. Argument.

A. The Unchallenged Findings of Fact Are Verities on Appeal.

The Appellant did not assign error to any of the findings of fact. As such, they are verities on appeal and the Appellate Court review is limited to whether the findings support the conclusions of law.<sup>2</sup>

B. The Appellant Waived or Abandoned the Claim for Adverse Possession.

The Appellant did not raise adverse possession either as a counterclaim, or as an affirmative defense. Based on the pleadings, the claim was not properly before the court at the time of trial.

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Appellant retained possession of the property.

<sup>2</sup> Jensen v. Lake Jane Estates, 165 Wash. App. 100, 267 P.3d 435 (2011).

Moreover, the Appellant specifically denied that she was claiming adverse possession by Virginia ShirLee Badger during trial (RP 123:4-6). Therefore, the Appellant has either waived or abandoned any claim for adverse possession.

Further, the Appellant failed to raise adverse possession under RCW 4.16.020 or 7.28.070 at trial. Under RAP 2.5, she cannot raise these claims for the first time on appeal.

C. The Findings of Fact Support the Conclusions of Law Quieting Title to the Respondents as to an 87.5% Interest in the Property.

Where the findings are verities on appeal, the Appellate Court is limited to determining whether the findings support the conclusions of law. The relevant conclusion of law is No. 28:

“The court quiets title to 133 Loop Road, Grays River, Washington, legally described in Exhibit ‘A’ and the 1988 Fleetwood mobile home to the following parties in the following percentages;

William McNeff and Araceli McNeff	87.5%
Charlene Badger	6.25%
Maria Joyce	6.25%”

The findings of fact support this conclusion.

1. Harold Badger acquired the property by real estate contract or adverse possession (5).<sup>3</sup>

2. Harold Badger's four sons, Raymond Badger, LaVerne Badger, Larry Badger and Marvin Badger, inherited one-fourth of the property under intestate succession (7).

3. Raymond Badger deeded his interest to the Respondents (4, 9).

4. Larry Badger's wife and all of his children deeded their interest to the Respondents (10).

5. LaVerne Badger's surviving son deeded his interest to the Respondents (11).

6. Marvin Badger's one-fourth interest passed by intestate succession, as follows: one-half to his four children (12.5% of the entire property interest) and one-half, or 12.5%, of the entire property interest, to his wife and Appellant's mother, Virginia ShirLee Badger (13).

7. Marvin Badger's four children deeded their interest to the Respondents (14).

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<sup>3</sup> The number denotes the number of the Finding of Fact.  
RESPONDENTS' OPPOSITION BRIEF

8. When Virginia ShirLee Badger passed away, her two daughters, Charlene Badger and Maria Joyce, each inherited one-half of her 12.5% interest in the property, or 6.25% (18).

9. At the time of trial, the Respondents owned an 87.5% interest in the property, Charlene Badger owned a 6.25% interest and Maria Joyce owned a 6.25% interest (19).

These findings support the trial court's Conclusion of Law at No. 28. Accordingly, the court's decision must be sustained.

D. There Was No Evidence Supporting Adverse Possession Presented at Trial.

The Appellant argues that she has a claim to the entire property by adverse possession, relying on two statutes. First, she claims adverse possession under RCW 4.16.020. This statute requires a party to have open, notorious, exclusive and hostile possession of property for over 10 years. The Appellant specifically denied that her mother, Virginia ShirLee Badger, held the property under adverse possession. Nor could she.

Her mother held a 12.5% interest in the property and

had the right to occupy it. Finding of Fact 26 is relevant to this issue. No. 26 states: "That the Plaintiffs' 87.50% ownership does not afford Plaintiff any more right to occupy the property than the 6.25% owned by Maria Joyce." The implication is that any ownership interest allows a person to occupy the property. Therefore, their possession could never be hostile. Similarly, because Virginia ShirLee Badger owned a 12/5% interest in the property after Marvin passed away, her possession was never hostile.

Using the same reasoning, Respondents' possession of the property after the death of her mother was never hostile because she retained a 6.25% interest in the property. Further, because her mother died in 2011, Respondent has not had possession for over 10 years. Therefore, the Appellant cannot establish adverse possession under RCW 4.16.020.

To claim adverse possession under RCW 7.28.070, a person in actual, open and notorious possession of lands must do so under "claim or color of title", and pay taxes for seven consecutive years. A claim or color of title requires an instrument "which is a semblance or appearance of title, but is not title in fact

nor in law.”<sup>4</sup> In the Nicholas case, awarding property to the Plaintiff by way of a decree of distribution in a probate met the test for color of title under RCW 7.28.070.<sup>5</sup>

The Appellant presented no evidence of a color of title in this case. There is no deed to Virginia ShirLee Badger. Marvin Badger had no Will, and there is no personal representative's deed from Marvin Badger's estate to his wife. There is no evidence that Virginia ShirLee Badger received any document that created color of title to the property. Therefore, Plaintiff cannot prevail in an adverse possession claim under RCW 7.28.070.

V. The Respondents Should be Awarded Costs and Reasonable Attorney Fees Because This Appeal is Frivolous Under RAP 18.9(a).

An appeal is frivolous if there are no debatable issues upon which reasonable minds might differ and it is so totally devoid of merit that there was no reasonable possibility of reversal.<sup>6</sup> All doubts as to whether an appeal is frivolous are resolved in favor of the Appellant.<sup>7</sup>

This appeal is based on theories that were not pled, not

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<sup>4</sup> Nicholas v. Cousins, 1 Wash. App. 133, 459 P.2d 970 (1969).

<sup>5</sup> Nicholas, 1 Wash. App. at 973.

<sup>6</sup> Eugster v. City of Spokane, 139 Wash. App. 21, 156 P.3d 912 (2007).

argued at trial, specifically waived at trial and are inconsistent with unchallenged findings of fact. Moreover, there was no evidence presented at trial to support either assignment of error. Even resolving any doubt in favor of the Appellant, there are no debatable issues on which reasonable minds could differ. This appeal has no merit. Respondents request an award of costs and attorney fees under RAP 18.9(a) and 18.1.

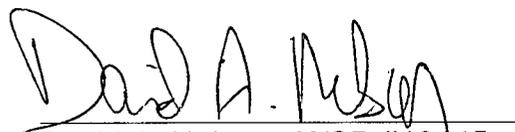
VI. Conclusion.

This appeal is based on legal theories that were not pled, not presented at trial, were specifically waived and for which there is no factual support. In addition to denying this appeal, the Respondents request this court find that it is frivolous and award them costs and attorney fees.

DATED this 5<sup>th</sup> day of October,

2015.

NELSON LAW FIRM, PLLC



David A. Nelson WSB #19145  
Attorney for Respondents

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 5th  
day of October 2015, she deposited in the United  
States Post Office in Longview, Washington, in a first-class  
sealed envelope postage prepaid a copy of RESPONDENT'S  
OPPOSITION BRIEF addressed to:

Maria Joyce  
P.O. Box 11  
Rosburg, WA 98643

David Ponzoha                      VIA UPS Overnight  
Clerk/Administrator  
Court of Appeals, Division II  
950 Broadway, Suite 300  
Tacoma, WA 98402

  
Sandra L. Good-Gaffney