

FILED

FEB 22 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS CASE No. 303721

IN THE WASHINGTON STATE COURT OF APPEALS

DIVISION III

**BEN CHRISTOPHER SCHOENWALD, as PERSONAL
REPRESENTATIVE FOR THE ESTATE OF BENNIE WALTER
SCHOENWALD, DECEASED, Respondent**

v.

**AMERICAN TRADING AND EXCHANG CORPORATION,
Formerly TRI-NITE MINING COMPANY, A Washington
corp; ELIZABETH HOFFMAN; and Janet Stuart, Appellant**

APELLANT'S BRIEF

Janet Stuart

1013 Joe Creek Road
Colville Washington 99114
509-684-8148

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If it be alleged in the complaint and established by evidence, or if it appear by the evidence without such allegation in the complaint, to the satisfaction of the court, that the property or any part of it, is so situated that partition cannot be made without great prejudice to the owners, the court may order a sale thereof, and for that purpose may appoint one or more referees. Otherwise, upon the requisite proofs being made, it shall decree a partition according to the respective

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I. INTRODUCTION.

The Decedent Bennie W. Schoenwald , 11years prior to his death had been ousted by Janet Stuart-Schoenwald from real property (Joe Creek Property). Does Ben Christopher Schoenwald personal representative for the estate of decedent Bennie W. Schoenwald , now have the rights to assert claim as cotenant to (Joe Creek Property) after Janet Stuart-Schoenwald's title Adverse Possession had ripen?

II Assignments of error

A. ERRORS

1. The trial court erred in entering the order of January 26, 2011 denying Janet Stuart-Schoenwald's motion for summary judgment quieting title by adverse possession of cotenant entered on February 22, 2011.

2. The trial court erred in entering the order of January 26 2011 granting of Ben Christopher Schoenwald as Personal Representative of the estate of Bennie Walter Schoenwald deceased, motion for partial summary judgment to quieting title and for partition order entered on February 22, 2011 The trial court erred in entering the order of October 25, 2011 granting of Ben Christopher Schoenwald as Personal Representative of the estate of Bennie Walter Schoenwald deceased Final order partitioning in kind the real property.

B. Issues Pertaining to Assignments of Errors

1. Did trial court error in ruling Janet Stuart-Schoenwald failed to establish the three elements of adverse possession : (1) the intent; (2) the adverse possession in fact; and (3) the knowledge or notice , required for Adverse Possession and denial of Appellant's motion for summary judgment?

2. Did trial court error in finding that Ms. Stuart-

Schoenwald did not raise genuine issues of material facts and in granting Respondent's Mr. Schoenwald summary judgment?

3. Did the trial court abuse its discretion in granting Mr. Schoenwald final order partitioning in kind the real property based on a single Referees Report when Statue RCW 7.52.080 for Partition mandates of three referee be appointed?

III. STATEMENT OF THE CASE

A. Factual background

In December, 1978, Defendant Janet Stuart-Schoenwald and Bennie Walter Schoenwald (now deceased) purchased land on contract from Tri-Nite Mining Co. in Stevens County Washington.

Stevens County Parcel No. 2692200

The NW ¼ of the SW1/4 of section 9 township 36 N, Range 4 East W.M. In Stevens County Washington . EXCEPT the West 650.0feet of the North 120.00feet. EXCEPT the south 1200.66 feet of the West 100.00feet thereof and EXCEPT right of way of Aladdin

Road CRP No. 13 and JD Brewer Road No. 1061 CP 268.

Title was taken in their names as husband and wife. CP 291.

The Schoenwald's subsequently acquired 3 additional parcels CP 274, CP 275, CP 277, CP 278 from Tri- Nite Mining Co and 1 from the Estate of Herb Learn, all adjacent to parcel CP 59 No. 2692200 referred to as the Joe Creek Properties CP 59.

In 1995 the Decree of Dissolution in Stevens County Superior Court CP 42, Judge Clark order that Ms. Stuart-Schoenwald have temporary use of the house for 18 months until July 1996. After that time the property was to be sold dividing the proceeds 60% to the wife and 40% to the husband. CP 45 , CP 46.

The Decree only gave Ms. Stuart-Schoenwald use of the house for 18 months, it did not prevent Mr. Bennie Schoenwald from using any of the rest of the forty acres of property. Mr. Bennie Schoenwald was NOT forbidden nor order by the decree from entering the Joe Creek Properties. Defendant's Declaration and Memorandum of Points and Motion for Summary Judgment CP 45, CP 46.

In July 1995 Ms. Stuart-Schoenwald sent letter to Mr. Bennie Walter Schoenwald with the rule set for him to remove his personal property from the Joe Creek properties CP 48.

By 2005 Ms. Stuart-Schoenwald had not allowed Mr. Schoenwald to enter, nor use the Joe Creek Properties for (10) ten years. In Mr. Schoenwald's letter of March 2005 CP 49, he states "that if he had use of the property he would have paid taxes on it and it was because you did not permit him to use the property."

Another 16 months lapsed after the 2005 letter CP 49, prior to Mr. Schoenwald's death in August 23, 2007. He did not to assert his right as a cotenant, for the previous 10 years prior 2005 letter CP 49.. Mr. Bennie Walter Schoenwald pass away August 23, 2007. Bennie Walter Schoenwald's Last Will and Testament was filed December 04, 2007 at Spokane County Clerks CP 50.

In 2008 Ms. Stuart-Schoenwald became aware that DSHS liens CP 60, CP 61 filed against the property after Mr. B Christopher Schoenwald listed the Joe Creek Properties in the Inventory and Appraisal filed in

Spokane Superior Court, on March 18, 2008. CP 56. A creditor claim was filed against Mr. Schoenwald's estate in error by Ms. Stuart-Schoenwald attorney CP 294. Ms. Stuart-Schoenwald dismissed that attorney shortly there after.

A Notice of Rejection of Creditor's Claim was filed on June 23, 2008 by the plaintiff Mr. B Christopher CP 170.

In 2009 Ms Stuart-Schoenwald made an offer to the plaintiff Mr. B Christopher Schoenwald prior to litigation in an attempt to prevent a costly litigation. CP 309. At NO time did Ms Stuart-Schoenwald ever offer Bennie Walter Schoenwald anything for the Joe Creek Property.

In 2010 after an agreement between plaintiff Mr. B Christopher Schoenwald and defendant Ms Stuart-Schoenwald could *not* be reach CP310, Mr. B Christopher Schoenwald started litigation to quiet title and partition of Stevens County parcels 2692200 & 2692701 Joe Creek Properties CP 194.

B. Allegations of the complaint and procedural history

On December 29, 2010, defendant Ms Stuart-Schoenwald moved for summary judgment based on RCW 7.28.070. CP 033..

Plaintiff Mr. B Christopher Schoenwald also filed a motion for summary judgment for hearing on December 27, 2010 . Mr. B Christopher Schoenwald as personal representative for Ben W. Schoenwald's estate claimed he became tenant in common with Ms. Stuart-Schoenwald. Mr. B Christopher Schoenwald claimed he was now entitled to order quieting title and partition the property pursuant to the divorce decree or RCW 7.52 CP 201.

Judge Nielson denied defendant's motion and granted plaintiff's motion. RP 3- 17; CP 153-156.

On March 4, 2011 defendant Ms. Stuart-Schoenwald brought a motion for reconsideration hearing on April 12, 2011 and argued that there had been such hostility to support a claim of adverse possession, combine with the statute of limitation, to effectively stop plaintiff's summary judgment CR 59 (a) 7,8,9 RCW 7.28.070 RCW 4.16.020 (2) RP pages 24-29 and 31 -33; CP 157 - 163, 164 -171.

Judge Nielson denied Ms. Stuart-Schoenwald motion for reconsideration RP33; CP 172-173.

On September 27, 2011 plaintiff Mr. B Christopher Schoenwald also filed a motion for judgment confirming report of referee. Allotment of 7 acre around home to Ms. Stuart-Schoenwald and allotment of the remaining 32.9 acres of the property to the Estate. CP 395-397.

Defendant Ms. Stuart-Schoenwald filed response to plaintiff's motion argued that the hearing was premature and there was only one referee report before the court. RCW 7.52.080 mandates that in the case of partition that three referees be appointed. RP 40-44 ;CP 417-419.

Judge Nielson granted plaintiff's motion of final order and decree partitioning real property RP 61; CP 185-190

IV. ARGUMENT

A. Standard of review .

On an appeal from a ruling on a motion for summary

judgment, the standard of review is *de novo*. "The *de novo* standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion." *Folsom v. Burger King*, 135 Wn.2d 658,663 (1998). "An appellate court engages in the same inquiry as the trial court when reviewing an order for summary judgment." *Id.*, citing *Mountain Park Homeowner's Ass 'n v. Tydings*, 125 Wn.2d 337,341 (1994).

B. Appellant's motion for summary judgment quieting title by adverse possession of cotenant should have been **granted**

Court erred in granting plaintiff's summary judgment ruling that defendant did not raised genuine question of material facts sufficient to resist the plaintiffs' motion for summary judgment. The burden is on the party moving for summary judgment to demonstrate there is no genuine dispute as to any material fact and reasonable inferences from the evidence must be resolved against the moving party. Lamon v. McDonnell Douglas Corp., 91 Wn.2d Wn.2d 3,15, 349, 588 P.2d 1346 (1979) (citing Morris v. McNicol, 83 Wn. 2d 491 494-95, 519 P.2d 7

(1974)

Genuine issues of material fact were presented as to her Adverse Possession of real property in defendants (Defendant's Declaration and Memorandum and Points of Authority Supporting Motion for summary Judgment CP 42 , CP48, CP49, CP50, CP 56 CP 59, CP 60 CP 61, CP 8 and CP 25 therein. The Declarations of Janet Stuart-Schoenwald CP 136-137, Jerusha Schoenwald-Rogers CP 085-086 Uriah Schoenwald CP 132-133 , Fastina Clinton CP 089-098, Carol Leithead CP 087-088, Vicki Case CP 134-135, Raymond Melton CP 099-100, Darlene Melton CP 101-102, Robert Amos CP 103-104 and Dixie Amos CP 105-106.

The defendant *did* raised genuine questions of material facts concerning the ouster of Bennie Walter Schoenwald from the Joe Creek Properties. Title by Adverse Possession had indeed ripen by 2003. Statue of limitation for Bennie Walter Schoenwald to claim co tenancy expired 2003 CP 48 RCW 7.28.070. Decree of Dissolution was entered May 1995, not 2005 as the court stated in it's oral order on January 26, 2001 RP 6 -9 The Decree of Dissolution CP 45 CP 46. did not order Bennie Walter

Schoenwald off the Joe Creek properties. It merely ordered him out of the home and gave this defendant temporary use of home for 18 months until July 1996. Then the property was to be sold with any proceeds leftover to be divided 60% to the wife and 40% to the husband. Nothing in the decree ousted Ben from using or occupying any of the 40 plus acres, as he was the defendant's then COTENANT CP 45 CP 46. .

Bennie W. Schoenwald had been ousted by the defendant Janet Stuart-Schoenwald started in 1995 CP 48 and defendant maintain adverse possession of the property C P 49 throughout the 12 years, up through the time of Bennie W. Schoenwald death 2007 CP 8 ,CP32.

Bennie W. Schoenwald had knowledge of being ousted as he stated in the letter that he sent Ms Stuart-Schoenwald, stating " he would have paid his portion of the property taxes if he had use of the land " "And when I went to repair the culvert to get to lower property you stopped that so I couldn't use it last year." CP 49.

Bennie W. Schoenwald took no legal action for 11 years. No excuse

of any kind, justifiable or otherwise, have been offered for not making such demand. Nor has the Plaintiff submitted in evidence to the contrary. Ben had been ousted from 1995 through 2007 by this defendant not by the Decree of Dissolution, 11 years, Bennie had knowledge of that. And that Ms Stuart-Schoenwald claimed the whole Joe Creek properties to herself where she resided, paid off the mortgage , she had paid the property taxes for the Joe Creek Properties from 1995 until today.

Evidence showed that Janet Stuart-Schoenwald established *Adverse Possession by cotenant* by maintaining sole possession of the land, and refused to permit Bennie Walter Schoenwald to enter the Joe Creek Properties, and he had knowledge of that fact . That she paid property taxes from 1995 through 2010. Well over the the 7 years required to claim title by adverse possession under

RCW 7.28.070 .Adverse possession under claim and color of title -- Payment of taxes. Every person in actual, open and notorious possession of lands or tenements under claim and color of title, made in

good faith, and who shall for seven successive years continue in possession, and shall also during said time pay all taxes legally assessed on such lands or tenements, shall be held and adjudged to be the legal owner of said lands or tenements, to the extent and according to the purport of his or her paper title. All persons holding under such possession, by purchase, devise or descent, before said seven years shall have expired, and who shall continue such possession and continue to pay the taxes as aforesaid, so as to complete the possession and payment of taxes for the term aforesaid, shall be entitled to the benefit of this section.

RCW 4.16.02 (2). Limitation of Actions - Divorce - Decree - Enforcement - Limitation Period. An action to enforce a judgment or decree entered in a marriage dissolution proceeding is subject to the 10-year limitation period.

Stokes v Polley 145 Wn.2d 341 (2001) RCW 4.16.020(2). [23]
Limitation of Actions - Action on Judgment or Decree - Commencement of Period - Entry Date. The 10-year limitation period specified by RCW

4.16.020(2) for an action on a judgment or decree commences on the date the judgment or decree is entered. On December 31, 1998, Stokes filed a complaint in Chelan County Superior Court to quiet title and partition the real property. She claimed the 1980 dissolution decree awarded her a one-half ownership interest in the real property, not merely a monetary award. The trial court rendered summary judgment that Stokes acquired no interest in the real property as such because the decree awarded her only a one-half interest in the equity of the property; equity meant one-half of the value of the property in excess of debt as of 1980; and such an award constituted at most an equitable lien. Accordingly, the trial court dismissed Stokes' claims with prejudice. A 1980 divorce decree awarding Ms. Stokes "one-half the equity" in certain real property purchased by Mr. Polley before the parties' brief marriage, **meant a money judgment barred by the statute of limitations, and not a title interest in the real property.**

The court has misapplied Schull V Shepard 63 Wn 2d. 503 and Silver Surprise, Inc. v. Sunshine Mining Co., 15 Wn. ... 1, 547 P.2d 1240 (1976) Schull V. Shepard 387 P. 2d 767, 63 Wash. 2d 503 - Wash: Supreme

Court, 2nd Dept., 1963

... In *Church v. State*, supra, we said (p. 55): "... In the absence of additional facts or circumstances sufficient to show an ouster, exclusive possession by one tenant is not adverse as against his cotenant, but is ordinarily the possession of both. ...[1] **Ouster** is essential to a cotenant's claim of adverse possession. *Church v. State* 65 Wash. 50, 117 Pac. 711; *McKnight v. Basilides* 19 Wn. (2d) 391, 143 P. (2d) 307; *Fritch v. Fritch*, 53 Wn. (2d) 496, 335 P. (2d) 43. Likewise, ouster is essential to the assertion of an applicable statute of limitations. *McKnight v. Basilides*, supra .

Silver Surprise, Inc. v. Sunshine Mining Co., 15 Wn. ... 1, 547 P.2d 1240 (1976), aff'd, 88 Wn.2d 64,558 P.2d 186 (1977) (**ouster of a cotenant requires a degree of proof stronger and more convincing than that necessary to sustain an ordinary claim of adverse possession**). **The ouster must be proved by acts of an adverse character, such as claiming the whole for himself, denying the title of his companion, or refusing to permit him to enter.** Actual or constructive possession of the ousted tenant in common at the time of the ouster is not necessary. See e.g

SILVER SURPRIZE v. SUNSHINE MINING ., 15 Wn. App. 1, 547 P.2d 1240 (1991) . "In order for ouster to exist, there must be an assertion of a right to exclusive possession." Cummings v. Anderson, 94 Wn.2d 136, 146, (1980). In addition, "where the property is not adaptable to double occupancy, the mere occupation of the property by one cotenant may operate to exclude the other." Cummings, 94 Wn.2d at 145. The Joe Creek Property was adaptable to double occupancy. It consists of 40 acres with multiple building sites. At anytime as a cotenant Mr. Bennie Schoenwald could have utilized the Joe Creek Properties except for the fact that Ms. Stuart-Schoenwald ousted him CP 48 . Ms. Stuart-Schoenwald claimed the whole Joe Creek properties to herself and refused to permit him to enter or use any portion of the Joe Creek Property. She continued to do so through the years that followed . Bennie Walter Schoenwald failed to assert rights as cotenant for eleven years. Even after his 2005 letter CP 49., an additional 16 months lapsed wherein he never sought to claim his right as cotenant, which would have been moot ,because Ms. Stuart-Schoenwald adverse possession had ripen to title as of 2003.

Defendant's conduct signifying her intention to hold, occupy, and enjoy the premises exclusively, and the tenant out of possession of the premises, had knowledge of her possession and that she intended an actual adverse possession as of that time, that she did in fact hold and claim the premises adversely, and, lastly, that her cotenant had knowledge of that fact.

Circumstances sufficient to show an ouster, exclusive possession by one tenant cited SURPRIZE v. SUNSHINE MINING., 15 Wn. App. 1, 547 P.2d 1240 (1991) Adverse Possession of a cotenant has three elements to be established : (1) the intent; (2) the adverse possession in fact; and (3) the knowledge or notice.in order for one cotenant to render his possession adverse to the others there must be on his part some act or acts of exclusive ownership . . . making manifest the fact of a hostile holding and carrying knowledge or notice of it to the ones out of possession. See e.g. SILVER SURPRIZE v. SUNSHINE MINING ., 15 Wn. App. 1, 547 P.2d 1240 (1991); An ouster, in the law of tenancy in common, is the wrongful dispossession or exclusion by one tenant of his

cotenant or cotenants from the common property of which they are entitled to possession. The ouster must be proved by acts of an adverse character, such as claiming the whole for himself, denying the title of his companion, or refusing to permit him to enter. Actual or constructive possession of the ousted tenant in common at the time of the ouster is not necessary. See e.g. SILVER SURPRIZE v. SUNSHINE MINING ., 15 Wn. App. 1, 547 P.2d 1240 (1991) . Foundation of a title by adverse possession must have signified, by acts and conduct, an intention to hold, occupy, and enjoy the premises exclusively and the cotenant ousted must have had actual knowledge of the repudiation of their rights. See e.g. MCKNIGHT v. BASILIDES ., 19 Wn.2d 391 (1943) That one cotenant may, by ouster, acquire the rights of his cotenant through adverse possession is well recognized. Annot., 82 A.L.R.2d Adverse Possession - Cotenants 23-24 (1962). The authors of this annotation, in summary, state: A cotenant . . . may undoubtedly hold the common premises adversely to his cotenant . . . and in such fashion as eventually to ripen his claim into title against them, even though his possession was commenced amicably as a cotenant. To

establish that his possession was adverse he must show that at the time in question he was . . . *in actual possession of the premises . . . to which he makes claim, that he intended an actual adverse possession operative as of that time, that he did in fact hold and claim the premises adversely, and, lastly, that his cotenant . . . had knowledge or notice of that fact.*

In short, **there are but three elements to be established:**

(1) ***the intent***; (2) ***the adverse possession in fact***; and (3) ***the***

knowledge or notice.in order for one cotenant to render his

possession adverse to the others there must be on his part some ***act***

or acts of exclusive ownership . . . making manifest the fact of a

hostile holding and carrying knowledge or notice of it to the ones

out of possession. See e.g. SILVER SURPRIZE v. SUNSHINE

MINING ., 15 Wn. App. 1, 547 P.2d 1240 (1991); Adverse

Possession - Cotenant - Ouster - Burden of Proof. The cotenant

claiming to have ousted another by clear **acts of exclusive**

possession has the burden of proving either actual knowledge by

the ousted cotenant of the events, or constructive knowledge by the

ousted cotenant, i.e., knowledge of actions sufficient to cause the cotenant to make inquiry into the possessor's activity. SILVER SURPRIZE v. SUNSHINE MINING ., 15 Wn. App. 1, 547 P.2d 1240 (1991); McKnight v. Basilides, 19 Wn.2d 391 400, 143 P.2d 307 (1943)

An ouster, in the law of tenancy in common, is the wrongful dispossession or exclusion by one tenant of his cotenant or cotenants from the common property of which they are entitled to possession.

The ouster must be proved by acts of an adverse character, such as claiming the whole for himself, denying the title of his companion, or refusing to permit him to enter.

Actual or constructive possession of the ousted tenant in common at the time of the ouster is not necessary. See e.g SILVER SURPRIZE v. SUNSHINE MINING ., 15 Wn. App. 1, 547 P.2d 1240 (1991) .

In this present case Janet Stuart-Schoenwald established Adverse Possession by cotenant by maintaining exclusive possession of real

property, paid the property taxes from 1995 through 2010.. Janet Stuart-Schoenwald sent letter putting Bennie W. Schoenwald on notice CP 8.

Janet Stuart-Schoenwald refused to allow him entry or use of the Joe Creek Property. *There must first be a "repudiation or disavowal of the relation of cotenancy between them, . . . any act or conduct signifying his intention to hold, occupy, and enjoy the premises exclusively . . ."* *Id.* at 506 (quoting *1 Am. Jur., Adverse Possession* § 54 at 824 (1959)).

6] An ouster, in the law of tenancy in common, is the wrongful dispossession or exclusion by one tenant of his cotenant or cotenants from the common property of which they are entitled to possession.

[7] The ouster must be proved by acts of an adverse character, such as claiming the whole for himself, denying the title of his companion, or refusing to permit him to enter. Actual or constructive possession of the ousted tenant in common at the time of the ouster is not necessary. (Cardoza v. Machado, supra, p. 811, citing Carpentier v. Webster, supra, p. 563, and 62 C.J. 426, 32.)

Bennie W. Schoenwald had knowledge of being ousted Mr. Bennie W. Schoenwald's letter sent to Ms. Stuart-Schoenwald in 2005, where he states that acknowledgment *"If I could have used my 40% I would have paid that portion of the property taxes" " ..when I wanted to use the shop...and when I went to repair the culvert to get to the lower property you stopped that so I couldn't use it last year"*CP 49 .

Facts showed that Janet Stuart-Schoenwald exclusive possession, held such possession in opposition to the rights of her cotenant. title by adverse possession under RCW 7.28.070,«1» and that Decedent failed to seek any legal remedy for 12 years, and was otherwise barred by laches and the statute of limitations. Accordingly, summary judgment should have been granted to the effect that Janet Stuart-Schoenwald should have Quiet title to 100% of the 1013 Joe Creek property.

Janet Stuart-Schoenwald established that her actions ripen her claim into title against Bennie W. Schoenwald's 40% interest of the Joe Creek Properties.

The court errors in not to taking into consideration that the

defendant did raised genuine issue of material fact sufficient to resist the plaintiffs' motion for summary judgment.

The evidence and all reasonable inferences therefrom must still be examined in the light most favorable to the non-moving party to determine if there are genuine issues of material fact for trial . " Weatherbee v. Gustafson, 64 Wn. App.128,132, 822 P.2d 1257 (1992) VersusLaw, Inc. v. Stoel Rivers 127 Wn App 309Apr. 2005 , Rivers,[2] Judgment - Summary Judgment - Determination - In General. A party moving for summary judgment has the burden of demonstrating the absence of a genuine issue as to any material fact. A material fact is one upon which the outcome of the litigation depends, in whole or in part. A summary judgment may be granted only if reasonable minds could reach but one conclusion from the factual averments in the record. Where different competing inferences may be drawn from the facts, summary judgment is improper and the issue must be resolved by the trier of fact..[3] Judgment - Summary Judgment - Determination - Interpretation of Facts. When ruling on a motion for summary judgment, a court views the facts submitted and the reasonable

inferences that may be drawn from the facts in the light most favorable to the nonmoving party.

Bennie Walter Schoenwald never took legal action to enforce his rights as a co-tenant of Joe Creek Property. He did nothing about this defendant's refusal to let him have access to the Joe Creek Properties. From 1995 until the time of his death in 2007, he was aware that this defendant refused to let him have access to the Joe Creek Properties. Nor has the Plaintiff submitted any evidence to the contrary. As stated in Enterprise Timber, Inc. v. Washington Title Ins. Co., 76 Wn.2d 479, 483, (1969): One who has notice of facts sufficient to prompt a person of average prudence to inquire is deemed to have notice of all facts which reasonable inquiry would disclose.

EQUITY - LACHES - ASSERTION OF CLAIM WITHOUT ACTION.
Even where a protest has been made, the mere assertion of a claim, without any act to give it effect, cannot keep alive a right which would be

precluded by failure to prosecute it diligently. See e. g. STEWART v. JOHNSTON 30 Wn. (2d) 926 (1948) In Edison Oyster Co. v. Pioneer Oyster Co., 22 Wn (2d) 616, 157 P. (2d) 302,(1945) the court said:
“Laches..... specifically, . . . is [the] inexcusable delay in asserting a right; an implied waiver arising from knowledge of existing conditions and an acquiescence in them; such neglect to assert a right as, taken in conjunction with lapse of time more or less great, and other circumstances covering prejudice to an adverse party, operates as a bar in a court of equity; such delay in enforcing one's rights as works disadvantage to another." EQUITY - LACHES - ASSERTION OF CLAIM WITHOUT ACTION. **Even where a protest has been made, the mere assertion of a claim, without any act to give it effect, cannot keep alive a right which would be precluded by failure to prosecute it diligently.** See e. g. STEWART v. JOHNSTON 30 Wn. (2d) 926 (1948)

At the time of the death of Bennie W. Schoenwald in 2007, he had no claim to the real property at 1013 Joe Creek, Colville, Washington. The sworn testimony of Bennie Walter Schoenwald in “Last Will and

Testament of Bennie Walter Schoenwald CP 50 real property was absence therein . *“A testator is presumed to have knowledge of his title to real estate.”* In re McNulta's Estate, 168 Wash. 397, 403, 12 P. (2d) 389 (1932). Bennie W. Schoenwald lived next to defendants Joe Creek Property, it was not like the property was forgotten in some distant state.

Bennie W. Schoenwald lists and bequests all of his assets in his Will, which does not include the real property at issue. *As this real property was not a lost asset capable of being found.* If Bennie had considered Joe Creek Properties to be part of his estate, he would have valued it at least as much as he did the dog and other assets he bequeathed in his Last Will and Testament CP 50.

It stands to reason that Plaintiff Ben Christopher Schoenwald has no grounds for quieting title for the estate nor making himself the defendant 's tenant in common on the real property at 1013 Joe Creek, Colville, Washington .FINK v. STATE, 50 Wn. (2d) 348 (1957) .[2, 3]”
Coming now to the facts in the present case, *it seems to us that these clearly add up to laches on the part of John Fink, the deceased. His son,*

Lloyd Fink, as administrator, can have no greater interests or rights in the matter than those to which the decedent may have been entitled. John Fink allowed this situation to continue for eleven years, until some time in 1949.

C. Respondents' motions for summary judgment should have been denied.

Court erred in granting plaintiff's summary judgment ruling that defendant did not raised genuine question of material facts sufficient to resist the plaintiffs' motion for summary judgment.

The burden is on the party moving for summary judgment to demonstrate there is no genuine dispute as to any material fact and reasonable inferences from the evidence must be resolved against the moving party. Lamon v. McDonnell Douglas Corp., 91 Wn.2d 315, 349, 588 P.2d 1346 (1979) (citing Morris v. McNicol, 83 Wn. 2d 491 494-95, 519 P.2d 7 (1974))

The defendant did raised genuine question of material fact sufficient to resist the plaintiffs' motion for summary judgment. Defendant

raised genuine issue of material facts concerning adverse possession by a cotenant, facts of the three element showing 1. intent 2. possession in fact and 3. knowledge of the cotenant out of possession. Ms. Stuart-Schoenwald's adverse possession title had ripened. Facts showing Bennie Walter Schoenwald was guilty of laches and that Statute of limitations did applied. The statute of limitation has elapsed for enforcement of the decree of dissolution, so the Plaintiff should be barred from doing for Decedent what Decedent failed to do during his lifetime. As of 2003 the statute of limitation had elapsed for be Schoenwald to assert any right to the Joe Creek Properties . The defendants Adverse Possession Title had fully ripen.

D. Trial court abuse its discretion in granting Mr. B Christopher Schoenwald final order partitioning in kind the real property based on a single Referees Report

RCW 7.52.080 Order of sale or partition.

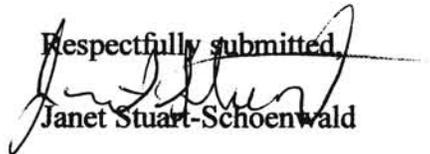
“If it be alleged in the complaint and established by evidence, or if it appear by the evidence without such allegation in the complaint, to the satisfaction of the court, that the property or any part of it, is so situated that partition cannot be made without great prejudice to the owners, the court may order a sale thereof, and for that purpose may appoint one or more referees. Otherwise, upon the requisite proofs being made, it shall decree a partition according to the respective rights of the parties as ascertained by the court, and appoint three referees, therefor, and shall designate the portion to remain undivided for the owners whose interests remain unknown or are not ascertained.” RCW 7.52.080 mandates that is the case of partition that three referees be appointed.

Trial court erred in ruling on partition of the Joe Creek Properties when Defendant objected to moving forward that the hearing was premature as there was absent 2 other Referee reports as to make an objective partition of the Joe Creek Properties. RP 59-64, CP 417-419

V. CONCLUSION.

Appellant requests that this court reverse the rulings of the court below with respect to its motion for summary judgment and Respondents' motions for summary judgment. This court should then direct the court below to enter judgment in favor of Appellants and to award interest, costs and fees, as appropriate under the law.

[Date] *2/20/2012*

Respectfully submitted,

Janet Stuart-Schoenwald

CERTIFICATE OF SERVICE

I declare under penalty of perjury of the laws of the state of

Washington that on this date true and correct copies of the document to which this declaration is attached were served by the method indicated below, and addressed to the following:

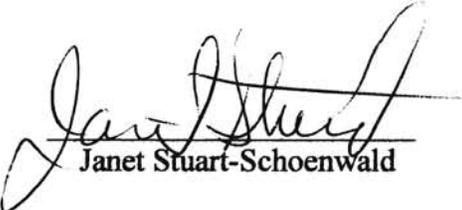
(1) CORRECTED APPELLANTS' BRIEF

Ben C. Schoenwald
C/O
Winston & Cashatt
601 West Riverside Ave.
Suite 1900
Spokane, Washington 99201-0695

VIA REGULAR MAIL

Plaintiff

2/21/2011


Janet Stuart-Schoenwald