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Supreme Court No. 85962-1
Court of Appeals No. 63053-9-1

SUPREME COURT OF THE STATE OF WASHINGTON

JAMES GORMAN, as General Partner of HOLLYWOOD
VINEYARDS LIMITED PARTNERSHIP,

Respondent/Appellant/Plaintiff,

v.

THE CITY OF WOODINVILLE,
a Washington municipal corporation.

Petitioner/Respondent/Defendant,

SUPPLEMENTAL BRIEF OF JAMES GORMAN, GENERAL
PARTNER OF HOLLYWOOD VINEYARDS LIMITED
PARTNERSHIP

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ORIGINAL

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I. INTRODUCTION

James Gorman, as General Partner of Hollywood Vineyards Limited Partnership's ("Gorman") offers his supplemental brief pursuant to Rule of Appellate Procedure 13.7(d).

II. ARGUMENT

A. THIS CASE IS STILL A MATTER OF FIRST IMPRESSION

Since this matter was presented to the Court of Appeals, counsel for Mr. Gorman has not been able to find a case which addresses the issues here, i.e., whether a municipal organization is subject to a previously perfected claim of adverse possession when it acquires property through a voluntary conveyance/dedication.

What counsel has been able to find is secondary authority from other states and commentators supporting Mr. Gorman's position. For example, the following cases from Indiana, Michigan, and Texas all support the argument that once the prescriptive period has run, then title vests in the adverse possessor by operation of law.

- *Marathon Petroleum Co. v. Colonial Motel Properties, Inc.*, 550 N.E.2d 778 (Ind. Ct. App. 1990) (Once adverse possession is shown, title is in adverse possessor and title of original owner is extinguished.)
- *Dep't of Transp. v. Pichalski*, 425 N.W.2d 145 (Mich. Ct. App. 1988) (Even before completion of adverse possession

period, adverse possessors had sufficient interest in property to make them "owners" of land for purposes of receiving condemnation award.)

- *Niles v. Dean*, 363 S.W.2d 317 (Tex. Civ. App. 1962): (Proof of a record title in either the defendant or a third person would not defeat a perfected adverse claim by the plaintiff.)

The commentators in Powell on Real Property also state as follows:

Title to property held in fee that is acquired by adverse possession matures into an absolute fee after the statutory prescriptive period has expired. Thus, adverse possession for the requisite period of time not only cuts off the true owner's remedies but also divests the owner of his or her estate. Accordingly, entrance by the record owner upon land to remove various improvements after title has already vested in adverse claimants constitutes trespass for which the possessor may seek damages. Moreover, such title may not be divested by the acknowledgment of title in the former owner, by a cessation of occupancy, or by mere failure to assert title after it has been perfected.

Title to property acquired by adverse possession is generally not affected by the recording laws. This is so even where the adverse possessor is not in actual possession at the time the record titleholder conveys to a bona fide purchaser.

16-91 POWELL ON REAL PROPERTY § 91.12 (Michael Allan Wolf ed., Matthew Bender 2011).

Additionally, from the law of eminent domain, the commentators in Nichols on Eminent Domain note:

Under eminent domain statutes, an owner has been held to include any person who has an interest in the land condemned. Since the rights of owners of possessory and equitable titles have been recognized, it follows that one who claims title in fee is entitled to equal recognition of his or her rights, even if the interest or right has arisen by adverse possession.

2 NICHOLS ON EMINENT DOMAIN § 5.2 (Matthew Bender, 3rd ed. 2011).

Those commentators also note the following cases from Ohio and Kentucky supporting the above proposition:

- *State Dir. of Highways v. Alvin Const. Co.*, 220 N.E.2d 617 (Ohio Probate Ct. 1966) (An "owner" of land for condemnation purposes, is not necessarily one owning the fee simple, or one having the property in the highest estate it will admit of, but one having a lesser estate may be an owner for purposes of participating in a condemnation action and award.)
- *U.S. v. Certain Lands*, 25 F. Supp. 52, 53 (W.D. Ky. 1938): ("Where an adverse claimant is in the actual possession and occupancy of land or any part thereof, when a subsequent purchase occurs, the subsequent purchaser is deemed to have constructive notice of the title under which the claimant occupies the premises.")

Thus, it is clear throughout the several states that the following points are commonly held in the law of prescriptive rights:

1. No court order is necessary to perfect a prescriptive right.
2. Title vests upon the passing of the requisite period. In Washington State, that period is ten years. RCW 4.16.020(1).

3. Purchasers of property against which a prescriptive claim is asserted take that property and the claim against it.

These principles should be applied to a governmental entity such as the City of Woodinville ("City") which takes property subject to voluntary conveyance/dedication.

B. MR. GORMAN'S POSITION IS THE NATURAL AND NEXT STEP IN THE DEVELOPMENT OF THE LAW

Mr. Gorman's position is a natural next step and arguably understood in the law if the great Professor Stoebuck¹ is to be believed. CP 30. Mr. Gorman's position does not violate the general proscription against claims made against a governmental entity based on the passage of time as set forth in RCW 4.16.160.

Here, there is no claim against the City based on the passage of time as the time passed prior to the City's ownership of the Subject Property. Thus, the prohibition contained in RCW 4.16.160 is simply not at issue here.

Mr. Gorman's position also makes common sense. There is no reason cited by the City that applying these long held rules relating to prescriptive rights to a municipal entity is not appropriate. Rather, the City claims that it should be entitled to the status of a

¹ The Court is asked to take judicial notice of the numerous cases in Washington State which rely upon his writings as authority.

tax foreclosure sale in a voluntary conveyance/dedication such as that presented here. Respondent's Court of Appeals Brief p. 9. However, that status is conferred on a taxing authority by statute, namely RCW 84.60.010 and RCW 84.60.020. There is no similar statute in the State of Washington (or another state which Counsel for Mr. Gorman could locate) which confers a similar status on a governmental entity like the City in this case.

Such an argument does not make sense. It is the long-held position of Washington law that the government is treated just like a private citizen and must act as a private citizen except in a few instances. For example, under the 11th Amendment of the United States Constitution, states generally enjoy sovereign immunity from suits for money damages or equitable relief. U.S. Const. amend XI. Liability only exists if immunity has been waived by the state. In Washington, that has occurred. RCW 4.96.010(1) and RCW 4.96.020.

As another example, RCW 84.60.010 and RCW 80.60.020 allows for superpriority for real property taxes without recording a notice as required by RCW 65.08. Again, there is no statute or reported case that excuses a government entity like the City from the common law rules of adverse possession, nor should there be.

**C. KIELY V. GRAVES, SUPREME COURT OF
WASHINGTON CAUSE NO. 84829-9 IS A RELATED
BUT DISTINGUISHABLE CASE**

This court has accepted direct review of an appeal of the trial court's decision in *Kiely v. Graves*, Supreme Court Cause No. 84829-9. There, this Court is faced with a number of questions relating to adverse possession against a governmental entity. More specifically, as is related to this case, this Court is asked to decide whether a private party may claim adverse possession against an underlying fee interest when a governmental entity holds a right-of-way right, or easement right, over the property?

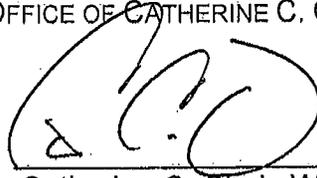
This case differs from *Kiely* in that there, the government holds some interest in the claimed property during the period of claimed prescriptive use. Here, however, there is no governmental interest during the claim prescriptive use by Mr. Gorman—rather, Mr. Gorman claims that he can prove his claim against the City based on prescriptive use for a 10 year period which completed itself prior to the City's ownership interest in the Subject Property. Thus, as there is no governmental interest to address, this case is distinguishable from *Kiely* even though it too addresses the common issue of adverse possession and governmental ownership of property.

III. CONCLUSION

For the above stated reasons, and those stated in the Appellant's Brief and the Court of Appeals decision in *Gorman v. Woodinville*, 160 Wn. App. 759, 249 P.3d 1040 (2011), the Court of Appeals should be affirmed. This matter should be remanded for trial.

Dated this 7th day of September, 2011.

THE LAW OFFICE OF CATHERINE C. CLARK PLLC

By: 

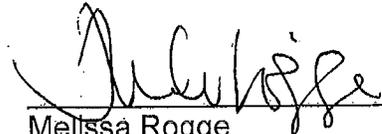
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Certificate of Service

I hereby certify that I caused the foregoing document to be served upon the below named individual in the identified manner on this 7th day of September, 2011:

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