

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION 1

NO. 64595-1-1

GARY F. KARLBERG and SHARON KARLBERG,
a married couple,

Respondent

v.

STEVEN L. OTTEN,
a single man,

Appellant

REPLY BRIEF OF APPELLANT
STEVEN L. OTTEN

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I. INTRODUCTION

The Brief of Respondent Karlberg (“Response”) proffers numerous arguments which are rooted in inapposite case law and misinterpretation of otherwise applicable case law. Otten’s Reply Brief (the “Reply”) addresses each of the relevant erroneous arguments set forth in the Response.

Perhaps most telling of Karlberg’s misapplication of the law is their attempt to turn the doctrine of *res judicata* on its head, rendering it inapplicable in virtually any case. This Court should refrain from unwinding the long history of judicial precedence establishing *res judicata*’s application in Washington.

A review of the record, the Brief of Appellant Steven L. Otten (the “Brief”) and this Reply reveals that Otten is entitled to the relief requested in the Brief.

II. ARGUMENT

A. Otten’s General Allegation of Title to the Disputed Property is Sufficient to Maintain His Adverse Possession Claim.

Otten’s Brief cites long standing Washington case law, i.e. *Rogers, et al. v. Miller*, 13 Wn. 82, 42 P. 525 (1895) (“*Miller*”) and its progeny, holding that one who pleads ownership in fee to a disputed parcel of property is entitled to prove ownership by any

means, including adverse possession. Brief at Pgs. 27-29. Despite that case law, Karlberg argues that the trial court correctly refused to consider Otten's adverse possession claim because: 1) Otten failed to raise the argument before the trial court and is therefore barred from arguing it before this Court; and 2) RCW 7.28.130 and *Brown v. Haley*, 56 Wn. 218, 105 P. 478 (1909) ("*Brown*") required Otten to specifically state the nature of his estate or right to possession of the Disputed Property. For the reasons set forth below, neither of Karlberg's arguments support departing from the *Miller* line of cases.

1. Related Issues May be Raised for the First Time on Appeal.

It is well established that where "an issue raised for the first time on appeal is arguably related to an issue raised in the trial court, the [C]ourt may exercise its discretion to consider newly-articulated theories for the first time on appeal." *Lunsford v. Saberhagen Holdings, Inc.*, 139 Wn. App. 334, 338, 160 P.3d 1089 (2007) ("*Lunsford*") (internal quotations omitted). At the trial court Otten argued extensively that he should be permitted to assert his claim for title to the Disputed Property via both paper title and through adverse possession theories including, but not limited to,

adverse possession under color of title. See CP 300-311 and CP 288-289.

The argument that Otten was entitled to argue adverse possession by virtue of his original pleadings is related to the request made by Otten before the trial court to amend his pleadings to specifically include claims of adverse possession. Both arguments lead to the same result, i.e. Otten being permitted to argue that his title to the Disputed Property arises either out of his paper title to that property or, alternatively, out of his adverse possession of that property.

Moreover, both arguments are premised on the notion that the adverse possession claim must be allowed as a matter of right: i.e. motions to amend must be granted as required to permit justice to be served and a general allegation of ownership includes, by law, the right to argue adverse possession. See Brief at Pgs. 27-33. Pursuant to *Lunsford* the argument proffered by Otten at trial is substantially similar in both its content and result to permit this Court to consider the *Miller* line of cases on appeal.

2. Karlberg Misinterprets and Misapplies *Brown* and RCW 7.28.130.

Karlberg relies on *Brown* and RCW 7.28.130 to argue Otten

was required to plead adverse possession as an affirmative defense. Response at Pgs. 29-30. *Brown* is inapposite to the present case; therefore, the *Miller* line of cases cited by Otten control.

RCW 7.28.130 was first enacted in or about 1869 and was last amended in or about 1881. See RCW 7.28.130. In 1909 the Supreme Court decided *Brown*, holding that a defendant who fails to plead *any title* in himself fails to comply with RCW 7.28.130's requirement to plead the nature of his estate, claim or title to disputed property. In *Brown*, the plaintiff filed an action to quiet title to disputed property. The defendant's answer contained only a general denial to the complaint and failed to plead *any title* to the property in himself. *Brown*, 56 Wn. at 218-219. After failing to allege any title to the property, the defendant introduced evidence of adverse possession at trial over plaintiff's objections. *Id.*

The Supreme Court held that the defendant's failure to allege *any title* in himself by entering only a general denial to the plaintiff's complaint failed to comply with RCW 7.28.130, and therefore defendant should not have been allowed to present evidence of adverse possession. *Id.* at 221-222. On those grounds the Supreme Court reversed the trial court judgment. *Id.*

at 223.

The distinction between *Brown* and the case at bar is obvious: unlike *Brown*, where the defendant filed a general denial failing to allege any title to the disputed property, Otten's Answer to Complaint and Counterclaim expressly alleged fee ownership to the Disputed Property. CP 312-317. This distinction is key and makes *Brown* inapposite and inapplicable herein.

As discussed in *Miller*, cited supra, and *Metropolitan Bldg. Co. v. Fitzgerald, et al.*, 122 Wn. 514, 210 P. 770 (1922) ("*Metropolitan*"), a general allegation of ownership to disputed property entitles a party to demonstrate title by adverse possession. Notably *Miller* was decided in 1895 and *Metropolitan* was decided in 1922, well after RCW 7.28.130 was enacted. Moreover, *Metropolitan* was decided by the Supreme Court *after* its ruling in *Brown*; thus, *Brown* does not control where a party makes a general allegation of title to disputed property.

Reading *Brown* in conjunction with *Miller* and *Metropolitan* reveals that where a party makes only a general denial to a complaint and fails to allege any ownership in property, such as in *Brown*, they are barred from introducing evidence of title pursuant to RCW 7.28.130. However, where a party makes a general

allegation of ownership to disputed property in their pleadings, as in *Miller* and *Metropolitan*, the party is entitled to prove that title by paper title and/or adverse possession. As such, Otten's general allegation of ownership to the Disputed Property entitled him, as a matter of law, to introduce evidence of and argue adverse possession at trial. The trial court's refusal to consider the adverse possession argument in light of *Miller* and *Metropolitan* constitutes reversible error.

B. Karlberg Fails to Substantiate Allegation that Motion to Amend Would Have Resulted in Prejudice.

As discussed extensively in the Brief, a motion to amend must be freely granted to permit justice to be served by ensuring all cases are decided on their merits. Brief at Pgs. 29-31. Undue prejudice is the only proper grounds to deny a motion to amend. *Id.* at Pgs. 30-31.

Karlberg's Response fails to substantiate the actual undue prejudice Otten's Motion to Amend would have caused Karlberg. Rather than detail how the Motion to Amend would have prejudiced Karlberg, they simply state that the timing of the Motion to Amend "speaks for itself" and there was "tenable reasons" for determining Karlberg would have been prejudiced. Response at Pg. 29.

Karlberg glosses over the prejudice issue for the simple reason that arguing an additional legal theory based on the same facts that would ultimately be admitted at trial does not amount to undue prejudice. If the Motion to Amend had been granted Karlberg simply would have had to make an additional argument during closing. Therefore, as discussed in detail in the Brief, the trial court's denial of the Motion to Amend constitutes reversible error. Brief at Pgs. 29-35.

C. Otten Openly Introduced Evidence of Adverse Possession without Objection.

Karlberg argues that Otten attempted to “finesse” the adverse possession argument into the trial and therefore this Court should refuse to amend the pleadings to conform to the evidence tried by the parties pursuant to CR 15(b). The record simply does not support this characterization of the trial.

Rather than “finesse” the adverse possession argument, Otten put Karlberg on notice of his intent to introduce evidence of adverse possession by filing, in the days leading up to trial, Defendant’s Additional Affirmative Defenses which stated:

1. Otten has possessed most of the disputed property for more than ten years so that under RCW 4.16.020(1) Karlberg is barred from recovering such property.

2. Otten has been in actual, open, and notorious possession under claim and color of title, made in good faith, and for more than seven successive years paid all taxes legally assessed on such lands or tenements so Karlberg cannot eject him from this property.

CP 288-289. Karlberg failed to lodge any objection to this pleading.

In light of the Defendant's Additional Affirmative Defenses, filed with the court before trial, Otten's intent to introduce evidence supporting adverse possession could not have been any more forthright. Otten proceeded to introduce evidence relating to his color of title, payment of taxes and open, notorious, hostile, exclusive and continuous use of the Disputed Property, all of which was admitted at trial *without objection* from Karlberg. Brief at Pgs. 5-17. It is well established that a litigant's failure to raise objections in a timely fashion results in waiver of those objections. *Haywood v. Aranda*, 97 Wn. App. 741, 744-745, 987 P.2d 121 (1999); Accord ER 103(a). Therefore, Karlberg's untimely objection during closing argument does not override the simple and indisputable fact that the parties tried, by implication, Otten's claim of adverse possession to the Disputed Property.

In lieu of the record created before the trial court, that court's refusal to adjudicate Otten's adverse possession claim consistent

with the facts tried by the parties constitutes grounds to vacate and remand. See Brief at Pgs. 36-38.

D. Otten's Use of the Disputed Property Was Open, Notorious, Uninterrupted and Exclusive for At Least Seven Years.

Karlberg argues that even if the trial court erred in not hearing Otten's adverse possession claim, that error is harmless because Karlberg allegedly disputed Otten's adverse use. Response at Pg. 35. Karlberg's argument, however, is not supported by the record.

The trial record shows that Otten was the only individual to use the Disputed Property from 1993 through 2008, with the exception of Karlberg mowing the approximately 45' by 200' lawn portion of the Disputed Property until 2003. Brief at Pgs. 11-15 and 24-27; Accord Response at Pgs. 20-23. Karlberg's Response fails to demonstrate any other use of the Disputed Property after 1993. The Response lacks any discussion of Karlberg's use of the Disputed Property during that timeframe for the simple reason that Karlberg admittedly failed to use any of the Disputed Property outside the lawn area during that time.

Mr. Karlberg's own testimony reveals that from 1993 forward Otten was the only individual to hay the Disputed Property. RP

144, Lines 17-21; Accord RP 235, Line 23 through RP 236, Line 12 and Defense Exhibit 29; Accord RP 155, Lines 21-25 and RP 156, Lines 1-12; Accord Brief at Pgs. 15-16. Not only did Mr. Karlberg cease haying the Disputed Property after 1993, Mr. Karlberg testified that he stopped using the Disputed Property, stating that for a consecutive period of up to five years the Karlbergs failed to even go on the Disputed Property. RP 239, Lines 16-26; Accord Brief at Pgs. 14-17.

Thus, the Court's failure to consider Otten's adverse possession claim constitutes reversible error in light of Otten's undisputed adverse use of the vast majority of the Disputed Property after 1993 through 2008.

E. *Res Judicata* Serves to Bar the 2009 Karlberg Lawsuit.

A significant portion of Karlberg's Response argues that *res judicata* does not bar the 2009 Karlberg Lawsuit and the summary judgment granted therein. Response at Pgs. 40-50. As will be discussed at length below, Karlberg's arguments are based on inapposite and inapplicable case law and, in some cases, on no case law at all. In fact, if the Court accepts Karlberg's argument it would vitiate the doctrine of *res judicata*. For the reasons discussed herein, the Court must reject Karlberg's arguments and

vacate the judgment entered in the 2009 Karlberg Lawsuit pursuant to *res judicata*.

1. The Causes of Action in the 2008 Lawsuit and 2009 Karlberg Lawsuit Share Identity Such That *Res Judicata* Applies.

Karlberg attempts to turn the doctrine of *res judicata* on its head by arguing that because a prior final adjudication resolved all factual and legal issues between two parties Karlberg is entitled to maintain a second action on those same facts simply by adding a “new” claim of collateral estoppel. Response at Pg. 42. This is erroneous for the obvious reason that *res judicata* demands exactly the opposite conclusion: i.e. that the 2009 Karlberg Lawsuit is barred *because* the 2008 Lawsuit suit adjudicated the central facts and legal issues at hand and that judgment is final.

Karlberg correctly notes the four elements of *res judicata*, i.e. identity of: 1) subject matter; 2) cause of action; 3) persons and parties; and 4) quality of the persons for or against whom the claim is made. *Id.* Karlberg then notes that the 2009 Karlberg Lawsuit alleged a cause of action that Otten was collaterally estopped from disputing ownership to the Remaining Disputed Property in the 2009 Karlberg Lawsuit by the fact that the trial court in the 2008 Lawsuit found that Karlberg had established facts consistent with

ownership up to the Cattle Fence. *Id.*; Accord CP 543. Karlberg next makes the erroneous and unsupported legal conclusion that the 2008 Lawsuit does not have a preclusive *res judicata* affect on the 2009 Karlberg Lawsuit because the 2009 Karlberg Lawsuit alleges a “new” cause of action, i.e. collateral estoppel. In what appears to be an attempt to avoid the applicable analysis required to determine identity of causes of action, Karlberg notably fails to cite any case law supporting their argument. Response at Pg. 42.

A review of the case law proves that the causes of action in the 2008 Lawsuit and 2009 Karlberg Lawsuit are identical for *res judicata*'s purposes. Whether or not two cases involve the same causes of action “cannot be determined precisely by a mechanistic application of a simple test.” *Rains v. State*, 100 Wn.2d 660, 663-664, 674 P.2d 165 (1983) (“*Rains*”). The courts examine four factors (the “*Rains* factors”) to determine whether or not two lawsuits share identity of causes of action, namely:

- 1) Whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action;
- 2) whether substantially the same evidence is presented in the two actions;
- 3) whether the two suits involve infringement of the same right;
- and 4) whether the two suits arise out of the same transactional nucleus of facts.

Id. at 664; Accord *Kuhlman v. Thomas*, 78 Wn. App. 115, 122, 897 P.2d 365 (1995) (“*Kuhlman*”) and *Landry v. Luscher*, 95 Wn. App. 779, 976 P.2d 1274 (1999) (“*Landry*”). *Kuhlman* and *Landry* are especially applicable to the case at bar and are therefore discussed at greater length below.

In *Kuhlman*, Mr. Kuhlman was disciplined and demoted by the Seattle Housing Authority (“SHA”) after being accused of sexual harassment. *Kuhlman*, 78 Wn. App. 117-118. In an effort to simplify the relatively complex procedural history, suffice it to say that Kuhlman ended up with two lawsuits: the first (“*Kuhlman I*”) filed against SHA for violation of his federal and state due process rights because he claimed the harassment allegations were false; and the second (“*Kuhlman II*”) against SHA officers and employees alleging due process violations, defamation and wrongful interference. *Id.* at 117-119.

Prior to any substantive hearings on the second lawsuit, the trial court dismissed *Kuhlman I* on summary judgment after finding, among other things, that Mr. Kuhlman’s constitutional rights were not impaired and Mr. Kuhlman failed to set forth evidence sufficient to show the harassment allegations were false. *Id.* at 119 and 123. The defendants in *Kuhlman II* then moved for summary judgment

arguing that Kuhlman I barred Kuhlman II due to *res judicata*.

The *Kuhlman* Court (which was hearing “Kuhlman II”) held that Kuhlman I did bar Kuhlman II under *res judicata* despite the fact that Kuhlman II included “new” or “different” causes of action including defamation and wrongful interference. That court held the two cases clearly satisfied all of the *Rains* factors used to determine if cases share identity of causes of action, stating:

First, it is clear that *Kuhlman* I and *Kuhlman* [II] arise out of the same transactional nucleus of facts. In particular, the basis for both suits is predicated on employee reports of sexual harassment and Kuhlman's subsequent suspension and demotion. Second, the evidence needed to support each action is identical. Indeed, Kuhlman has not set forth any facts in *Kuhlman* [II] that differ from *Kuhlman* I. Third, both suits allege infringement of the same rights: the right not to be deprived of due process and the right not to be adversely affected by false allegations of sexual harassment. Fourth, the rights established in *Kuhlman* I would be impaired by a judgment in *Kuhlman* [II].

Id. at 122-123. The *Kuhlman* Court affirmed the summary judgment dismissing Kuhlman II on the basis of *res judicata*.

Likewise, *Landry* reaffirms the general rule that when an action is brought for part of a claim, a judgment obtained in the action precludes the plaintiff from bringing a second action on the same facts for the remainder of that claim. *Landry*, 95 Wn. App. at

782-783. This is to eliminate duplicitous litigation. *Id.*

Landry was injured and her car was damaged in a motor vehicle collision with Luscher. Landry sued Luscher for property damages in small claims court, obtaining a judgment for approximately \$2,000.00. *Id.* at 781. After the accident Landry began receiving treatment for a cervical strain, which ultimately required surgery. *Id.* Some time after completion of the small claims case, Landry sued Luscher for damages related to her personal injuries sustained in the collision. *Id.* The trial court dismissed Landry's personal injury action as it constituted improper claim splitting barred by *res judicata*. *Id.* at 782. Landry appealed.

In an attempt to avoid *res judicata*'s merger and bar components, Landry argued that the two lawsuits were distinct causes of action: one for personal injury and one for property damage. The court held that because both actions were causes of action for damages based on Luscher's liability in the collision they constituted a single claim, the second of which was barred by *res judicata*. *Id.* at 784-785.

When taking into consideration the four *Rains* factors, it is evident that simply adding a "new" cause of action for collateral estoppel to the 2009 Karlberg Lawsuit does not change the fact that

the 2008 Lawsuit shares identity of causes of action with that suit sufficient to bar the 2009 Karlberg Lawsuit under *res judicata*. Much like *Kuhlman* and *Landry*, the evidence in the two lawsuits was *identical*. In fact, Karlberg's summary judgment in the 2009 Karlberg Lawsuit relied exclusively on the findings and conclusions entered by the trial court in the 2008 Lawsuit. CP 548-549. Likewise, it can not be contested that the two suits arise out of the same nucleus of facts, i.e. Otten's paper title and use of the Disputed Property and Karlberg's alleged adverse possession of that same property.

The suits involved an infringement of the same rights, i.e. Mr. Otten's right to quiet enjoyment of that real property he holds paper title to, paid taxes on and used exclusively, i.e. the Otten Property. Lastly, the second action would destroy or impair rights or interests established by the first judgment. The judgment in the 2008 Lawsuit quieted title in Karlberg up to a line 45' east of the Survey Line. CP 277-278. Thus, the Remaining Disputed Property was left with the titleholder of record, i.e. Otten. Permitting the 2009 Karlberg Lawsuit's judgment to stand would vitiate Otten's right to the Remaining Disputed Property.

Much like *Landry*, Karlberg creates a distinction without legal relevance between the two lawsuits by alleging the relief requested is different: i.e. a distinct portion of the Disputed Property was quieted in the 2009 Karlberg Lawsuit. This is a distinction without merit, however, just as the distinction between personal injury damages and property damages was irrelevant in *Landry*. Karlberg's alleged right to the Remaining Disputed Property arises solely and exclusively out of precisely the same facts as Karlberg's alleged right to the 45' Strip, rights which were adjudicated to finality in the 2008 Lawsuit. Pursuant to *Landry*, *res judicata* bars Karlberg's proverbial second bite at the apple.

Under the factors and analysis set forth in *Kuhlman* and *Landry*, the 2008 Lawsuit and the 2009 Karlberg Lawsuit share identity of causes of action. Karlberg does not challenge application of the remaining *res judicata* elements; therefore, this Court should vacate the 2009 Karlberg Lawsuit's judgment under *res judicata* as an improper attempt to obtain additional relief in a matter previously adjudicated to finality.

Moreover, Karlberg's argument, if accepted, would render *res judicata* meaningless. One attempting to bring a barred second lawsuit on the same facts could always add a "new" claim of

collateral estoppel arguing that the facts have been previously determined and the opposing party is estopped from arguing against them. This “new” claim of collateral estoppel would, according to Karlberg, prevent application of *res judicata* and permit a plaintiff, such as Landry in *Landry*, to maintain the second action for additional damages on a previously fully litigated matter, thus rendering *res judicata* meaningless. This Court should not overturn the well placed and well established doctrine of *res judicata*.

2. *Kinsey v. Duteau* Supports Application of *Res Judicata* Against the 2009 Karlberg Lawsuit.

As discussed in the Brief, *Kinsey v. Duteau*, 126 Wn. 330, 218 P. 230 (1923) (“*Kinsey*”) supports vacating the 2009 Karlberg Lawsuit judgment pursuant to *res judicata*. Brief at Pgs. 42-44. Based on an erroneous reading of *Kinsey* Karlberg argues that the case supports their request for additional relief based on previously litigated facts. Response at Pgs. 43-44.

As originally stated by Otten, *Kinsey* holds that simply expanding one’s requested real property relief does not overcome a prior adjudication’s preclusive bar to additional relief on the same facts *even if the facts support the underlying request for relief.* *Kinsey*, 126 Wn. at 333-334. The *Kinsey* Court noted that the

original trial court entered the demurrer against Duteau erroneously and the facts actually supported Duteau's claim to the property, but Duteau's failure to appeal the original demurrer resulted in a conclusive judgment granting ownership of the contested property to Kinsey. *Id.* at 332-333. To wit, the Court stated:

It may be that the court was in error in its ruling on the demurrer. We think it was. This would undoubtedly have subjected the judgment to reversal on appeal, or to reversal by some other form of direct attack; but it does not subject it to a collateral attack. So long as it stands of record unreversed, it is conclusive as against the parties thereto or in privity therewith, as to all matters litigated therein.

Id. at 333. Thus it was Duteau's failure to appeal the original demurrer, not the facts of the case, which resulted in his loss of the property.

Duteau then argued that because his original action sought only a half interest in the property while the new cross-complaint sought the entire parcel, *res judicata* should not apply. *Id.* The Court held that a change in the amount of relief sought does not avoid the prior ruling's preclusive *res judicata* effect, as that would constitute impermissible claim splitting. *Id.*; Accord Brief at Pgs. 42-44.

Duteau's failed argument that adding additional property to his requested relief avoids *res judicata* is precisely the argument Karlberg proffers to this Court. Simply requesting additional property on the basis of facts previously litigated to final judgment in the 2008 Lawsuit does not entitle Karlberg to additional relief even if the underlying facts support Karlberg's claimed ownership of the Disputed Property (which Otten contests). Karlberg is legally barred from additional recovery on the previously litigated facts by *res judicata*.

3. The Property Line Location Was Fully Adjudicated in the 2008 Lawsuit.

Karlberg relies on *Washington Nickel v. Martin*, 13 Wn. App. 18, 534 P.2d 59 (1975) ("*Washington Nickel*") for the proposition that *res judicata* does not apply to issues not litigated in prior suits. *Washington Nickel* is inapposite because the boundary line issue was fully adjudicated in the 2008 Lawsuit.

In *Washington Nickel* the only issue adjudicated by the court was whether the point of beginning of a legal description was a "lost corner" or an "obliterated corner," the distinction between which is not relevant to this discussion. After determining that issue, the court held it was unable to determine the actual boundary line

between the properties based on the evidence before it. Any future case which included additional evidence, i.e. a survey, could address the issue of the boundary line's location. This ruling recognized the obvious fact that the location of a corner point is a separate and distinct issue from the location of a boundary line. *Id.*

Unlike *Washington Nickel*, the 2008 Lawsuit's central dispute was the location of the property line between the Karlberg and Otten Properties. While the parties introduced extensive evidence regarding ownership of that Disputed Property, Karlberg expressly requested relief only to the 45' Strip. Thus, the 2009 Karlberg Lawsuit is distinct from *Washington Nickel* because the property line issue was fully adjudicated but Karlberg elected to request less than all of the relief he alleged he was entitled to. In that respect, this case is controlled by *Landry*, discussed at length above, and not *Washington Nickel*.

Recall that Landry opted to sue in small claims court for property damage incurred in a vehicle collision with Luscher. Judgment in that small claims action precluded Landry from later suing for personal injury damages arising from the same accident in superior court. *Landry*, 95 Wn. App. at 782-783. Likewise, Karlberg's election to request quiet title solely to the 45' Line in the

2008 Lawsuit precludes him from later seeking additional relief, i.e. the Remaining Disputed Property, in the 2009 Karlberg Lawsuit when that second lawsuit is based on the exact same operative facts.

4. Otten Did Not Waive *Res Judicata*.

Karlberg relies on *Brice v. Starr*, 93 Wn. 501, 161 P. 347 (1916) ("*Brice*") to argue Otten waived his right to raise *res judicata* in the 2009 Karlberg Lawsuit. Response at Pgs. 46-48. Otten expressly raised *res judicata* in the 2009 Karlberg Lawsuit thereby preserving that defense; therefore, *Brice* is inapplicable.

In *Brice* the Court notes the simple proposition that when two cases are simultaneously pending and a final judgment is rendered in the second of the two cases, that case has preclusive *res judicata* affect against the first suit *unless an objection was properly lodged that the second suit was barred by res judicata*. *Brice*, 93 Wn. 503. To wit, the Court stated:

It follows that, having submitted to a trial of the second action without moving therein for a consolidation with the first, **and without raising the objection that, by it, respondent was splitting his cause of action, appellants waived the right to raise that objection here.**

Id. (emphasis added).

Otten expressly raised, and thereby preserved, his objection that the 2009 Karlberg Lawsuit was barred by *res judicata*. CP 232-233, 240-244. This key distinction makes *Brice* inapplicable in the present case and preserved Otten's objection to the 2009 Karlberg Lawsuit on *res judicata* grounds.¹

5. Ownership of the Remaining Disputed Property Was Not Reserved for Future Adjudication in the 2008 Lawsuit.

Karlberg's reliance on *Estate of Black*, 153 Wn.2d 152, 102 P.2d 796 (2004) ("*Estate of Black*") to argue that their claim to the Remaining Disputed Property is not barred by *res judicata* is misplaced. First and foremost, *Estate of Black* expressly narrows its holding to the application of *res judicata* in probate proceedings. *Estate of Black*, 153 Wn.2d at 169.

The narrow applicability of *Estate of Black* aside, that case is inapposite to the case at bar. In *Estate of Black*,

¹ *Brice* is further distinguishable and inapplicable. The holding in *Brice* was founded largely on the fact that both suits were ongoing simultaneously, thus the appellant knew he should have either "pled the first in abatement of the second, or demur in the second on the ground of pendency of the first." *Brice*, 93 Wn. 504. Appellants' failure to properly seek to abate the second action barred their ability to assert *res judicata* as to the first action. *Id.* at 506. Conversely, Karlberg filed the 2009 Karlberg Lawsuit more than a month *after* judgment was entered in the 2008 Lawsuit; therefore the two actions did not occur simultaneously. CP 277, 363.

The trial court specifically stated it would not address claims regarding competency or undue influence and limited the summary judgment trial to whether the lost will should be admitted to probate...[and] because the trial court order limited the issues...[the judgment] would not bar claims regarding competency or undue influence because [those] claims were not addressed, nor could they be addressed, in the summary judgment trial.

Id. at 171.

In this case, the trial court did *not* expressly limit its ruling thereby reserving the issue of title to the Remaining Disputed Property. In fact, both the trial court *and* Karlberg expressly acknowledged that while the facts submitted by Karlberg detailed their alleged ownership of the entire Disputed Property, Karlberg limited their requested relief to only the 45' Strip. Brief at Pgs. 10-11. Rather than reserving any issues for later resolution, the judgment in the 2008 Lawsuit conclusively determined the rights of the parties and therefore bars further litigation as to the Remaining Disputed Property.

F. RAP 9.12 Does Not Preclude Review of the Summary Judgment Entered Against Otten.

Karlberg misinterprets RAP 9.12 and Supreme Court case law in an attempt to avoid this Court's review of the erroneous summary judgment entered against Otten in the 2009 Karlberg

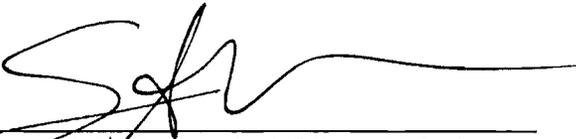
Lawsuit. In the interest of brevity, the basis of Karlberg's misinterpretation of the RAP and applicable case law is omitted because the issue is moot. Otten filed a supplemental designation of clerk's papers pursuant to RAP 9.6(a) designating additional pleadings to avoid further discussion of this issue. See CP 534-549.

III. CONCLUSION

For these reasons, Otten respectfully requests that the Court vacate the trial court's judgments in the 2008 Lawsuit and the 2009 Otten and Karlberg Lawsuits, amend Otten's pleadings in the 2008 Lawsuit to conform to the evidence tried and either quiet title to the Disputed Property in Otten or remand for further proceedings. Alternatively, Otten respectfully requests that the trial court vacate the judgment entered in the 2009 Karlberg Lawsuit pursuant to *res judicata*.

DATED this 27th day of April, 2011.

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Attorneys for Appellant Steven L. Otten

**IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION ONE**

| | | |
|--|---|------------------------|
| STEVEN L. OTTEN, a single man, |) | |
| |) | |
| Appellant, |) | No. 64595-1-I |
| |) | |
| vs. |) | |
| |) | |
| GARY KARLBERG and SHARON KARLBERG, a married couple, |) | CERTIFICATE OF SERVICE |
| |) | |
| Respondents. |) | |
| | | |

I, AMY SHELKIN, certify under penalty of perjury under the laws of the State of Washington that the following is true and correct:

1. I am over the age of twenty-one (21) years, not a party to the above entitled action, not interested therein, and competent to be a witness in such action.
2. On the date set forth below, I caused to be served, via legal messenger, a true and correct copy of the REPLY BRIEF OF APPELLANT STEVEN L. OTTEN on the following party:

Counsel for Respondents

John C. Belcher, WSBA #5040
BELCHER SWANSON LAW FIRM
900 Dupont Street
Bellingham, WA 98225

DATED this 27th day of April, 2011, at Bellingham,
Washington.



AMY M. SHELKIN

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