No. 91622-5

SUPREME COURT
OF THE STATE OF WASHINGTON

UPPER SKAGIT INDIAN TRIBE,

Appellant,

v.

SHARLENE LUNDGREN and RAY LUNDGREN, wife and husband,

Respondents.

APPELLANT'S REPLY BRIEF

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A. JURISDICTIONAL ARGUMENTS

1. In rem Jurisdiction is Insufficient to Provide the Relief Requested by Respondents.

No Washington Court has ruled that *in rem* jurisdiction subjects a federally recognized tribe to the jurisdiction of the Washington State courts. In fact, all of the case precedent relied upon by Respondents are very specific as to the limitations of *in rem* jurisdiction and do not address the legal impact of CR 19 to these proceedings.

An action to quiet title requires that the tenant in possession be joined by the Respondents in order to bring its action. "Any person having a valid subsisting interest in real property, and a right to the possession thereof, may recover the same by action in the superior court of the proper county, ***to be brought against the tenant in possession; if there is no such tenant, then against the person claiming the title or some interest therein***, and may have judgment in such action quieting or removing a cloud from plaintiff's title" (*emphasis added*) RCW 7.28.010. Respondents fail to reconcile this statutory requirement with the legal reality that this Court cannot join Upper Skagit, which is, in this instant, the *tenant in possession*. *Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, 130 Wn.2d 862, 929 P.2d 379 (1996) does not hold that superior courts have

jurisdiction over federally recognized Indian tribes. Rather, the Court very specifically narrowed its holding as to jurisdiction, contrary to Respondents' assertion that it "unquestionably shows that superior courts have jurisdiction over an Indian Tribe in a pure *in rem* action." The actual holding is as follows:

> As sovereign entities, Indian tribes are immune from suit in state or federal courts. It is well settled that waiver of their sovereign immunity will not be implied, but must be unequivocally expressed. . . . Because our decision is based upon *in rem* jurisdiction, **we need not further consider *in personam* jurisdiction, immunity and waiver.** *Id* at 867.

Anderson & Middleton Lumber Company v. Quinault Indian Nation establishes that *in rem jurisdiction* does not give a court jurisdiction over a federally recognized tribe.

Further, it is silent as to the need to join a necessary party as the Court found that underlying claim did not require the joinder of the Quinault Nation. In *Anderson*, the Court was presented with a dispute based upon a partition action, a significantly different legal action from a claim for adverse possession in that it is not dispossessing a party of a legal interest, but rather, clarifying each party's interest in a property they hold in common. Furthermore, the action was initiated prior to the Quinault Nation's acquisition of its interest and the Quinault Nation took title subject to the ongoing litigation. The court did not address the issue of CR 19 and

the inability to join the Quinault Nation to the proceedings as it determined that the exercise of its *in rem* jurisdiction would have no legal impact on Quinault's legal interest. Contrary to *Anderson*, Upper Skagit has a legal interest that it purchased prior to these proceedings and from which it could be dispossessed should this court exercise jurisdiction over these proceedings

Another case which the Respondents have inaccurately represented is *Phillips v. Tompson*, 73 Wash. 78, 131 P. 461. Respondents write: "As stated in *Phillips,* adverse possession and quiet title actions are *in rem.*" The actual language of the case is of significance. In finding jurisdiction, the court noted that a quiet title action or an action to partition property is "strictly speaking" equitable and "acts upon the Person and not upon the property" *Supra* at 82. This recognition by the Court that a quiet title action acts upon the person reaffirms the need for the Court here to assert personal jurisdiction over the tribe in order to effectuate the relief sought by Respondents. Otherwise, any judgment rendered would have no force and effect against the Upper Skagit and could not provide the Respondents with the legal relief they are seeking.

Neither of the above cases stand for the proposition urged upon this court by Respondents that *in rem* jurisdiction subjects the Tribe to this Court's jurisdiction. They certainly don't support the statement that "the

Tribe is not immune from this type of suit." These cases stand for the proposition that when the state has jurisdiction over real estate it may authorize procedures for adjudication of title or ownership of the property consistent with Constitutional principles of due process which magnifies the significance of CR 19 to these proceedings.

Smale v. Nortep, 150 Wn. App. 476, 208 P.3d 1180 (2009) has already been distinguished in the Tribe's opening brief. However, to reiterate, the *Smale* court was not presented with the impact that CR 19 has on these proceedings. The Tribe in *Smale* took the property subject to the ongoing litigation and subject to the claim of Smale. The Tribe in *Smale* did not raise CR 19, and the court was not forced to address the fact that said Tribe was a necessary and indispensable party. Another critical distinguishing factor is that in *Smale,* the Tribe took its bundle of rights to the property at issue subject to the ongoing litigation and as such, any determination as to the status of the property would not have divested it of an interest, as it took the property subject to the ongoing claim.

County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251, 112 S. Ct. 683, 116 L. Ed. 2d 687 (1992) did not address CR 19 nor did it assert that the Court had jurisdiction over the Tribe. Rather, it specifically limited its jurisdiction to *in rem* and not *in personam*. The action at issue was whether the County could exercise its

taxing authority over specific parcels of land held in fee within the exterior boundaries of the Yakima reservation. This action had no impact on the legal interest for the Tribe and did not divest them of a property right.

2. Sovereign Immunity Mandates Dismissal.

The Respondent's effort to recast this case as an *in rem* action blurs the important distinction between an *in rem* claim (allegations concerning property) and *in rem* jurisdiction (the Court's power to hear a case based on the property where the judgment only affects the property). *See, e.g., In re Marriage of Kowalewski,* 163 Wn.2d 542, 182 P.3d 959 (2008) *(en banc).* Here, the Respondents have alleged "*in rem*" claims to the extent the adverse possession involves real property owned by the Tribe. However, jurisdiction in this case can only lie if the Court has both subject matter jurisdiction and personal jurisdiction over the claims and parties. Thus, the mere fact of an *in rem* claim does not affect or somehow avoid threshold jurisdictional questions such as sovereign immunity.

There is no adverse possession exception to tribal sovereign immunity, and the Respondents cannot avoid the doctrine by the simple expedient of pleading such a claim. There are only two exceptions to tribal sovereign immunity: "a clear waiver by the tribe or congressional abrogation." *Wright v. Colville Tribal Enterprises Corp.,* . 159 Wn.2d 108, 111, 147 P.3d 1275 (2006) at 112. An adverse possession claim is not one

of these two recognized ways that immunity may be waived to allow a suit to proceed against a tribe. Given that waivers of immunity are "construed strictly in favor of the sovereign," the Court should not read-in a third waiver for claimants alleging adverse possession claims. As there has been no waiver, and the court cannot assert the jurisdiction necessary to adjudicate the underlying complaint, Lundgren's complaint must be dismissed.

3. Application of *Gorman v. City of Woodinville.*

Respondents virtually ignore the fact that the Washington State Supreme Court has now resolved the *in rem* versus *in personam* argument here in its determination in *Gorman IV v. City of Woodinville*, 175 Wn.2d 68, 283 P.3d 1082 (2012). After recognizing the existence of an *in rem* claim, the Court nevertheless determined that this claim did not end the inquiry. The Supreme Court remanded the underlying proceedings to the Superior court "for trial to determine the validity of Gorman's **claim** of title." The Supreme Court recognized the right in *Gorman* to pursue its claim and potential legal rights associated thereto, but held that those claims needed to be adjudicated at the superior court level. The Supreme Court held that evidence needed to be presented and contested which required the participation of both of the parties.

The *Gorman* Court did not adopt the Respondents' rationale asserted here: that as original title ripens automatically, there is no need for the parties to present their claims and defenses for adjudication as if a claim of adverse possession is in and of itself sufficient to resolve the dispute. The remand in *Gorman* made it absolutely clear that the Superior Court was required to hold a trial and serve as the trier of fact:

> "We affirm the Court of Appeals and remand for trial **to determine the validity of James Gorman's claim of title."**
>
> "Gorman filed an action to quiet title **claiming** he acquired tract Y through a 10 year period of adverse possession that transpired while the land was still in private hands."
>
> "Title Vest automatically in the adverse **if** all the elements are fulfilled through the statutory period."
>
> " We therefore affirm the Court of Appeals **and remand for trial to determine the validity of Gorman's claim of title.**"

If the Respondents were faced with an ordinary defendant, then they could proceed to have the Court take *in personam* jurisdiction over the subject matter and the parties and try their claims as mandated by *Gorman.* However, the Respondents are faced with a sovereign, and there can be no subject matter jurisdiction and no *in personam* jurisdiction here because the sovereign is not subject to suit and is an indispensable party.

Finally, the Tribe must unwillingly address the specious argument that because it is a sovereign, immune from suit for the relief sought, that

Tribes en mass will acquire property subject to claims of adverse possession and thereby cause injustices throughout Washington State. This argument implicitly cast Tribes as governments that will act contrary to law and without regard to their Constitutional frameworks. The Lundgrens certainly would not assert that the United States or Washington State would participate in fraudulent acts to divest individuals of their property interest. The fact that the Lundgrens elected to suggest this demonstrates their failure to recognize the Upper Skagit Indian Tribe as a federally recognized government with inherent sovereignty.

B. SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED

Even if this Court finds jurisdiction was established, and reaches the merits of the case, summary judgment was not proper and the case should be remanded for trial. The trial court erred by finding no issues of material fact, and that the Lundgrens were entitled to judgment as a matter of law.

1. Material Facts In Dispute.

The Lundgrens' summary judgment motion relied almost entirely on their own self-serving declarations. Annabell Brown is deceased and cannot speak for herself, yet the Lundgrens repeatedly and unilaterally state she was in "agreement" with the fence acting as a boundary between their

properties. Further, the Lundgrens ask this Court to turn a blind eye to disputed material facts and reasonable inferences that can be made therefrom, just as they did the trial court. To do so again is error.

Anabelle Brown's son, David Brown, was a tenant in common and on title to the property since 1984. (CP 68, CP 57). David Brown stated under oath that neither he nor his family members knew that a fence existed or was being used to demarcate a property line—despite him being in title for nearly 30 years. (CP 58). This fact is not innocuous, as suggested by the Lundgrens.

The Lundgrens attempt to marginalize the significance of Mr. Brown's statement by arguing "one minority property owner's lack of familiarity with his own property"[1] should not defeat Lundgrens' claim. But when Annabel Brown is deceased, then her son is the only voice of history, other than the Lundgrens. To dismiss his statements as simply that of a "minority owner" with no relevance is to ignore facts on the record in favor of the Upper Skagit's position in this case—something that cannot be done at summary judgment.

The Lundgrens also argue that David Brown's and his relatives' knowledge of the fence and claim are not relevant—but Washington law

[1] Respondent's Brief at 11

says otherwise: "Real property will be taken away from an original owner by adverse possession only when he was or should have been aware and informed that his interest was challenged." *Bryant v. Palmer Coking Coal Co.*, 86 Wn. App. 204, 212, 936 P.2d 1163 (1997). "[C]ourts will not permit the "theft" of property by adverse possession unless the owner had notice and an opportunity to assert his or her right." *Herrin v. O'Hern*, 168 Wn. App. 305, 310, 275 P.3d 1231 (2012). The Lundgrens' fail to argue or present evidence on how David Brown or his predecessors in title "should have known" about the fence. As they admit, it is in the middle of a wooded area, rarely used by David Brown and his now-deceased mother.

Lundgrens' arguments regarding the declaration of David Brown ignore their fundamental burdens on summary judgment: Lundgrens have the burden of proving all elements of the case by clear, cogent, and convincing evidence. They have the burden of proving there are no material facts disputed. They have the burden of proving they are entitled to judgment as a matter of law. On the contrary, the Tribe is entitled to all benefits of the evidence. The trial court was not supposed to weigh the declaration of David Brown versus the others, but by granting summary judgment, it clearly did.

Lundgrens further ask this Court (as they did the trial court) to ignore the circumstances and logical inferences that can be made in favor

of the Tribe. The fence turns north at the property corners, indicating that it was almost certainly installed by the Tribe's predecessors-in-interest. The property owned by the Lundgrens has been designated agricultural and timber land for decades. The fence is hidden in the woods—hardly an open and notorious use. A gate 12 feet wide exists in the fence—a gate which can be inferred was not intended for just one person, but rather, for free access of farming equipment and perhaps livestock. These facts lead to the inference that the Tribe's predecessors installed the fence, and fully intended to use the land to the south of it through the 12 foot wide gate. These facts lead to the inference that the use by the Lundgrens to the south was permissive, it was not hostile.

2. Lundgrens Not Entitled To Judgment As a Matter of Law.

Even if the Lundgrens convince this Court that there are no disputed material facts as to the elements, the Lundgrens must also show they are entitled to judgment as a matter of law. Lundgrens argue that the "policy" of adverse possession law is in their favor. However, the policies they cite, both as to presumptions of permission and the purpose behind the doctrine of adverse possession, are arcane. As outlined in the opening brief,[2] these

[2] Appellants' Brief, at pg 39-42.

policies have changed over time. The old purpose of avoiding "idle land" and allowing adverse possession to stand makes less sense in today's world of online parcel maps, recorded documents an public records, and easily discernable titles and land boundaries.

These changes in arcane policy—as outlined in the concurrence in *Gorman v. City of Woodinville*, and espoused in the expansion of the presumption of permission in *Gamboa v. Clark*, 183 Wn.2d 38, 348 P.3d 1214 (2015), are particularly relevant considering the context of this case. As Lundgrens rightly point out, the nature and character of the property is important context for the Court to consider in an adverse possession case. Lundgrens then go on to try and characterize the property at issue here as a park, or more like their back yard. But the reality is, it is rural; timber, and large acreage without regular human occupation—maintaining a forest and agricultural tax classification for years. The fence is old—very old, with a tree growing around it. The Lundgrens lived nearby, but the Tribe's predecessor, Ms. Brown, lived miles away, and did not have a house on the property. The land the Lundgrens claim adverse possession of here was vacant land, not regularly used; it was acre upon acre of pasture and forest.

In this vein, Lundgrens argue that the presumption of permissive use should not apply in this case. They do so by arguing the policy of the law

in adverse possession is different from that in prescriptive easement cases.[3] This logic does not follow. The presumption of permissive use as expanded in *Gamboa* applies to cases involving prescriptive rights, because those cases involve claims which "necessarily work corresponding losses or forfeitures of the rights of other persons." The presumption of permission should apply in a scenario such as this—where the facts and circumstances lead to a reasonable inference that there was permission, or neighborly acquiescence or sufferance. *Gamboa*, 183 Wn.2d at 47. When adverse possession—legal theft of another's land—is sanctioned by our courts, it should only be under the most limited of circumstances requiring a modicum of proof consummate with the act.

Here, vacant land owned by Annabel Brown bordered upon land owned by the Lundgrens. A fence separated that land—a fence located amongst acres upon acres of woods and agricultural land. That fence had a 12 foot wide gate in it. The fence was likely installed by Ms. Brown or her predecssors, as evidenced by the fact it turns north at its corners rather than south. The Lundgrens at some points in time, performed some maintenance to the land (cleaning up brush) and of the fence.[4]

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[3] Respondent's Brief at 16.

[4] It is not clear from the record what type of maintenance the Lundgrens did to the fence. It is clearly decades old, with a tree growing around the barbed wire. To the untrained eye at least, it does not look recently maintained whatsoever.

Is the policy of the law intended to allow a plaintiff to steal land from the rightful title owner under these circumstances? Under the trend of the cases from our appellate courts, it is not. And, particularly not when considering the procedural posture of this case: summary judgment. Assuming for argument that jurisdiction is established for this case, the Upper Skagit Tribre is entitled to a trial before it is divested of the land it rightfully acquired.[5] Based on the testimony on record disputing the Plaintiffs' claims, the facts on site, and the inferences therefrom, the Tribe is entitled to cross examine the Lundgrens and any other witnesses who would purport to testify against their rights in title. At that trial, facts will be vetted, and credibility and weight will be aassigned to each witness. Only after such an examination and fact finding endeavor should the Lundgrens ever be deemed to have proven their case, but not before. To affirm summary judgment here is to absolve the Lundgrens their burdens of proof and production, and allow them to take what is not theirs by merely filing self-serving affidavits.

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[5] It is worth noting that many of the seminal cases involving adverse possession or prescriptive easements involved trials, or remands of summary judgments for trial. Most trial courts have the benefit of hearing and finding the facts related to adverse possession or prescriptive easements, after a trial on the merits. Such cases are not often decided merely on affidavits at summary judgment. *See, Gamboa v. Clark*, 183 Wn.2d 38, 348 P.3d 1214 (2015); *Lilly v. Lynch*, 88 Wn. App. 36, 945 P.2d 727 (1997); *Bryant v. Palmer Coking Coal Co.*, 86 Wn. App. 204 (1997); *Chaplin v. Sanders*, 100 Wn.2d 853, 676 P.2d 431 (1984); *El Cerrito, Inc. vl Ryndak*, 60 Wn.2d 847, 376 P.2d 528.

3. Mutual Recognition and Acquiescence.

Lundgrens are required to prove by clear and convincing evidence that the Tribe's predecessors acquiesced in recognition of the fence as a boundary line as opposed to just a fenceline or barrier. *Lamm v.* McTighe, 72 Wn.2d 587, 592, 434 P.2d 565 (1967). Plaintiffs again rely solely on their self-serving declarations in support of this requirement. Those declarations are directly contradicted by the facts as presented in David Brown's declaration as well as the reasonable inferences that can be taken from the facts on site. Lundgrens have failed to prove this element. Summary Judgment on Mutual Recognition and Acquiescence cannot be supported when there is a question of fact as to whether the predessors in title to both sides of the dispute ever acquiesced to the fence being a boundary.

II. CONCLUSION

For the foregoing reasons, the Upper Skagit Indian Tribe respectfully requests that this Court reverse the trial court, dismiss this matter with prejudice for lack of subject matter jurisdiction, and failure to join a necessary and indispensable party. Alternatively, the trial court's ruling on summary judgment should be reversed and the matter remanded for trial. The Tribe should be awarded all taxable costs as prevailing party.

Respectfully submitted this 2nd day of December 2015.

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DECLARATION OF SERVICE

On said date below, I sent via email (pursuant to agreement) a true and correct copy of Appellant's Opening Brief to Scott Ellerby, Mills Meyers Swartling, PS, 1000 Second Ave., 30th Floor, Seattle, WA 98104 via email to: sellerby@millsmeyers.com; aarmitage@millsmeyers.com.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to my best knowledge and belief.

DATED December 2, 2015 at Bellingham, Washington.

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Please find attached Upper Skagit Indian Tribe's Reply Brief in the above referenced matter. Thank you.

Sincerely,

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