No. 97936-7

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON
No. 77980-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

FABIENNE L. RIGGERS,

Petitioner

vs.

CATHERINE STOTZKY,

Respondent

FABIENNE L. RIGGERS PETITION FOR REVIEW

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Table of Contents

I. Table of Authorities

Cases

II. Identity of Petitioner

Fabienne L. Riggers, the appellant in this case, files this petition for review through her attorneys of record.

III. Citation to Court of Appeals Decision

The petitioner seeks review of the decision of the Court of Appeals above entitled matter filed on September 23, 2019. The order of the Court of Appeals denying the appellant's motion for reconsideration in this case was filed on October 30, 2019.

IV. Issues Presented for Review

A. When a contents contribution toward the purchase price can be traced, but the deed is silent as to the interests, should the cotenants hold title in proportion to their contributions toward the purchase price, whether the case is tried at law or in equity?

B. Where a cotenant has had exclusive occupancy of a single-family home as the cotenant's personal residence, should that cotenant be to other cotenants for an offset share of fair market rent?

C. Is the standard of review for abuse of discretion by the trial court exercising equitable powers in a partition action whether the discretion was exercised on untenable grounds or for untenable reasons, considering the purpose of the trial court's discretion?

V. Statement of the Case

Following her divorce, Catherine Stotzky sold her home in Aurora, Colorado and came to live with her daughter, Fabienne Riggers. (CP 125); (VRP 365, 483, 485.) At the time, Ms. Riggers and her husband at the

time, Timothy Riggers, had a home in Bellevue where they lived with their two young school aged daughters. (VRP 70-71.) After about six months Ms. Riggers and Ms. Stotzky began looking for a permanent residence for Ms. Stotzky. (CP 125; VRP 74, 229, 221, 451, 454.) Ms. Stotzky's assets of approximately $110,000 and monthly income of approximately $1,000 from her ex-husband's retirement benefits, (VRP 214, 372-373), they could not find a home that Ms. Stotzky could afford to buy in a suitable neighborhood. (CP 125; VRP 452-453.) Tim Riggers proposed that Ms. Riggers and he use their income and investments to buy a house acceptable to Ms. Stotzky and rent it to her at a discounted rent which would be based on their payments for mortgage and real estate taxes, less their projected income tax deductions for the property.

Mr. Riggers learned through Rourke O'Brien, a mortgage banker, that they could finance the house purchase at a lower interest rate under his mortgage company's owner-occupied loan program if Ms. Stotzky name was on title. Since a lower interest rate would reduce monthly payments and in turn the rent to charge Ms. Stotzky, Mr. Riggers decided to follow Mr. O'Brien's suggestion. (CP 125, 127; VRP 223, 225, 390-92.)

The Riggers and Ms. Stotzky found small home in Issaquah which met Ms. Stotzky's needs and proceeded to purchase it on September 25,

1995. (Ex. 1; CP 126; VRP 155.) The purchase price was $175,000.00. (CP 125.) The entire down payment of $35,000 and closing costs of $4,188.32 were paid by the Riggers. (CP 127; VRP 206, 513.) As planned, the parties took out an owner-occupied mortgage from Mr. O'Brien's company for $140,000.00. (CP 127.) Ms. Stotzky's name was included on the deed to qualify for the lower interest as an owner-occupied loan. (CP 126.)

Mr. Riggers estimated his after-tax carrying cost for mortgage interest and taxes and told Ms. Stotzky her rent was $802.00 per month. (CP 127; VRP 392, 488, 498.) Ms. Stotkzy paid $802/month over 21 years at trial claimed it was towards the mortgage payment. (CP 130)

In June, 2002, the Riggers dissolved their marriage and the Issaquah house was awarded to Ms. Riggers. (Ex. 21; CP 131; VRP 117, 319, 327, 422.) In December, 2002, Ms. Riggers refinanced the mortgage. (CP 131; VRP 117-118.) in her name alone. (CP 131; VRP 118-119, 563.) In 2012 she again refinanced the house in her name alone. (CP 132; VRP 563.)

Ms. Riggers made all the mortgage payments on the property. These mortgage payments included escrow payments for taxes and insurances as part of the total payment, along with interest on the amount loaned out. (CP 135; VRP 564.) After her spousal maintenance expired,

Ms. Riggers struggled financially. She knew Ms. Stotzky could not afford to pay her more rent. She proposed that Ms. Stotzky move into the apartment in her home without payment of rent and allow her to sell the Issaquah house. Ms. Stotzky rejected the idea. In the summer of 2016, Ms. Riggers reached out to her sisters to address finances and for help in caring for their mother who was in her mid-eighties and having difficulty living alone. (VRP 555.) Her sisters then told Ms. Stotzky that Ms. Riggers wanted her out of the house, though Ms. Riggers had not made such a demand. (VRP 181, 555.) In response, Ms. Stotzky's filed this partition action and moved to Portland to live with another daughter. (CP 133; VRP 137, 507.), She ceased her $802 monthly payments to Ms. Riggers. (CP 134; VRP 98, 525, 558.)

Ms. Riggers continued to make the payments for mortgage, taxes and insurance and went to considerable expense to prepare the house to be rented. (CP 134-135; VRP 138, 558, 561.) In late March, it was rented through a real estate broker for $2,400 per month. (CP 135; VRP 139, 559.) At trial Ms. Riggers presented the unrebutted expert testimony of Christy Rice who testified that the cumulative fair market rent for the Issaquah house over the period of Ms. Stotzky's occupancy was $403,653, which was $201,549 more than what Ms. Stotzky paid to Ms. Riggers. (Ex. 61.)

The trial court found there was no agreement that Stotzky's monthly payments were rent, and treated them as contributions toward the mortgage payments and adopted Stotzky's "total cost of ownership" theory. The court traced, with certainty, the amounts each party had paid toward mortgage principal and interest, taxes, insurance, homeowner dues and the down payment, which the Court defined as the overall cost of ownership, and found that Stotzky paid 56.2% of that category of costs. Therefore, the trial court ruled that Ms. Stotzky had a 56.2 % interest in the property and Ms. Riggers a 43.8% interest.

Ms. Riggers appealed the trial court's decision requesting that the Court of Appeals reverse as an abuse of discretion the trial court's ruling that Stotzky's monthly payments were not rent and, alternatively, modify the trial court's decision by determining of the percentage interest of the parties based on the contribution each party made to the purchase price, allowing Ms. Riggers an offset for her share of the fair market rent and revising the allocation of net rental income received in 2017. The Court of Appeals affirmed the trial court's decision on all issues. Ms. Riggers filed a motion for reconsideration, which was denied.

VI. Argument

The Supreme Court should accept review in this case under RAP 13.4(b) for any, or all, of the following reasons:

A. The Court of Appeals decision on the determination of the percentage ownership of co-tenants conflicts with four Supreme Court decisions.

The Washington Supreme Court, through a series of cases has adopted a consistent, reasoned approach to establishing the legal title and percentage ownership of real estate owned by co-tenants in this State. In *Iredell v Iredell,* 49 Wn.2d 627, 305 P.2d 805 (1957), the Supreme Court addressed how the cotenant's interest would be allocated if the deed was silent. The Court noted there was a presumption that the co-tenants had an equal interest, but went on to hold:

> When in rebuttal the purchasers of property are shown to have contributed unequally to the purchase price, the general rule is that a presumption arises that they intended to share the property in proportion to the amount contributed by each. *Id*. at 631

The Court elaborated on this rule when affirming trial court decisions in *West v. Knowles,* 50 Wn.2d 311, 311 P.2d 689 (1957) and in *Shull v Shephard,* 63 Wn.2d 503, 387 P.2d 767 (1963). In *Shull,* the trial court found that Ms. Shull's contribution toward the purchase price of a house she bought while in a meretricious relationship with Mr. Shepard consisted of her down payment, ($1,500), her share of payments to reduce the mortgage, ($432), and her share of the outstanding mortgage principal balance, ($2,361.94) and totaled ($4,293.94). Since that contribution represented 45.2% of the $9,500 purchase price, the trial court held that she owned a 45.2% in the property. Later, in *Cummings v. Anderson,* 94

Wn.2d 135, 614 P.2d 1283 (1980) the Supreme Court again cited the above principle from *Iredell* and followed the same methodology used in *Shull* to determine Ms. Cummings interest in the home she had purchased with Mr. Anderson. This Court found that her interest was 7.38% because she had her contribution of $1,414.46 on the down payment and principal reduction equaled 7.38% of the $19,179.08 purchase price.

In her appeal, Ms. Riggers argued that the Court of Appeals could determine from the record that Ms. Stotzky's contributed $18,016.59 toward the $175,000 purchase price through her share of reduction in the mortgage principal and down payment. Then, since her contribution was 10.3% of the purchase price, the Court of Appeals should conclude her interest was 10.3% under the Supreme Court's precedent.

The Court of Appeals, however, departed from these Supreme Court decisions and affirmed the trial court's use of a novel formula it called the "overall cost of ownership." This overall cost of ownership theory gave Ms. Stotzky credit for interest paid on the mortgage, homeowner association dues, taxes and insurance in addition to principal payments on the mortgage rather than just the purchase price. Under this theory, the trial court determined his interest to be 52.6%. Rather than following the established law in the *Irdell* line of cases, the Court of Appeals affirmed on the grounds of the trial court's "great flexibility' in

fashioning equitable relief" in partition actions and suggested that the court in equity is at liberty to disregard the legal precedents set forth in these Supreme Court cases and apply its own formulation to calculating legal title of real estate.

The conflict between the Court of Appeals' decision and these Supreme Court decisions is irreconcilable and poses problems on several levels. It ignores that these Supreme Court decisions set forth a substantive rule of law for determining the extent of ownership which can applied in many types of proceedings, not just actions for partitions. For example, in *Iredell*, Jonathon Iredell's percentage ownership interest needed to be determined for the enforcement of a judgment against him, but not his cotenant. In *Shull* the court determined interests in a declaratory judgment action. Determining a continent's share of ownership may be the subject of litigation probate, bankruptcy or other proceedings which do not involve equitable relief. Thus, the Court of Appeals decision could lead to one determination of the percentage interest of a cotenant in a case at law—e.g. obligation owed a contractor— and a different determination in a subsequent partition action. This conflict leads to inconsistent, uncertain results.

The Court of Appeals below confuses the legal determination of extent of ownership with the flexibility equity has to fashion remedies. In

Cummings the Court used the legal principles set forth in *Iredell, West* and *Shull* to determine the extent of Ms. Cummings ownership and then turned to equitable remedies including offsets and gives an opportunity for Mr. Anderson to buy her out rather than compelling a sale of the property. roperty which bears the same ratio to the total equity as the ratio of her investment to the total investment of the parties. 94 Wn.2d at 144. The Court of Appeals decision departs from this *Cummings* precedent in allowing a court in equity to make any determination it choses on the extent of the cotenant's ownership so long as it "falls within the range of fair results."

B. The Court of Appeals decision on whether a cotenant occupying a single-family home as her exclusive personal residence owes a share of fair market rents to the other cotenant conflicts with Supreme Court decisions and a published decision of the Court of Appeals.

Case law in Washington unclear on when a cotenant occupying a house as his or her personal residence is subject to an offset for fair market rent, but there is a line of cases pointing in a direction opposite from the one in the Court of Appeals decision. In earlier cases, the Court allowed an offset for rent when one cotenant occupied a home as his or her exclusive personal residence. *In re Foster's Estate,* 139 Wn. 224, 246 P. 290 (1926); *McKnight v Besilides,* 19 Wn.2d 391, 143 P.2d 307 (1943). Both *Foster's Estate* and *McKnight* involved surviving spouses who

occupied as their personal residence a home co-owned with adult children of the deceased spouse. However, in *Fulton v Fulton,* 57 Wn.2d 331, 357 P.2d 169 (1970), the Court appeared to have taken a different direction, at least with respect to commercial property. In that case, one partner sought rental compensation from the other because the other's business used a greater portion of the jointly owned property than his business did. The Court ruled that he could not recover rent because he had not been ousted. In *Fulton,* the Court said that its holding was consistent with its decisions in *Foster's Estate* and *McKnight*, but nothing in the record in those cases suggests there was an ouster. The only way to interpret the Court's claim that the cases are consistent is to conclude that the Court considered the exclusive use of a home as personal residence to act as an ouster.

The concept of occupancy of a single-family home working as an ouster arose again in *Cummings,* when Ms. Cummings sought an offset for rent claiming she could no longer live in the house with her daughters because of the sexual behavior of Mr. Anderson's son. The Court stated:

> An appealing argument is made that, in a situation such as this, where property is not adaptable to double occupancy, the mere occupation of the property by one cotenant may operate to exclude the other. See Annot. 51 A.L.R. 2d at 443. Had the respondent not abandoned her obligations under the contract of purchase at a time when over four-fifths of the purchase price remained to be paid, we would be much inclined to agree that she is entitled to receive rent. *Cummings v. Anderson, supra. Id*. at 145.

In *In re the Marriage of Maxfield,* 47 Wn. App. 699, 737 P.2d 671 (1987), Division III of the Court of Appeals took one step further and held that Ms. Maxfield's exclusive occupancy of a home she owned in cotenancy with her former husband created an ouster and cited *Cummings* as support. The Court then denied her claim against Mr. Maxfield for reimbursement for payments on mortgage, taxes and insurance because of his offsetting right to rent.

Court of Appeals in this case conflicts with Division III's decision in *Maxfield* and from where the Supreme Court said it would be inclined to go in *Cummings.* Unlike Ms. Cummings, Ms. Riggers personally assumed the entire mortgage liability for the Issaquah house and paid every installment due. Therefore, she argued the Court of Appeals should follow the Court's announced inclination in *Cummings* and award her rent. Contrary to the Supreme Court's stated inclination in *Cummings* and the holding in *Maxfield,* the Court of Appeals rejected her claim for rent because she had not been ousted.

C. Assuming arguendo a trial court may depart for the Iredell-Cummings line of cases, the Court of Appeals decision conflicts with published decisions of the Court of Appeals on the standard of review.

On appeal, Ms. Riggers challenged the trial court's use of an "Overall Cost of Ownership" theory for determining percentage of ownership as being completely arbitrary. In this case, the Court of Appeals

affirmed the trial court's use of its "Overall Cost of Ownership" because its "determination falls within the range of fair results". This standard of review for abuse of discretion the trial court is the same as the "reasonable judge" standard for review for abuse of discretion expressly rejected in *Coggle v. Snow,*56 Wn. App. 499, 784 P.2d 554 (1990). In *Coggle,* the Court stated: "The proper standard is whether discretion is exercised on untenble grounds or for untenable reasons considering the purposes of the trial court's discretion." *Id* at 507. One fundamental purpose of trial court's discretion in partition actions is "that a cotenant should not be permitted to take inequitable advantage of another's investment." *Cummings, supra* at 142.

Under *Coggle,* the Court of Appeals should have evaluated whether the trial court's exclusion of a return on the $35,000 down payment and other costs to Ms. Riggers failed to further this fundamental purpose. The Court of Appeals should have reviewed whether there were any tenable or reasonable grounds which supported a novel methodology which gave Ms. Stotzky a windfall recovery at Ms. Riggers expense. The trial court's methodology made from whole cloth allowed Ms. Stotzky to continue to earn a return on her $110,000 investment in mutual funds, avoid any cost to her for the $35,000 the Riggers took out of mutual funds to make the down payment, receive a credit for mortgage interest she paid

as a means of building equity and enjoy exclusive use of a home without payment of rent for 21 years, the fair market value of which was $403,403,653. Where Ms. Stotzky paid no money down and only $18,016.59 on mortgage principal, the Court of Appeals should have reviewed whether there were any tenable and reasonable grounds supporting the trial court's new formula which awarded her a 56.2% interest in the property. Instead, it applied a standard of review *Coggle* rejected and overturned.

D. This petition involves issues affecting a growing number of people who buy single family residences in Washington as co-tenants and impacting substantial public interests.

The Court of Appeals decision will affect a growing number of people who buy homes in Washington as tenants in common. A recent report from the U.S. Census Bureau reveals a dramatic increase in the number of unmarried person's livings together. The report states, "The number went from nearly 6 million in 1996 to 19.1 million in 2018" Mike Schneider, *Unmarried Partners in US Have Tripled in 2 decades* SEATTLE TIMES, September 24, 2019, Associated Press.

A recent report from Zillow, studying the trends in home ownership found that nationwide, the percentage of homebuyers in the ages of 24-35 who purchase property together as unmarried couples has increase from 11 percent to 15 percent, a 36 percent increase. Zillow, Inc.

"More Young Unmarried Couples Buying Homes Together" http://zillow.mediaroom.com/2017-02-08-More-Young-Unmarried-Couples-Buying-Homes-Together (last visited Nov. 27, 2019). With the tightening of mortgage underwriting standards and rise of home prices, another growing trend has been parents and adult children or even siblings combining their resources and creditworthiness to buy a residence for a family member. For cotenants of homes in both these trends, this case presents issues of great concern and public interest. Though the Court of Appeals decision is unpublished, it will be read, and used, by lawyers in research to provide advice to their clients and under GR 14.1 will be cited to trial courts in cases involving co-tenancies in personal residences.

This decision will also have an impact of certainty of title across this state. A public policy of promoting certainty of title pervades equitable and legal decisions in this state. This policy has been cited in cases involving equitable redemptions, errors in non-judicial foreclosures, quiet title actions, recording act questions, and even the strict application of the need for a legal description in enforcing contracts, listing agreements or contracts of real estate. *See e.g.* W. *Loan & Sav. Co. v. Waisman*, 32 Wash. 644, 649, 73 P. 703, 704 (1903) (stability of title is a public policy requiring clear and convincing evidence overcome an notary acknowledgement); *see also E. K. Wood Lumber Co. v. Whatcom Cty.*, 5

Wn.2d 63, 72, 104 P.2d 752, 756 (1940) (stability of title a public policy that is protected by the laws and courts); *Cox v. Helenius*, 103 Wn.2d 383, 693 P.2d 683 (1985) (public policy requires the deed of trust act to be interpreted to promote the stability of land titles); *Key Design Inc. v. Moser*, 138 Wn.2d 875, 983 P.2d 653 (1999), *amended*, 993 P.2d 900 (1999) (court reaffirms the strict requirements of a legal description in real estate contracts to ensure clarity and consistency); *Certification from the United States Court of Appeals for the Ninth Circuit in Centurion Properties III, LLC v. Chicago Title Ins. Co.*, 186 Wn.2d 58, 375 P.3d 651 (2016) (public policy behind the recording act is to promote certainty and stability of title). The Court of Appeals decisions undercuts the Supreme Court's policy of promoting certainty of title.

This problem can be illustrated by a simple example. Megan and Jake are an unmarried couple who decide to buy a house for $400,000. Megan has $200,000 in cash which she contributes toward the purchase price. Jake does not want to sell his stock to buy the house. He suggests they take out a mortgage loan to finance the balance of the purchase price and says he will make the monthly payments. They take out a 15-year mortgage at 4.5% in the amount of $200,000 to close the sale. Their deed the escrow agent lists them as cotenants without any reference to their percentage interests.

Three years after buying the home, Megan and Jake are both dissatisfied with their relationship and decide to part on amicable terms. Since she understands how important the house is for visitations by Jake's children by a prior marriage, Megan choses to moves to a condominium near her work. Since she thinks the house has a lot of potential for appreciation and is happy to hold it as an investment. Jake remains in the house and pays the mortgage, taxes, insurance and maintenance costs. Without telling Megan, Jake replaces the furnace when it fails. Fifteen years after they bought the house, Jake starts a partition action to sell it.

Under the line of Supreme Court cases cited above, Megan has certainty of title concerning her interest in property. Since it can be shown that she contributed 50% of the purchase price, she holds a 50% interest as co-tenant. However, under the "overall cost of ownership" approach affirmed by the Court of Appeal, Megan has no certainly of title to her ownership interest. Citing the decision of the Court of Appeals in this case, Jake may assert that his contribution to ownership was the total of his mortgage payments ($1,529.99 x 180 = $275,398) plus payments on taxes, insurance and replacement of furnace incurred since Megan moved out. If Jake's contributions toward ownership, for example, came to $350,000, he would argue that Megan's contribution of $200,000 was 36.36% of the overall costs of ownership of $550,000 and, therefore, her

cotenancy interest is 36.36%. Indeed, under total cost of ownership approach affirmed by the Court of Appeals, Megan's ownership interest was in constant flux from when she moved out until the Court in the partition action decided what constituted "overall costs of ownership" over 15 years and what each contributed to it.

A second issue of substantial interest to these classes of cotenants is having clear and fair rules on when a cotenant occupying a home as his or her exclusive residence is subject to an offset for rent. As noted above, the law in Washington was moving toward the principle that the exclusive occupancy of a home by a cotenant as a personal residence functions as an ouster of other cotenants which entitles them to an offset their share of fair market rent. The decision of the Court of Appeals in this case moves in the opposite direction and would require that a cotenant intrude into the personal residence of a former life partner or a family member to attempt to live there and thereby provoke action which would constitute an ouster. Such a requirement in the law is inconsistent with human behavior and bad policy.

It is inconsistent with human behavior to expect that unmarried partners will continue to share equally in occupancy of a home they own following their break-up. How is the master suite shared? Or the living room when each wants to entertain different friends or a new love interest?

It is awkward and impractical for unmarried partners to continue to occupy the same home and the common experience is that one of them moves out. It is similarly unrealistic for the court to have expected Ms. Riggers, or anyone in a similar position, to try to move into and assert equal occupancy of a home which has been used by a family member as his or her personal residence. Thus, a presumption in the law that a home owned by cotenants is available for their equal use has no basis in the real world today and should not be a justification for denying a cotenant a right to a share of fair market rent. The presumption may work fairly in cases of commercial property such as *Fulton,* but it does not in cases involving a home used as a cotenant's personal residence.

In cases involving personal residences, a requirement that there be an ouster of a cotenant before an offset for rent will be awarded is bad policy because it fosters conflict. In the example given above, it would penalize someone like Megan who treats her former partner with respect and kindness. It would require Megan either insist that they rent the house to third parties or to contest occupancy to the point where Jake takes action to kick her out in order to receive a share of fair market. In Ms. Riggers case or for others in a similar situation, it would require that she show up with a suitcase and moving van at her mother's house and demand to be allowed to move in. Such a gesture would most certainly

provoke conflict and damage the familial relationship, but it is what the Court of Appeals decision would require as a pre-condition for receiving a share of rent.

The better public policy and presumption to establish in the law is one that treats the exclusive occupancy of a home as the personal residence of one cotenant as an ouster which will qualify other cotenants to an offset for rent. Setting the presumption in favor of offsets for rent, absent an agreement otherwise, will promote respect and cooperation between unmarried couples and family members in dealing with a residence one of them may occupy.

VII. Conclusion

The Supreme Court should accept review of the decision of the Court of Appeals in order to address its significant conflict with decisions of the Supreme Court and another division of the Court of Appeals and also to address substantial public interest concerns of significant and growing segment of homeowners. This decision is directly contrary to the *Iredell-Cummings* line of Supreme Court cases and the policy of promoting certainty of title promulgated by the Supreme Court in other cases. This decision will create uncertainty of title for cotenants whose deeds are silent on their share of ownership. Acceptance of review will also allow the Court to address another issue of interest to this class of

cotenants which the Court has not addressed in 40 years, namely when a cotenant exclusively occupying a home as his or her personal residence is liable to other cotenants for an offset of rent. On this topic, the Court can address the conflict between this decision and Division III's decision in *Maxfield,* and clear up ambiguities created by language in *Cummings* setting out an inclination to award rent offsets to cotenants on single family homes who have not abandoned their obligations and language in *Fulton* claiming without explanation that its holding is consistent with *Foster's Estate* and *McKnight.*

Dated: November 26th, 2019, at Kirkland, Washington.

Respectfully submitted,

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APPENDIX A TO PETITION FOR REVIEW BY

FABIENNE l. RIGGERS

WASHINGTON COURT OF APPEALS DECISION

FILED
9/23/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CATHERINE STOTZKY, Respondent, v. FABIENNE L. RIGGERS, Appellant.	)	No. 77980-0-I DIVISION ONE UNPUBLISHED OPINION FILED: September 23, 2019

LEACH, J. — Fabienne Riggers appeals the trial court's partition decision and award of statutory costs. Catherine Stotzky cross appeals dismissal of her breach of a fiduciary duty claim. Substantial evidence supports the trial court's challenged factual findings, which support its legal conclusions. And Stotzky failed to show any disputed material fact about her fiduciary duty claim. Because Stotzky prevailed and her requests were reasonable, the trial court did not err in awarding her costs. We affirm.

FACTS

In 1995, Catherine Stotzky moved to Seattle after her recent divorce. She originally intended to purchase her own home near her daughter and son-in-law, Fabienne Riggers and Timothy Riggers, and their children. Stotzky searched

and found one house in her price range of $150,000. But it was far from the Riggers's home. Timothy suggested that, instead, the Riggers help Stotzky buy a house closer to their home.

After identifying a suitable house in Issaquah, the Riggers and Stotzky made a joint offer of $175,000, which the owner accepted. At closing, the owner delivered a statutory warranty deed to "Timothy P. Riggers and Fabrienne [sic] Riggers, Husband and Wife and Catherine Stotzky, a Single Person." Before closing, the Riggers and Stotzky submitted separate residential loan applications to Q Point Mortgage. Each application stated that Stotzky and the Riggers would hold title to the Issaquah property. On that same day, the Riggers and Stotzky signed additional documents "stating that the Issaquah residence would be owner-occupied."

At closing, the Riggers paid $4,188.00 in closing costs and $35,000.00 as a down payment. The Riggers and Stotzky financed the balance of the purchase price through a 30-year fixed rate mortgage loan for $140,000.00 with an interest rate of 7.75 percent. The lender reduced the interest rate by one-half percent because the property was to be owner occupied. The monthly payments of principal and interest were $1,002.98, and the monthly escrow amounts for taxes and insurance were $216.19 and $43.83, respectively.

Timothy calculated that Stotzky should make $802 monthly payments to the Riggers to cover their "carrying costs" of the property. This was the amount the $1,263 mortgage payment cost the Riggers after accounting for the economic benefit they received from tax deductions for mortgage interest and property taxes. The first payment was due November 1, 1995. Stotzky was responsible for homeowners' association dues.

Stotzky had $108,000 in funds from her divorce settlement that she had intended to invest in a house. Instead, she permitted Timothy to invest the funds for her. He was a wholesaler for Lord Abbett & Company.

Between December 1, 1995, and March 1, 1996, Stotzky wrote six checks to the Riggers.[1] On two of these checks she wrote "mortgage" on the memo line, and on four of the checks she wrote "rent." Stotzky did not remember why she made these notations. From 1996-2013, she wrote 103 checks to the Riggers. She did not write on the memo line of any of these checks. From 2004 onward, she directly deposited money into the Riggers's bank account.

From 1995-2002, the Riggers deducted the full amount of real property taxes and interest on their federal income tax returns. After 2002, Fabienne deducted these amounts on her returns. None of these returns reported Stotzky's payments as rental or other income.

[1] Only four were negotiated, and two were canceled after they were written.

Fabienne filed for divorce from Timothy in 2001. During the dissolution proceedings, she signed under oath and filed pleadings that described Stotzky as a co-owner of the Issaquah property.[2] Fabienne's position in the dissolution that her mother co-owned the property caused Timothy to file a declaratory judgment action against Stotzky and Fabienne. He asked the court to declare that Stotzky had no ownership interest in the Issaquah property. As part of the dissolution action settlement, Timothy dismissed the declaratory judgment action and conveyed to Fabienne his interest in the Issaquah property. In a later proceeding, where Timothy asked to reduce his spousal maintenance payments, Fabienne identified the $802 monthly payment she received from Stotzky as "payment toward [mortgage]."

Fabienne refinanced the Issaquah property mortgage in 2002 to remove Timothy as an obligor and in 2012 to get a lower interest rate. Stotzky and Fabienne signed the trust deed that secured the 2002 note. Fabienne, but not Stotzky, signed and was obligated on the note. Only Fabienne signed the 2012 mortgage note as the "borrower."

In 2013, Fabienne applied for a $50,000 home equity line of credit (HELOC), using the Issaquah house as security. Stotzky did not want the

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[2] For example, in one declaration she stated, "Mr. Riggers insists on scheduling the deposition of my elderly mother in an effort to evict her from the house that she jointly owns with us."

property further encumbered but ultimately signed the trust deed securing the HELOC. At trial, Fabienne agreed that she was solely responsible to pay the HELOC.

In spring 2016, Fabienne told Stotzky she needed to sell the Issaquah property and invited Stotzky to move in with her. Fabienne said she planned to use the proceeds from the sale to pay off the mortgage on her Seattle home. Stotzky rejected the offer. In July 2016, Fabienne and her then ex-husband, Timothy, informed Stotzky's two other daughters that Stotzky had to move out of the Issaquah property.

In November 2016, Stotzky sued Fabienne. She asked the court to partition the Issaquah property by sale, award her the costs she paid maintaining the property, and award her damages for Fabienne's alleged breach of her fiduciary duty owed to Stotzky.

In November 2016, Stotzky moved out of the Issaquah house. Her final $802 payment to Fabienne was for November 2016. She paid the homeowners' association dues through December 31, 2016. From January to March 2017, Fabienne maintained, repaired, and prepared the Issaquah property for lease. At the end of March 2017, a real estate broker hired by Fabienne secured renters for the property. Fabienne collected rent from them from March to November, 2017.

In October 2017, the trial court dismissed, on partial summary judgment, Stotzky's breach of fiduciary duties claim. After a bench trial on the partition issues, the court partitioned the property. It concluded that Stotzky held a 52.6 percent interest in the property and awarded her statutory costs. Fabienne appeals, and Stotzky cross appeals.

ANALYSIS

Fabienne challenges the trial court conclusion that she and Stotzky held the Issaquah property as tenants in common, claiming Stotzky was a tenant. She asserts, in the alternative, that the trial court erred in calculating Stotzky's interest in the cotenancy as 52.6 percent, in not charging her fair market rent for her exclusive use of the property, and in calculating the net rent Fabienne owed Stotzky while the house was leased in 2017. Finally, Fabienne challenges the award of statutory costs to Stotzky.

In her cross appeal, Stotzky asserts that the court should not have dismissed her breach of fiduciary duty claim on summary judgment.

We affirm on all issues.

Substantial Evidence Supports the Trial Court's Findings That Stotzky and Fabienne Were Tenants in Common

Fabienne contends that the evidence supports only the conclusion that Stotzky occupied the Issaquah property as a tenant and her payments were rent.

She challenges the sufficiency of the evidence to support several of the trial court's findings supporting its contrary conclusion. She claims that the court relied on Stotzky's "subjective desires and beliefs" and not substantial evidence. We disagree.

Fabienne asserts that the Riggers and Stotzky made an oral rental agreement. This made Stotzky a tenant and her payments rent. But undisputed evidence alone sufficiently supports the trial court's contrary findings and conclusions. First, the Riggers stated on their loan application that the property would be owner occupied by Stotzky. Second, the Riggers never reported Stotzky's payments to taxing authorities as rental or other income. Third, Fabienne had Stotzky sign a trust deed as part of the first refinance of the property. Finally, Fabienne, during her dissolution and postdissolution proceedings, represented to the court under oath that Stotzky jointly owned the property.

This unchallenged evidence cuts two ways. Either there was no rental agreement or Fabienne lied on the loan application, violated federal tax law, and lied again during the dissolution and postdissolution proceedings.[3] The trial court

[3] Fabienne's position here may violate 18 U.S.C. § 1014, which defines as a violation of federal law to "knowingly make any false statement or report . . . for the purpose of influencing in anyway . . . any . . . mortgage lending business . . . upon any application [or] purchase agreement." And if Fabienne failed to include required information on her tax forms and misrepresented

chose to accept as true her representations to the lender, the federal government, and the dissolution court. The trial court had discretion to do this. So substantial evidence supports the trial court's conclusion that there was no rental agreement.

Fabienne also challenges several of the trial court's specific findings of fact. These fail.

First, Fabienne challenges two findings where the court made express credibility determinations.[4] But this court does not resolve conflicting testimony or evaluate the credibility of the witnesses but instead defers to the trial court's credibility determinations.[5] So these challenges fail.

Second, Fabienne challenges two findings supported by Stotzky's testimony because, she claims, they are solely based on Stotzky's motives and desires.[6] She asserts that under the objective manifestation theory of contracts,

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information to the dissolution court under oath, she may have violated other federal and state statutes.

[4] In finding 20, the court stated that "the testimony of the defendant and Tim Riggers concerning the existence of such an oral agreement was not credible." In finding 24, the court stated that Timothy's testimony "concerning numerous meetings with [the] plaintiff, including one attended by [Alice] Woo and [Rourke O'Brien], at which it was explained to and agreed by plaintiff that she would have no ownership interest in the property, would be only a renter, and that her name would be on title solely to qualify for a slightly lower mortgage" was not credible.

[5] Boeing Co. v. Heidy, 147 Wn.2d 78, 87, 51 P.3d 793 (2002).

[6] The two findings challenged under this legal theory are findings 25 and 58. Finding 25 states that Stotzky "would not have agreed to a rental arrangement that would last only until it was no longer financially beneficial

the "test for determining the existence of an agreement is strictly objective and any subjective motives and desires are irrelevant." Fabienne does not cite any authority that requires a trial court to ignore testimony because it is not "objective."[7] This challenge also involves a credibility determination that this court leaves to the finder of fact,[8] so it also fails.

Third, Fabienne challenges the sufficiency of the evidence to support several trial court findings to the effect that the monthly payments were not rent. This court reviews challenged findings of fact to determine whether they are supported by substantial evidence.[9] Substantial evidence supports a finding if there is a sufficient quantity of evidence in the record to persuade a fair-minded,

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and/or possible for the Riggers to continue the arrangement." Finding 58 states that Stotzky "was absolutely devastated at the prospect of losing the home that she thought she was going to be in for the rest of her life . . . . [Stotzky's] reaction indicates to the Court that [she] was unaware of the rental arrangement described by Mr. Riggers in his testimony."

[7] Cf. State v. Logan, 102 Wn. App. 907, 911 n.1, 10 P.3d 504 (2000) ("'Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.'") (quoting DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)).

[8] Riggers cites to two cases, neither of which provide support for her theory of the requirement for "objective substantial evidence." Vikingstad v. Baggott, 46 Wn.2d 494, 497, 282 P.2d 824 (1995) (holding that a verbal agreement between two people benefitting a third person created an agreement that the third person could enforce); Wash. Irr. & Dev. Co. v. United States, 110 Wn.2d 288, 300, 751 P.2d 1178 (1988) (concluding that the trial court could disregard evidence based on its evaluation of a witness's credibility).

[9] State v. Halstien, 122 Wn.2d 109, 128, 857 P.2d 270 (1993).

rational person of the truth of the finding.[10] The party claiming error has the burden of showing that substantial evidence does not support the finding of fact.[11] If substantial evidence supports the findings, this court then decides whether the findings support the conclusions of law and judgment.[12] As stated above, this court defers to the trial court's determinations about conflicting testimony and witness credibility.[13]

Fabienne challenges a finding that Stotzky was "particularly vulnerable" after her divorce.[14] But Stotzky's testimony provides sufficient evidence to support this finding. She emigrated from France to the United States in 1960 with her then-husband. She had recently divorced from her husband of 36 years and had moved 15 times during the marriage. She had 2 years of secondary education and had never worked in the financial or real estate industry. So substantial evidence supports the finding that Stotzky was vulnerable.

Fabienne also challenges a finding that "Tim Riggers is educated, is experienced and sophisticated in financial matters, and is the type of person who would insist on putting agreements in writing unless it was to his benefit not to."

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[10] Halstien, 122 Wn.2d at 129.

[11] Fisher Props., Inc. v. Arden-Mayfair, Inc., 115 Wn.2d 364, 369, 798 P.2d 799 (1990).

[12] Brin v. Stutzman, 89 Wn. App. 809, 824, 951 P.2d 291 (1998).

[13] Boeing Co., 147 Wn.2d at 87.

[14] Fabienne also contends that the court erred in making this finding because it was based on Stotzky's "wants and beliefs" but, as indicated above, this argument fails.

Fabienne claims that substantial evidence does not support the finding because Timothy testified that he and Fabienne did not have a written contract with Stotzky because "he trusted her." She also points to his testimony that he did not ask for a written agreement when he guaranteed his brother's loan.

But the court did not believe Timothy's testimony about an oral agreement. And Timothy testified that he was "employed at [the time the house was purchased] for 11 years by a top quality money management company called Lord Abbett & Company [and] was one of their top salespeople." He testified to applying his expertise to Stotzky's financial situation at the time, noting that he was a "creative thinker" and a "problem solver." He drafted a memo in 2016 stating that they had a rental agreement after he learned from Fabienne that she was struggling to convince her mother to let her sell the house. He testified that he wrote the memo "to hopefully avoid litigation." So substantial evidence supports the finding that Timothy is financially "sophisticated" and knew to put agreements in writing unless it was "to his benefit not to."

Fabienne also challenges a finding that

> the testimony of [Stotzky], her daughters Nathalie Roloff and Melinda Baldwin, Rourke O'Brien and Alice Woo does not support the existence of such an agreement, and I find that there was no such agreement. Rather, I find that while Mr. Riggers had his own investment plan for the purchase of the Issaquah property, his plan was not agreed to by [Stotzky].

Fabienne contends that the record does not support this finding because Baldwin, Woo, and O'Brien used the term "rent" at some point. But these witnesses also made statements supporting this finding. Baldwin testified that she thought the plan was to allow her mother to live in the house "until she was incapable of taking care of herself." Roloff testified that her understanding was that the Issaquah property was Stotzky's "house, even if they [the Riggers] were putting the down payment." O'Brien testified that he told Timothy about the option to get a lower interest rate on a loan if it was owner occupied, which he would not have done if the Riggers were the sole owners. And Woo testified that her conversations with Timothy involved discussing how he might "help[ ] buy the property" and that she did not remember any conversation that made it clear to Stotzky that she was "going to pay rent." This combined testimony provides substantial evidence to support the finding that there was no rental agreement.[15]

Fabienne also challenges finding 65 that "equity requires that [Fabienne] alone bears" the expenses she incurred in maintaining and leasing the property in 2017 "since they were incurred without [Stotzky's] knowledge or consent." She contends that if this court views this statement as a finding of fact, the record

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[15] Fabienne also asserts that Timothy's actions related to the house, particularly during the marriage dissolution, fail to support the finding. But Fabienne's sworn statements directly contradicted Timothy's position in the dissolution proceedings. She swore that the payments were mortgage payments and that her mother had an interest in the house.

does not support it because "[n]othing in the record shows that Ms. Stotzky was injured or prejudiced by [her] action in finding a tenant." But the court did not find that Stotzky was injured or prejudiced. So Fabienne bases this challenge on something the court did not find. And Fabienne and Stotzky agreed that they did not talk about the 2017 maintenance and leasing costs. So substantial evidence supports the finding.

Fabienne also challenges this finding as a conclusion of law, asserting that equity provides no basis for the court's decision. This argument, analyzed below, also fails.

Fabienne challenges one additional finding but does not provide a basis for her challenge. This finding states,

> [Fabienne's] testimony was further contradicted by previous testimony and sworn statements further described below, and from the fact that no financial application or other document introduced at trial listed [Stotzky's] $802 monthly payments to [Fabienne] as income, nor could [Fabienne] identify such a document in her testimony.

Fabienne does not identify anything in the record that describes the payments as income. And Fabienne previously stated under oath that Stotzky was a co-owner in the Issaquah property and that Stotzky's payments went toward the mortgage. So substantial evidence supports this finding.

Fabienne's challenges to the trial court's findings fail.

The Trial Court Did Not Err in Its Partition Determinations

Next, Fabienne challenges the trial court decisions about the partition by sale. Specifically, she asserts that the court miscalculated Stotzky's interest in the property because its calculations included factors in addition to the proportion of the down payment and mortgage principal she paid. She also contends the court should have included a deduction for fair market rent for Stotzky's occupation of the property as her home and a credit to Fabienne for the net rents paid to Stotzky in 2017. We disagree.

This court reviews a trial court's partition decisions for abuse of discretion.[16] If the trial court based its ruling on "an erroneous view of the law," it abused its discretion.[17] Chapter 7.52 RCW governs a partition action between tenants in common. The trial court acts in equity when it divides property in a partition action.[18] RCW 7.52.090 directs the trial court to make partition decisions based on the "respective rights of the parties as determined by the courts." If the partition "cannot be made equal between the parties according to their respective rights, without prejudice to the rights and interests of some of

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[16] Overlake Farms B.L.K. III, LLC v. Bellevue-Overlake Farm, LLC, 196 Wn. App. 929, 939, 386 P.3d 1118 (2016) (citing Friend v. Friend, 92 Wn. App. 799, 803, 964 P.2d 1219 (1998)).

[17] Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d. 299, 339, 858 P.2d 1054 (1993).

[18] Overlake Farms, 196 Wn. App. at 947.

them," the court may require that one compensate the other based on its determination of "the inequality of partition."[19]

The statute provides no specific rules for valuing each cotenant's interest. It does not require the court, on partition, to charge fair market rent to the occupying cotenant. Nor does it instruct the court how to address rental income produced by the property. "The trial court has 'great flexibility' in fashioning equitable relief' for the parties."[20] "[A] court in the exercise of its equitable powers may fashion remedies to address the particular facts of each case, even if the partition statute does not strictly provide for such a remedy."[21]

First, Fabienne asserts that the trial court should not have considered any amounts other than "the amounts [Fabienne and Stotzky each] paid as the down payment and principal reductions on the mortgage." She correctly cites Cummings v. Anderson[22] and Iredell v. Iredell[23] as recognizing that evidence of unequal contributions to the purchase price raises a presumption that cotenants "intended to share the property proportionately to the purchase price."[24] Fabienne claims that this presumption required the court to divide the property

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[19] RCW 7.52.440.
[20] Kelsey v. Kelsey, 179 Wn. App. 360, 365, 317 P.3d 1096 (2014).
[21] Kelsey, 179 Wn. App. at 369.
[22] 94 Wn.2d 135, 614 P.2d 1283 (1980).
[23] 49 Wn.2d 627, 305 P.2d 805 (1957).
[24] Cummings, 94 Wn.2d at 140 (citing Iredell, 49 Wn.2d at 631).

based on the down payment and principal mortgage reductions alone. It could not consider other factors, like payments of mortgage interest.

But Fabienne fails to recognize that this presumption arises from a more fundamental principle—"that a cotenant should not be permitted to take inequitable advantage of another's investment."[25] And the facts of an individual case may make application of the presumption inappropriate because "[a] partition proceeding is an equitable one in which the court has great flexibility in fashioning relief for the parties."[26] Fabienne does not cite any case applying this presumption to limit the trial court's equitable discretion in the manner she suggests. She cites no case limiting factors the court may consider to the share of the purchase price paid by each party. And she does not cite any case prohibiting the trial court from considering mortgage interest payments in reaching an equitable result.[27]

The trial court included the Iredell / Cummings presumption in its analysis. But it concluded that because

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[25] Cummings, 94 Wn.2d at 142.

[26] Cummings, 94 Wn.2d at 143 (citing Leinweber v. Leinweber, 63 Wn.2d 54, 385 P.2d 556 (1963)).

[27] Fabienne asserts that "our Court has never considered mortgage interest payments in calculating the proportionate share of cotenants interests in property." But the absence of appellate authority on this issue does not establish that a trial court may not consider these payments to decide what is fair in a particular case.

> the amounts contributed by the parties to the overall costs of ownership of the property c[ould] be calculated with reasonable accuracy, . . . apportioning the equity based on the parties' proportionate financial contributions to the total costs of ownership of the property [was] consistent with the law governing cotenancies and partition, as well as the principles of equity to be applied in such cases.

The court's determination falls within the range of fair results. And the trial court's findings support its decision. Stotzky wanted to buy a home, and she had sufficient resources to buy one. The Riggers encouraged her to let them participate in the home purchase and allow Timothy to invest her liquid assets. She expected to live in the house for the rest of her life. Fabienne provides no persuasive argument that the trial court reached an unfair result. She fails to show that the trial court abused its discretion.

Second, Fabienne asserts that the trial court should have charged Stotzky fair market rent for her occupation of the Issaquah house. But the authority she cites does not support this contention. As Fabienne accurately notes, "[t]he case law in Washington has not followed clear lines on when a cotenant in possession is liable to another co-tenant for rent." Also, "[i]t is the rule in Washington that, in the absence of an agreement to pay rent, or limiting or assigning rights of occupancy, a cotenant in possession who has not ousted or actively excluded the cotenant is not liable for rent based upon his occupancy of the premises."[28]

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[28] Cummings, 94 Wn.2d at 145 (citing Fulton v. Fulton, 57 Wn.2d 331, 334-35, 357 P.2d 169 (1960)).

Despite this, Fabienne attributes the difference in decisions about whether rent is owed between cotenants to the "type of property involved." But she fails to recognize the outcomes in these cases sometimes depend on the nature of the relationship between cotenants, not the type of property.[29] She also claims ouster, quoting the Cummings court's statement that "[a]n appealing argument is made that, in a situation such as this, where the property is not adaptable to double occupancy, the mere occupation of the property by one cotenant may operate to exclude the other."[30] But the Cummings court ultimately concluded that the respondent's abandonment of the property eliminated this argument.[31] And, here, Fabienne never attempted to occupy the house, so her ouster argument is meritless.

Finally, Fabienne contends that the court miscalculated Stotzky's share of the 2017 rental income. She asserts that neither the record nor the law supports the court's decision not to reduce Stotzky's share of the rental income by the amount Fabienne paid to maintain the property.

First, she challenges a finding of fact stating that the court found that equity required that Fabienne bear the expenses she incurred to maintain and

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[29] For example, some decisions have based an ouster conclusion about a single-family home on pending divorce proceedings where the nature of the relationship between the two parties precludes co-occupancy. See Cummings, 94 Wn.2d at 145.

[30] Cummings, 94 Wn.2d at 145.

[31] Cummings, 94 Wn.2d at 145.

lease the property in 2017 "since they were incurred without [Stotzky's] knowledge or consent." As discussed above, substantial evidence supports this finding.

Fabienne next identifies the rule in Washington as "a co-owner is responsible for his share of the necessary property maintenance expenses throughout his tenure of ownership."[32] In addition, she describes the rule as "where a cotenant leases property without the participation of another cotenant, the recognized remedy has been to require the cotenant to render an accounting and pay over a proportionate share of the profits." But Stotzky vacated the premises before Fabienne incurred her claimed maintenance expenses. As we have noted, courts have broad discretion to identify the fair distribution of property interest in a partition.[33] Fabienne fails to establish that the trial court abused its discretion.

We conclude that the trial court did not abuse its discretion in its partition decisions.

The Trial Court Properly Awarded Costs

Fabienne claims that the trial court should not have awarded Stotzky statutory costs because Stotzky was not the prevailing party. And even if she were the prevailing party, the court should not have awarded costs for service of

[32] Yakavonis v. Tilton, 93 Wn. App. 304, 313, 968 P.2d 908 (1998).
[33] Kelsey, 179 Wn. App. at 369.

process, subpoenas served on several witnesses, and transcription of an exhibit. We again disagree.

RCW 4.84.030 states that in "any action in the superior court of Washington the prevailing party shall be entitled to his or her costs."[34] Whether a party is a "prevailing party" is a mixed question of law and fact that the court reviews under an error of law standard.[35] The trial court has discretion when it awards costs to the prevailing party.[36]

The prevailing party means the party in whose favor final judgment is rendered at the end of the entire case.[37] Here, the trial court entered final judgment granting partition. Stotzky filed for partition. Fabienne denied that Stotzky had any interest in the property and Fabienne should be declared the sole owner. Because the trial court decided to partition the property and awarded Stotzky the larger interest in the property, Stotzky was the prevailing party despite the dismissal of her claim for breach of fiduciary duty on summary judgment.

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[34] Fabienne claims that the statute does not include a court sitting in equity but fails to provide authority to support that claim. Logan, 102 Wn. App. at 911 n.1.

[35] Eagle Point Condo. Owners Ass'n v. Coy, 102 Wn. App. 697, 706, 9 P.3d 898 (2000).

[36] Austin v. U.S. Bank of Wash., 73 Wn. App. 293, 310, 869 P.2d 404 (1994).

[37] Marassi v. Lau, 71 Wn. App. 912, 915, 859 P.2d 605 (1993) (abrogated on other grounds by Wachovia SBA Lending, Inc. v. Kraft, 165 Wn.2d 481, 915, 200 P.3d 683 (2009)).

Fabienne also asserts that the trial court abused its discretion by awarding Stotzky costs for service of process and subpoenas. RCW 4.84.010 provides that costs may be awarded for

> (1) Filing fees;
> (2) Fees for the service of process by a public officer, registered process server, or other means, as follows:
> (a) When service is by a public officer, the recoverable cost is the fee authorized by law at the time of service;
> (b) If service is by a process server registered pursuant to chapter 18.180 RCW or a person exempt from registration, the recoverable cost is the amount actually charged and incurred in effecting service;
> . . . .
> (5) Reasonable expenses, exclusive of attorneys' fees, incurred in obtaining reports and records, which are admitted into evidence at trial . . . , including but not limited to medical records, tax records, personnel records, insurance reports, employment and wage records, police reports, school records, bank records, and legal files[.]

Specifically, Fabienne challenges the awards for service of process fees and witness fees for subpoenas duces tecum served on Timothy, The Escrow Service, Chicago Title Insurance Co., Eagle Mortgage, and B[oeing] E[mployees] C[redit] U[nion]. She asserts that the court erred because the "subpoenas were for records depositions undertaken as a part of pretrial discovery." But Stotzky used these subpoenas to obtain material evidence later admitted at trial. So the trial court had discretion under RCW 4.84.010 to award these costs.[38]

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[38] CR 54(d)(1), (2; Lee v. Sauvage, 38 Wn. App. 699, 710, 689 P.2d 404 (1984).

Fabienne also challenges the costs awarded Stotzky for service of process and a subpoena duces tecum on Rourke O'Brien because he filed objections to the subpoena. But O'Brien objected only to producing records required by the subpoena. As compelled by the subpoena, O'Brien appeared and testified as a witness for Stotzky's case in chief. So the trial court did not abuse its discretion by awarding Stotzky costs to obtain O'Brien's testimony.

Finally, Fabienne contends that the trial court should not have awarded the cost for a full transcript when the court admitted only five pages at trial. She contends that because the court did not admit the entire transcript, the court should not have awarded the entire transcription cost. Also, she contends the cost was not reasonable for the transcript and so not permitted under RCW 4.84.010(5).

Exhibit 25 is five pages of Fabienne's testimony during a hearing on Timothy's 2003 spousal maintenance motion. This evidence was material to the case because it helped prove Fabienne's earlier inconsistent position about Stotzky's interest in the property. The court relied upon this evidence and quoted from it in its findings.

Stotzky had difficulty obtaining this evidence because it was not transcribed before she filed this lawsuit and the original stenographer was unavailable to transcribe her notes. She left them with the court clerk when she

left. Stotzky asked the court stenographer referred to her by the Court Operations Supervisor to transcribe the notes for the section she wished to introduce into evidence. Because he was transcribing another stenographer's notes, the time involved and the extent of the hearing transcribed resulted in a larger bill than the five pages would have cost had the original stenographer been available. So, as the trial court noted, the transcription occurred under "unusual circumstances." Given the transcription's materiality, the costs associated with these "unusual circumstances" were reasonable.

We conclude that the trial court did not err in awarding Stotzky costs.

The Trial Court Did Not Err in Dismissing Stotzky's Fiduciary Duty Claim

In her cross appeal, Stotzky challenges the trial court's dismissal of her breach of fiduciary duty claim for encumbering the house with the $50,000 HELOC on partial summary judgment. This court reviews an order on summary judgment de novo.[39] It considers all facts and reasonable inferences in the light most favorable to the nonmoving party.[40] It awards summary judgment only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[41]

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[39] CR 56(c); Sabey v. Howard Johnson & Co., 101 Wn. App. 575, 581-82, 5 P.3d 730 (2000).

[40] CR 56(c); Sabey,101 Wn. App. at 581-82

[41] CR 56(c); Sabey, 101 Wn. App. at 581-82.

Stotzky first contends that Fabienne, as a cotenant, owed her a duty not to encumber the house, citing Woodard v. Carpenter.[42] But we find Woodard distinguishable. It involved a cotenant who, unbeknownst to the other, failed to pay taxes and assessments, purchased the property on foreclosure, and, due to the delinquent assessments, was estopped from claiming the land awarded in the foreclosure.[43] So the encumbrance was made without the knowledge of the cotenant, and the remedy was estoppel in order to ensure that Woodard did not "take advantage of his or her own wrong or neglect and profit thereby."[44] Here, Stotzky cosigned the loan, so she knew of the encumbrance. And Fabienne agreed to full liability for the loan, so there was no taking advantage to prevent.

Stotzky also asserts that Fabienne owed her the duty not to interfere with her coequal rights as a party to a joint venture. She cites Douglas v. Jepson,[45] which provides that cotenants generally have no duty to disclose an encumbrance to their own interest in a cotenancy unless that cotenancy is also a partnership. Stotzky asserts that the question of whether she and Fabienne were in a partnership was an issue of material fact that prevented the trial court from granting summary judgment. But even if a partnership existed, Fabienne did not

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[42] 31 Wn.2d 271, 273, 195 P.2d 983 (1948).
[43] Woodard, 31 Wn.2d at 273-74, 275.
[44] Woodard, 31 Wn.2d at 273-74, 275.
[45] 88 Wn. App. 342, 348-350, 945 P.2d 244 (1997).

breach a duty to disclose because Stotzky was present when Fabienne obtained the HELOC.

Finally, Stotzky contends that she and Fabienne shared a "confidential relationship" that gave rise to unique fiduciary duties. She relies on McCutcheon v. Brownfield,[46] which states that "'[a] confidential relation exists between two persons when one has gained the confidence of the other and purports to act or advise with the other's interest in mind. A confidential relation is particularly likely to exist where there is a family relationship.'" As Fabienne notes, in McCutcheon and the two additional cases Stotzky cites, the courts evaluated whether or not a child improperly influenced a parent to sign a deed.[47] In each case, the court analyzed the possible existence of a confidential relationship because that would shift the burden of proof for showing undue influence.[48] Stotzky does not cite any cases where the court considered whether, like here, a confidential relationship could provide the basis for a breach of fiduciary duty if the claimant does not assert being the victim of undue influence.[49]

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[46] 2 Wn. App. 348, 357, 467 P.2d 868 (1970) (quoting RESTATEMENT OF RESTITUTION § 166 cmt. d (AM. LAW INST. 1937)).

[47] McCutcheon, 2 Wn. App. at 356; Pedersen v. Bibioff, 64 Wn. App. 710, 718, 828 P.2d 1113 (1992); Lewis v. Estate of Lewis, 45 Wn. App. 387, 388-89, 725 P.2d 644 (1986).

[48] McCutcheon, 2 Wn. App. at 356; Pedersen, 64 Wn. App. at 718; Lewis, 45 Wn. App. at 388-89.

[49] Stotzky appears to contend that she acquiesced to the HELOC under duress. For example, she claims that Fabienne "told . . . Stotzky that if she did not sign the documents [to facilitate the HELOC], she would make . . . Stotzky go

Stotzky fails to show a legal basis for her claim that Fabienne violated a fiduciary duty to her.

Stotzky also asserts that emotional distress damages are available for breach of fiduciary duty. Because she does not establish that she has this claim, we need not evaluate it.

We conclude that the trial court did not err in dismissing Stotzky's claim in summary judgment.

CONCLUSION

We affirm. Substantial evidence supports the trial court's challenged findings. The trial court did not abuse its discretion in its partition decision or in awarding Stotzky costs. And Stotzky does not establish the court erred in dismissing her claim for breach of fiduciary duty on summary judgment.

Leach, J.

WE CONCUR:

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live in an apartment." But she does not assert duress or undue influence, so this argument does not help her.

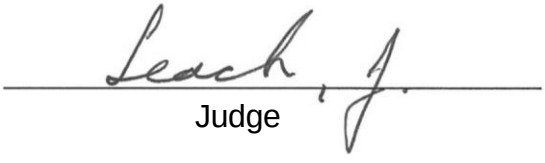
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CATHERINE STOTZKY, Respondent, v. FABIENNE L. RIGGERS, Appellant.	)	No. 77980-0-I ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, Fabienne L. Riggers, having filed a motion for reconsideration herein, and the hearing panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

FOR THE COURT:



Judge

DAVIDSON, KILPATRIC, KRISLOCK, PLLC

November 27, 2019 - 8:04 PM

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Appellate Court Case Title:	Catherine Stotzky, Res/Cross-App. v. Fabienne L. Riggers, App/Cross-Res.

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