

71845-2

71845-2

No. 71845-2

COURT OF APPEALS  
DIVISION I OF THE STATE OF WASHINGTON

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JULIE ANN THOMAS, a single woman,

Appellant,

v.

J.R. LeVASSEUR and DONNA LOUISE LeVASSEUR,  
husband and wife, individually and the  
marital community composed thereof,

Respondents.

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**BRIEF OF RESPONDENT**

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2011 SEP 24 PM 4:52  
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## I. INTRODUCTION

Defendants/Respondents J.R. LeVasseur and Donna LeVasseur are the parents of Plaintiff/Appellant Julie Thomas. Ms. Thomas filed suit against her parents on or about January 29, 2014 requesting that the LeVassuers' names be taken off title to a \$1,000,000.00 condo in Seattle (the "subject property" or the "Seattle condo") and that Ms. Thomas' name be put on title; Ms. Thomas also filed a lis pendens. Ms. Thomas' theory for why she should be on title instead of her parents has gone through a couple of changes. Originally, Ms. Thomas alleged she paid for everything and there was a mistake/an error on the title to the subject property. Then, Ms. Thomas reinvented her story and admitted her parents were properly on title to the subject property, but claimed they had orally agreed to gift the Seattle condo to Ms. Thomas upon her request.

The subject property was transferred to the LeVasseurs in 2012 pursuant to a Purchase and Sale Agreement that the LeVasseurs entered into as buyer with the subject property's developer/owner as the seller. The LeVasseurs funded a portion of the purchase price; Ms. Thomas alleges she paid a portion as well. The LeVasseurs were listed as owners on the tax rolls in addition to being put on title at the close of the purchase and sale transaction. Subsequently, the LeVasseurs have made property

tax payments. Ms. Thomas has never been on title and has never been reflected in the tax rolls as owner of the subject property.

The LeVasseurs intended to own the subject property—there was no mistake about it. But the LeVasseurs’ principal residence is a modest apartment above their machine parts shop in rural Thurston County and they had no interest in moving to a fancy Seattle condo. The LeVasseurs only purchased the subject property to help their daughter and granddaughter. Ms. Thomas and her daughter, the LeVasseurs’ granddaughter, lived in the Seattle condo after it was purchased. However, the LeVasseurs’ understanding is that the subject property is currently vacant as Ms. Thomas has moved in with her new fiancée and their granddaughter is now college age.

Ms. Thomas is apparently on her feet now, but things were different in 2012. In 2012 when Ms. Thomas wanted a place in Seattle to live, the LeVasseurs, like many parents would have done, tried to help their daughter when she asked for help. The LeVasseurs have built a successful business, and, therefore, they have the means to offer significant financial help to their daughter in addition to love and emotional support. In fact, the LeVasseurs have made gifts and loans to their daughter over the years amounting to perhaps millions of dollars. When Ms. Thomas asked her

parents to buy the subject property, the LeVasseurs saw the opportunity as a way to help their daughter have a nice place to live in the short-term and as a way to replenish bank accounts that had been depleted by Ms. Thomas in the long-term. The LeVasseurs planned to use expected capital gains from the eventual sale of the subject property to payoff bank loans and reimburse themselves for money they had loaned to Ms. Thomas during the last few years—for example, the LeVasseurs provided Ms. Thomas with over \$170,000.00 for her personal use during her divorce proceedings in or about 2010.

Other financial assistance the LeVasseurs have given Ms. Thomas over the years includes the attempted gift of a waterfront residence in Jefferson County, Washington. The LeVasseurs made a gift of that property to their daughter via a qualified personal residence trust, but Ms. Thomas never recorded that property in her own name and she signed a quit claim deed in May 2012 conveying any interest she had back to her parents. [It should be noted that despite the quit claim deed, Ms. Thomas has filed a second lawsuit, which is currently pending in King County Superior Court, alleging that Ms. Thomas should take title to the Jefferson County property in addition to the Seattle condo.]

Ms. Thomas could not have qualified for or afforded a mortgage of her own in 2012. The LeVasseurs believe Ms. Thomas decided to quit claim the Jefferson County property back to them so that they could obtain a mortgage and because Ms. Thomas made a calculated bet that she could get her parents to pay that mortgage and then still get ownership of the Jefferson County property when her parents passed away.

As noted at the outset, Ms. Thomas originally alleged that she had paid all expenses associated with the purchase and ownership of the subject property. She even alleged she paid the excise tax on the purchase and sale transaction—she has now been forced to admit that was a wild and untrue allegation. Ms. Thomas originally claimed it was a mistake that her parents' names were on the title to the subject property. But she has also recanted that story and now admits there was no mistake on the title. Instead, Ms. Thomas alleges she is entitled to argue that there was an oral contract between herself and her parents regarding the transfer of the subject property.

The LeVasseurs prevailed at the Trial Court level on summary judgment by showing there was no mistake on the title. In addition to the dismissal of Ms. Thomas' Complaint for Quiet Title and Declaratory Relief, the Trial Court ordered the LeVasseurs were entitled to attorneys'

fees pursuant to CR 11 and/or the lis pendens statute (RCW 4.28.328); judgment was entered on August 26, 2014 in the amount of \$26,280.00. The Trial Court also denied Ms. Thomas' request for leave to amend to add Breach of Contract type causes of action because the amendment was/is futile and Ms. Thomas' request was untimely. The LeVasseurs request that all Orders of the Trial Court be affirmed.

## **II. STATEMENT OF THE CASE**

### **A. Julie Thomas' Original Complaint.**

Ms. Thomas' original Complaint alleged only Quiet Title and Declaratory Relief. There was no mention of an alleged oral agreement. Ms. Thomas alleged that she paid for everything—in other words, that the LeVasseurs paid for nothing. And she alleged the Statutory Warranty Deed was incorrectly issued to the LeVasseurs. CP 1-14.

Further, Ms. Thomas filed a lis pendens based on her allegation that there was an issue with the title. See CP 23-26.

### **B. The Objective, Documentary Evidence Supports Mr. and Mrs. LeVasseur.**

The LeVasseurs are listed on the Statutory Warranty Deed for the subject property as owners. The Statutory Warranty Deed reflects the subject property was sold to the LeVasseurs by Harvard & Highland,

LLC, which the LeVasseurs believe is or was associated with the developer of the Harvard & Highland Condos. CP 55-59.

The Settlement Statement for the closing of the LeVasseurs' purchase of the subject property reflects that purchase funds were contributed by Defendant J.R. LeVasseur. It is the LeVasseurs' understanding that the seller paid the excise tax applicable to the sale of the subject property between the LeVasseurs and Harvard & Highland, LLC—and the LeVasseurs note that real estate excise tax is typically paid by the seller of the property. CP 61-64.

In addition to the Statutory Warranty Deed and closing documents, the LeVasseurs were identified as the buyers in the purchase and sale agreement for the Subject Property. CP 66. Furthermore, the LeVasseurs are listed as the Tax Payer of record according to the King County Treasurer. CP 68-72. The LeVasseurs have paid property taxes associated with the subject property, which Ms. Thomas admitted in a signed and notarized letter dated September 30, 2013 (Ms. Thomas proposed a plan to repay various debts, including “property taxes on condo paid by [the LeVasseurs]...”). CP 74. This letter also reflects that Ms. Thomas paid the deposit for the subject property with money provided by the LeVasseurs (i.e. even though Ms. Thomas may have written a personal

check for the deposit, the money in her checking account came from the LeVasseurs). *Id.*

Ms. Thomas is the LeVasseurs' daughter and she has been given numerous substantial gifts and loans throughout the course of her life. See e.g., *Id.* However, the subject property was not a gift that the LeVasseurs made to their daughter—the subject property is owned by the LeVasseurs as the Statutory Warranty Deed reflects. CP 48-52. The subject property was purchased by the LeVasseurs, in large part with funds that came from a mortgage the LeVasseurs are debtors on and that is secured by property in Jefferson County, Washington that the LeVasseurs are owners of. See CP 76-79; see also CP 61-64.

The LeVasseurs purchased the Jefferson County property in 1997 and did previously attempt to gift that property to Ms. Thomas via a Residential Trust, which was part of the LeVasseurs' estate distribution plan. CP 48-52. However, Ms. Thomas, who was Trustee of the aforementioned Residential Trust, never transferred the property into her name at the expiration of the Trust's ten year term. CP 81-82. Instead, Plaintiff, as Trustee, gifted the Jefferson County property from the Trust back to the LeVasseurs. *Id.*

The LeVasseurs have given so much financial assistance to Ms. Thomas that it is difficult to keep track of. See CP 74. Based on the Closing Statement associated with the purchase of the subject property reflecting that all funds were provided by the LeVasseurs, the LeVasseurs believed their money must have been used for the entire purchase of the subject property. See CP 61-64. However, there is now reason to believe that some of the money the LeVasseurs gave their daughter was used for other purposes (See e.g. CP 74) and that Ms. Thomas borrowed money from a boyfriend, which was combined with the LeVasseurs' money to close the sale on the subject property. CP 194. That boyfriend, Mr. Shaw, was apparently repaid with funds from a loan taken out in September 2012. See CP 84-97.

After the LeVasseurs purchased the subject property in May/June 2012 and became owners of record, they allowed Ms. Thomas to reside there—all the while, the LeVasseurs made payments on the loan secured by their Jefferson County property and paid the Seattle condo's taxes. See CP 48-52. Further, when the aforementioned September 2012 loan was taken out, the LeVasseurs were listed as debtors and the loan was secured by Seattle condo. CP 84-97. However, the loan was used in part to fund a business interest Ms. Thomas was attempting to run. *Id.* In September

2013, the loan that was used to repay Mr. Shaw and also to fund Ms. Thomas' business was repaid in full by Ms. Thomas' current fiancé, Douglas Bain. See CP 99. Mr. Bain paid after the LeVasseurs refused to be intimidated by threatening correspondence Mr. Bain directed to the LeVasseurs and their other daughter. CP 101-107.

Based on the objective evidence, it is a fact that Ms. Thomas made numerous unfounded allegations in her original Complaint, including:

- “[A]ll funds used to purchase the Subject Property were provided by [Plaintiff]...” (CP 2 at Paragraph 3.2 of the Complaint). This is clearly false as funds used for the purchase of the subject property are traceable to the LeVasseurs and others. CP 61-64.
- “[Plaintiff] paid the real estate excise tax obligation associated with the purchase and sale of the Subject Property, has full[y] and timely paid all real estate taxes...” (CP 3 at Paragraph 3.3 of the Complaint). The LeVasseurs believed the seller of the subject property paid the excise taxes as sellers typically do. This belief was confirmed by the Settlement Statement. CP 61-64. Further, Ms. Thomas' counsel has since admitted this was an unfounded allegation. VRP page 21, lines 17-21. The LeVasseurs knew without a doubt that they paid real estate taxes for the subject property. Ms. Thomas acknowledged that her parents paid real estate taxes. CP 74. It was absolutely frivolous for Ms. Thomas to deny that her parents paid real estate taxes given her admission in writing. *Id.*
- “At no time has [Defendants] contributed any funds whatsoever to the purchase of the Subject Property, paid any portion of the real estate excise tax, paid any real estate taxes...” (CP 3 at Paragraph 3.5 of the Complaint). Another frivolous statement alleging the LeVasseurs did not contribute money towards the purchase of the subject property, including paying its real estate taxes, when Ms. Thomas knew this not to be true. CP 74.

Ms. Thomas was clearly exaggerating/lying when she alleged her parents paid for nothing, but the LeVasseurs concede they did not pay for everything. Ms. Thomas did make some payments to the LeVasseurs through their business (a business Ms. Thomas has received a salary and other benefits from despite contributing almost nothing). However, the payments she made are miniscule compared to what Ms. Thomas received. At the rate Ms. Thomas was making payments, the LeVasseurs would need to live to be well over 100 years old before they would be repaid—this is more evidence that the parties had agreed the Seattle condo would be sold and the money used to reimburse the LeVasseurs. This is also evidence that Ms. Thomas was never just supposed to receive the Seattle condo as a gift. See, e.g. CP 206-218 and CP 74.

**C. Julie Thomas' Attempt to Change Her Story to Get What She Wants.**

The LeVasseurs' Motion for Summary Judgment was based on Ms. Thomas' original Complaint. CP 35-47. Perhaps sensing a problem, Ms. Thomas changed her story and her Response to the LeVasseurs' Motion for Summary Judgment proposed an entirely new theory for why she claimed the Seattle condo should be given to her. CP 141-155 and CP 160-166.

Ms. Thomas' new story was that she was attempting to defraud her former husband by putting property in her parents' names. Ms. Thomas claims that her parents orally agreed they would give Ms. Thomas certain properties, including the Seattle condo, at an indeterminate date subject to the whims of Ms. Thomas. Ms. Thomas' new story was that she asked her parents to gift her the Seattle condo in September 2013 and they refused, which Ms. Thomas claims was a breach of the alleged oral agreement. *Id.* Ms. Thomas' new story confirmed that several allegations in her original Complaint were false and made with apparent knowledge of their falsity—either that or Ms. Thomas' new story was a sham. See CP 1-14, CP 141-155, CP 160-166, and CP 268-277. Further, Ms. Thomas failed to reconcile her new story with her prior written admission that her parents loaned her a substantial amount of money that she agreed to repay. CP 74. Nor did Ms. Thomas explain why she should be given the Seattle condo outright even though her parents are responsible for the mortgage they took out on their Jefferson County property<sup>1</sup>. See CP 160-166.

Ms. Thomas' new story shot her original Complaint in the foot. And there was nothing in Ms. Thomas' new story that she would not have been

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<sup>1</sup> In a new lawsuit filed by Ms. Thomas, she claims the Jefferson County property was also part of the alleged oral agreement. However, this is yet another new story as Ms. Thomas failed to assert such an allegation in the instant case.

aware of at the time the original Complaint was filed. See CP 1-14 and CP 160-166.

**D. Statement of the Procedure in the Trial Court.**

Ms. Thomas' original Complaint alleged only Quiet Title and Declaratory Relief. The original Complaint was based on the premise that Ms. Thomas paid for everything and that title being in the LeVasseurs' names was an error. CP 1-14.

The LeVasseurs filed for Summary Judgment on or about March 11, 2014 with the hearing set for April 11, 2014. CP 35-47. With their Motion for Summary Judgment, the LeVasseurs presented evidence that it was no mistake they were on title. CP 48-129.

In response to the LeVasseurs' Motion for Summary Judgment, Ms. Thomas changed her story. She admitted she had not paid for everything and that there was no mistake on title. However, she alleged she should be given the subject property pursuant to an alleged oral agreement. CP 141-155 and CP 160-166.

Ms. Thomas did not attempt to amend her Complaint when she came out with her new story. In Reply on their Motion for Summary Judgment, the LeVasseurs pointed out that Ms. Thomas was changing the nature of the lawsuit from a Quiet Title action to a Breach of Contract action. The

LeVasseurs' argued that Ms. Thomas' original Complaint must fail, but the door was left open for Ms. Thomas to amend her Complaint. CP 268-277.

The LeVasseurs' Reply on their Motion for Summary Judgment was timely filed on April 7, 2014. *Id.* Ms. Thomas made no attempt to amend her Complaint prior to the hearing on April 11, 2014. See CP 302-309. During oral argument, Ms. Thomas' counsel made some indication the Complaint might be amended, but mainly Ms. Thomas' argument was that there was no need for an amendment. VRP page 18, line 4 – page 19, line 6; page 22, lines 6-20; and page 23, line 21 – page 24, line 13. However, several days after the hearing, Ms. Thomas did file a Motion to Amend. CP 294-296 and CP 302-309.

The Trial Court denied Ms. Thomas' Motion to Amend. CP 362-363. The Trial Court granted the LeVasseurs' Motion for Summary Judgment. CP 364-367. The Trial Court also found the LeVasseurs were entitled to reasonable attorneys' fees under CR 11 and/or RCW 4.28.328. *Id.* On August 26, 2014, the Trial Court entered judgment against Ms. Thomas, and her attorneys, in the amount of \$26,280.00.

Ms. Thomas timely filed an appeal of the Trial Court's Orders.<sup>2</sup> CP 368-375. The LeVasseurs request that the Trial Court's orders be affirmed.

### III. SUMMARY OF ARGUMENT

First, Ms. Thomas' original Complaint and claims were properly dismissed as a matter of law based on the absence of disputed material facts—the parties agree the LeVasseurs correctly took title to the Seattle condo as buyers under the applicable purchase and sale agreement. Second, it was appropriate for the Trial Court to find that the LeVasseurs should be awarded attorneys' fees pursuant to CR 11 and/or RCW 4.28.328—the LeVasseurs should also be awarded their fees on appeal. And third, Ms. Thomas' motion to amend her Complaint to add new claims was properly denied—her proposed new claims are futile based on Washington law, including the statute of frauds, and the motion was untimely filed.

The LeVasseurs request that this Court affirm all rulings of the Trial Court and award the LeVasseurs their reasonable attorneys' fees on appeal. However, there is precedent for affirming the Order granting

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<sup>2</sup> The Trial Court ruled on a subsequent motion that it cannot formally remove the lis pendens while Ms. Thomas' appeal is pending. But as indicated in the body of this Brief, after initially reserving on the exact amount of fees to award, the Trial Court has now entered judgment in the amount of \$26,280.00.

summary judgment (thereby dismissing the quiet title and declaratory relief causes of action in this case), but reversing and remanding on the Order denying the Motion to Amend (thereby allowing the case to go forward on the new proposed causes of action)<sup>3</sup>. At the very least, this Court should affirm the summary judgment Order and award attorneys' fees on appeal consistent with the Trial Court's Order granting summary judgment.

Ms. Thomas' pleadings are replete with contradictions and false statements. No reasonable trier of fact could believe Ms. Thomas. Ms. Thomas' original Complaint for Quiet Title and Declaratory Relief alleged that, "the Statutory Warranty Deed was incorrectly issued to LeVasseur" (CP 2 at paragraph 3.2) and "[t]he fact that title to the Subject Property is currently in LeVasseur's name is an error" (CP 3 at paragraph 3.7). But Ms. Thomas did a complete about face in response to her parents' Motion for Summary Judgment and changed her story to admit that Ms. Thomas intended for her parents to take title to the Subject Property (i.e. the Seattle condo). See CP 162. However, Ms. Thomas suggests the LeVasseurs

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<sup>3</sup> This Court is hereby advised that after the LeVasseurs prevailed at the Trial Court level, Ms. Thomas filed a second Complaint in King County Superior Court alleging similar facts and causes of action to what were contained in Ms. Thomas' proposed Amended Complaint in the instant case. This second lawsuit has been assigned Case Number 14-2-14624-8SEA. The LeVasseurs may move to dismiss the second lawsuit on the basis of res judicata and/or collateral estoppel in addition to seeking summary judgment as a matter of law in that case on the merits based on the statute of frauds.

only took title pursuant to some alleged oral agreement that Ms. Thomas now indicates was necessary to alleviate “concerns that [Ms. Thomas’] ex-husband would pursue [the subject property if it was titled in Ms. Thomas’] own name.” *Id.* Ms. Thomas’ new story that there was no mistake in issuing title to her parents made Ms. Thomas’ original Complaint untenable regardless of why the LeVasseurs were designated as purchasers or how they took title to the Seattle condo.

Ms. Thomas’ new story alleging there was an oral agreement to transfer title without consideration at an unknown future date did not come to light until after the LeVasseurs filed their Motion for Summary Judgment. The change in Ms. Thomas’ stories did not rely on any evidence that had been discovered or offered between the time Ms. Thomas’ original Complaint was filed and when Ms. Thomas filed her contradictory declaration. There is no reason Ms. Thomas would have needed to depose her parents or review interrogatory responses from them in order to allege she had an oral agreement with them. It is apparent that Ms. Thomas makes her stories up at her convenience in an attempt to get what she wants and without any regard for the truth.

But even assuming there is some truth to Ms. Thomas’ new story, there was undue delay in Ms. Thomas attempting to amend her original

Complaint to add Breach of Contract and other related claims. And given Ms. Thomas' obvious lack of credibility in addition to the law in Washington concerning the statute of frauds, Ms. Thomas' proposed amended Complaint was/is futile. The LeVasseurs would be prejudiced if they were forced to spend resources (e.g. time and money) litigating against their daughter's futile claims.

#### IV. ARGUMENT

**A. The Court of Appeals should affirm the Trial Court's ruling Granting the LeVasseurs' Motion for Summary Judgment because there are no issues of material fact and summary judgment is warranted as a matter of law.**

- i. The only material fact is a fact the parties agree on—that the LeVasseurs were intentionally made buyers of the purchase and sale contract and properly took title.

The LeVasseurs' Motion for Summary Judgment was directed at the claims alleged in Ms. Thomas' original Complaint—these were the only allegations pled or attempted to be pled at the time the LeVasseurs filed their Motion. See CP1-14 and CP 35-47. The causes of action pled in Ms. Thomas' original Complaint were Declaratory Relief and Quiet Title. CP 1-14. The gravamen of each of these causes of action originally pled by Ms. Thomas, and their nexus, is Ms. Thomas' assertion that her claim to the Seattle condo was superior to the claim by her parents. *Id.* And based

on the averments in her original Complaint, Ms. Thomas' causes of action relied entirely on the allegations that Ms. Thomas had paid for the Seattle Condo on her own and that, subsequently, it was a mistake title was in the LeVasseurs' names. *Id.*

Ms. Thomas did not plead Breach of Contract or Constructive Trust<sup>4</sup> in her original Complaint. *Id.* Thus, based on the pleadings before the Trial Court, the only fact material to Ms. Thomas' original Complaint was whether there was an error or mistake in placing the LeVasseurs on title to the Seattle condo. When, in her Response to the LeVasseurs' Motion for Summary Judgment, Ms. Thomas changed her story and admitted there was no mistake, the Court properly recognized there were no disputes of material fact and granted summary judgment.

The Court of Appeals' review of orders granting summary judgment is de novo, and the Court of Appeals engages in the same inquiry as the Trial Court. *Rafel Law Group PLLC v. Defoor*, 176 Wn.App. 210, 218, 308 P.3d 767 (Div. 1 2013) (citing *Aba Sheikh v. Choe*, 156 Wn.2d 441, 447, 128 P.3d 574 (2006)). Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment

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<sup>4</sup> Ms. Thomas has now pled Constructive Trust in her second lawsuit (Case No. 14-2-14624-8SEA), but she did not attempt to plead it in the first lawsuit—not even as part of the proposed Amended Complaint.

as a matter of law. CR 56(c). All facts and reasonable inferences must be considered in the light most favorable to the nonmoving party. *Defoor*, 176 Wn.App. at 218-19 (citing *Mountain Park Homeowners Ass'n v. Tydings*, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994)). Summary judgment should be granted if reasonable persons could reach only one conclusion. See *CPL (Delaware) LLC v. Conley*, 110 Wn.App. 786, 790-91, 40 P.3d 679 (Div. 2 2002) (citing *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982)).

A “material fact” for summary judgment purposes is one upon which the outcome of litigation depends. *International Ass'n of Firefighters, Local 1789 v. Spokane Airports*, 146 Wn.2d 207, 223-24, 45 P.3d 186 (2002); *Conley*, 110 at 790 (citing *Capitol Hill Methodist Church v. City of Seattle*, 52 Wn.2d 359, 364, 324 P.2d 1113 (1958)); *Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990) (citing *Morris v. McNicol*, 83 Wn.2d 491, 494, 519 P.2d 7 (1974)).

As previously stated, the only causes of action Ms. Thomas had pled or attempted to plead when the LeVasseurs moved for Summary Judgment were Quiet Title and Declaratory Relief. CP 1-14. And at that time (i.e. when the LeVasseurs filed their Motion), it appeared Ms. Thomas' story

was that she paid for the Seattle Condo all on her own and it was a mistake her parents were on title. *Id.* In the LeVasseurs' Motion for Summary Judgment, the LeVasseurs' presented evidence reflecting that they were instrumental in purchasing the Seattle condo and that there was no mistake. CP 35-47 and CP 48-129.

Ms. Thomas admitted in her Response to the LeVassuers' Motion that there was no mistake in conveying title to her parents. Instead, Ms. Thomas attempted to frame the issues as "who paid for the [Seattle condo] and whether there was an agreement among family members to convey the title to the condominium [from the LeVasseurs] to Julie Thomas upon request..." CP 151 at lines 18-20.

In Reply on their Motion for Summary Judgment, the LeVasseurs pointed out, "[Ms. Thomas] has changed her story and argues she is entitled to equitable relief based on the alleged breach of some oral contract. However, [Ms. Thomas] has not attempted to amend her Complaint and apparently continues to seek relief in the form of quiet title even though [Ms. Thomas] admits that [her parents] participated in the purchase of the subject property and it was no mistake title was conveyed to [the LeVasseurs]." CP 270 at lines 10-14.

Ms. Thomas now argues she should have been “permitted to amend her complaint [so] those claims regarding title to the [subject] property [c]ould have been re-framed as arising out of breach of contract and/or specific performance.” Opening Brief at page 18. Yet, Ms. Thomas neglected to make any attempt to amend her Complaint prior to the summary judgment hearing despite: (1) virtually being told by the LeVasseurs that she should seek to amend her Complaint (CP 268-277); (2) acknowledging “[t]he facts [alleged in her original Complaint] were intentionally sparse and the claims were broadly asserted,” (Opening Brief at page 4); and (3) acknowledging that the claims needed to be “re-framed” (*Id.* at page 18).

Ms. Thomas’ own pleadings support the LeVasseurs’ arguments that Ms. Thomas’ original Complaint was properly dismissed. It is unbelievable that Ms. Thomas did not attempt to “re-frame” her Complaint in a timely manner. The only conceivable explanation for Ms. Thomas’ undue delay is that once her original Complaint was filed, changing Ms. Thomas’ story in order to allege Breach of Contract could not be done without ruining Ms. Thomas’ credibility and exposing her to CR 11 sanctions—therefore, perhaps Ms. Thomas decided to see how long she could get by with her original, “intentionally sparse” claims.

A discussion of Ms. Thomas' dereliction with respect to her attempt to "re-frame" her Complaint (i.e. completely change her story) is appropriate in this part of Respondents' Brief because Ms. Thomas' actions/inaction highlights the fact she could not support her original causes of action and so she came up with a new story instead of trying to stick with her original story. In fact, the only law cited in Ms. Thomas' pleadings responsive to the LeVasseurs' Motion for Summary Judgment is cookie-cutter statements regarding the summary judgment standard—Ms. Thomas makes no attempt to discuss law that might support her Quiet Title and/or Declaratory Relief causes of action. CP 141-155. Ms. Thomas continues to avoid a discussion of the law in her Opening Brief as her "Argument and Authority" section on this issue, Section IV.A.2, is barely over a page long and cites only one case, which is simply another case on the summary judgment standard. Opening Brief at page 10.

In a conclusory statement, Ms. Thomas baldly asserts there is a "multitude of 'genuine disputes of material fact' that exist[] on the record..." Opening Brief at page 10. However, Ms. Thomas' view of what constitutes a material fact is wrong. The only material fact is that the LeVasseurs are properly on title because Ms. Thomas and the LeVasseurs agreed the LeVasseurs would substitute for Ms. Thomas as buyers in the

purchase and sale agreement and receive title at the close of the transaction. Whether the LeVasseurs, Ms. Thomas, or one of Ms. Thomas' boyfriends paid for the Seattle condo is not material to the issuance of the statutory warranty deed to the LeVasseurs. Whether there was an oral agreement of some kind and, if so, what the agreement consisted of is similarly not material to the issuance of the statutory warranty deed to the LeVasseurs.

An action to quiet title is equitable and designed to resolve competing claims of ownership—such actions are governed by RCW 7.28.010. *Kobza v. Tripp*, 105 Wn.App. 90, 95, 18 P.3d 621 (Div. 3 2001). An action to quiet title allows a person in peaceable possession or claiming the right to possession of real property to compel others who assert a hostile right or claim to come forward and assert their right or claim and submit it to judicial determination. *Id.* “[T]he object of the [quiet title] statute is to authorize proceedings ‘for the purpose of stopping the mouth of a person who has asserted or who is asserting a claim to the [subject] property. It is not aimed at a particular piece of evidence, but at the pretensions of the individual[.]’” *Id.* (quoting *McGuinness v. Hargiss*, 56 Wn. 162, 164, 105 P. 233 (1909) (quoting *Castro v. Barry*, 79 Cal. 443, 21 P. 946 (1889))).

Although Declaratory Relief and Quiet Title actions may have the ability to encompass broad facts in an effort to grant equitable remedies on a case by case basis, the relief granted must be consistent with the facts alleged. Here, Ms. Thomas alleged that her basis for relief was a mistake in the issuance of the statutory warranty deed for the Seattle condo to the LeVasseurs. The LeVasseurs proved there was no mistake and when Ms. Thomas then changed her story it was clear there was only one conclusion reasonable minds could reach—there was no mistake. As such, granting summary judgment on the claims alleged in Ms. Thomas’ original Complaint was proper.

- ii. The Trial Court correctly declined to continue the LeVasseurs’ Motion for Summary Judgment. Further discovery would not change the outcome of the LeVasseurs’ Motion since the parties agree on the only material fact.

An appellate court reviews a trial court’s decision on a request to continue a summary judgment hearing for abuse of discretion. *Building Industry Ass’n of Washington v. McCarthy*, 152 Wn.App. 720, 743, 218 P.3d 196 (Div. 2 2009) (citing *Colwell v. Holy Family Hosp.*, 104 Wn.App. 606, 615, 15 P.3d (Div. 3 2001)). “The trial court may deny a motion for continuance when (1) the requesting party does not have a good reason for the delay in obtaining evidence, (2) the requesting party

does not indicate what evidence would be established by further discovery, or (3) the new evidence would not raise a genuine issue of fact.” *McCarthy*, 152 Wn.App. at 742-43 (quoting *Butler v. Joy*, 116 Wn.App. 291, 299, 65 P.3d 671 (Div. 3 2003)); see also *Tellevik v. Real Prop. Known as 31641 W. Rutherford St.*, 120 Wn.2d 68, 90, 838 P.2d 111, 845 P.2d 1325 (1992). It is up to the party requesting a continuance of a Motion for Summary Judgment to show there is a need for additional time. See *McCarthy*, 152 Wn.App. at 742; CR 56(f).

In Ms. Thomas’ Opening Brief, she argues that “[t]he Declaration of Dan Lossing (CP 224-6) sets forth good cause for why evidence could not be obtained in time for the summary judgment proceeding.” Opening Brief at page 13. However, Ms. Thomas does not explain what evidence she expected to obtain if given more time. She also fails to explain how new evidence would raise a genuine issue of fact.

The Declaration of Dan Lossing is itself vague on what evidence Ms. Thomas anticipated discovering. See CP 224-226. But straining to give Ms. Thomas the benefit of the doubt it appears the new evidence would have only related to issues concerning: (1) financial contributions towards the purchase and maintenance of the Seattle condo; and (2) an alleged oral agreement. *Id.* There is no indication that Ms. Thomas expected to obtain

new evidence that may have altered the undisputed facts that the LeVasseurs were the buyers under the applicable purchase and sale agreement and the LeVasseurs were properly put on title.

The Trial Court did not abuse its discretion in denying Ms. Thomas' request for a continuance under CR 56(f). Ms. Thomas did not articulate what additional evidence she expected to discover and it was apparent from the evidence before the Trial Court that new evidence would not raise a genuine issue of fact. Ms. Thomas remains unable and/or unwilling to comprehend the key issue in this matter and the fatal flaw in her case—she knowingly/intentionally allowed her parents to take title to the Seattle condo and there is no written contract providing for Ms. Thomas to succeed them in ownership as a matter of right. Who paid for what is irrelevant under Ms. Thomas' original Complaint, which Complaint was the subject of the LeVasseurs' Motion for Summary Judgment.

**B. The LeVasseurs are entitled to their attorneys' fees, including on appeal.**

i. CR 11

Every pleading of a party represented by counsel must be signed by at least one attorney certifying that the pleading is, to the best of the signing

attorney’s “knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact; (2) it is warranted by existing law...; (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay...; and (4) the denials of factual contentions are warranted on the evidence or...are reasonably based on a lack of information or belief.” CR 11(a). If a Complaint is signed in violation of CR 11(a), the court may impose upon the signing attorney, the attorney’s client, or both, a sanction, “which may include an order to pay the other party or parties the amount of the reasonable expenses incurred because of the filing of the [Complaint], including a reasonable attorney fee.” *Id.*

The parties agree what case law says about CR 11 sanctions—they should be awarded when a pleading is baseless although there is some allowance for mistakes. See *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 829 P.2d 1099 (1992); CR 11. Ms. Thomas argues that she and her counsel should be excused from CR 11 sanctions because they tried to amend the original Complaint, but the case Ms. Thomas cites in support of her argument, *Biggs v. Vail*, 124 Wn.2d 193, 876 P.2d 448 (1994), is clear that amending a Complaint “does not expunge the [CR 11] violation.”

124 Wn.2d at 199-200. At most, Ms. Thomas' attempt to amend her Complaint is merely a mitigating factor. See e.g., *Id.*

It is appropriate and not an abuse of discretion to fully compensate the LeVasseurs for the attorneys' fees and costs incurred defending against Ms. Thomas' original Complaint—i.e., Ms. Thomas has no reasonable argument in favor of mitigating the damages. One reason mitigation should not be allowed is that Ms. Thomas did not attempt to amend her Complaint until after the hearing on the LeVasseurs' Motion for Summary Judgment—amending the Complaint was discussed at oral argument, but no proposed Amended Complaint was served on the LeVasseurs until the week following the hearing. CP 294-296.

Ms. Thomas argues that had she been permitted to amend her original Complaint, the “re-framed” issues might have fixed the CR 11 violations. See Opening Brief at page 18. But as previously stated, amending the Complaint does not expunge the original violation. Moreover, Ms. Thomas has given no justifiable reason for why she could not have attempted to amend the Complaint prior to the LeVasseurs' Motion for Summary Judgment. Had she requested to amend in a timely manner, the LeVasseurs would not have needed to use resources defending against the original allegations, which to a large extent have now been withdrawn.

Ms. Thomas seems intent on arguing she could not have amended her Complaint until after she received discovery responses from her parents, but this makes no sense—why would she need the LeVasseurs’ interrogatory responses in order to tell her own story? If there was really an oral contract, as Ms. Thomas now alleges, she would have known about the alleged oral contract that she was allegedly a party to without needing to confirm the contract with her parents. Further, it does not appear that anything in the LeVasseurs’ discovery responses supports Ms. Thomas’ proposed Amended Complaint. This is critical because Ms. Thomas’ counsel argued that at the time the original Complaint was filed, he did not believe the facts known to Ms. Thomas justified a Breach of Contract cause of action. VRP page 22, line 21 – page 24, line 20. However, Ms. Thomas attempted to amend her Complaint to add a Breach of Contract cause of action without discovering any additional facts that would support this type of claim.

Ms. Thomas’ violations go beyond factual errors and deficiencies—she pled blatant lies. Ms. Thomas’ original story was that she paid for everything and title in the LeVasseurs’ name was a mistake. CP 1-14. Ms. Thomas’ next story was that: the LeVasseurs and others had paid for the Seattle condo; Ms. Thomas paid some money back and was in the

process of repaying the rest; and there was an oral contract regarding the transfer of title, which was correctly in the LeVasseurs' names, at least initially. CP 160-166 and CP 319-326. Ms. Thomas' two stories contradict each other—i.e. at least one of those stories is a lie. *Id.*

The inconsistencies between Ms. Thomas' original Complaint and her "re-framed" allegations were outlined in the LeVasseurs' Motion for Summary Judgment and their Reply on the Motion for Summary Judgment. CP 43-45 and CP 273-275. Ms. Thomas has not been able to reconcile her averments. In fact, Ms. Thomas' counsel has admitted that Ms. Thomas' original Complaint contained at least one averment that was pled without conducting any type of inquiry into the veracity of the allegation. See VRP page 21, lines 17-19.

Based on the contradictions between Ms. Thomas' competing stories and Ms. Thomas' undue delay in attempting to mitigate the damages, the Trial Court correctly concluded that Ms. Thomas and her counsel violated CR 11. The Trial Court did not abuse its discretion in ordering that CR 11 sanctions are appropriate. The Trial Court's Order should be affirmed.

ii. RCW 4.28.328

RCW 4.28.328 titled “Lis pendens – Liability of claimants – Damages, costs, attorneys’ fees” provides for a couple of scenarios where an aggrieved party is entitled to damages:

(2) A claimant in an action not affecting the title to real property against which the lis pendens was filed is liable to an aggrieved party who prevails on a motion to cancel the lis pendens, for actual damages caused by filing the lis pendens, and for reasonable attorneys' fees incurred in canceling the lis pendens.

(3) Unless the claimant establishes a substantial justification for filing the lis pendens, a claimant is liable to an aggrieved party who prevails in defense of the action in which the lis pendens was filed for actual damages caused by filing the lis pendens, and in the court's discretion, reasonable attorneys' fees and costs incurred in defending the action.

RCW 4.28.328(2) – (3).

Here, the LeVasseurs are an aggrieved party as Ms. Thomas filed a lis pendens against the LeVasseurs’ property (CP 23-26) and named the LeVasseurs in a lawsuit to quiet title to that property (CP 1-14). RCW 4.28.328(1)(c).

In *South Kitsap Family Worship Center v. Weir*, 135 Wn.App. 900, 146 P.3d 935 (Div. 2 2006), Mr. and Mrs. Weir purchased land from their church (the “Center”). Originally, an agreement memorializing terms between the Weirs and the Center included a repurchase option—Mr.

Weir signed the Sales Agreement memorializing the original terms, but Mrs. Weir did not sign that document. A later real estate purchase and sale agreement (“REPSA”), which was signed by both Mr. and Mrs. Weir, left out the repurchase option, contained an integration clause stating the REPSA was the entire agreement between the parties, and required the Center to transfer the property to the Weirs via a statutory warranty deed.

To summarize the *Weir* case, the Center asked to repurchase the land from the Weirs and the Weirs declined. 135 Wn.App. at 904-06. The Center sued the Weirs for damages and specific performance—the Center also filed a lis pendens. *Id.* The Weirs counterclaimed for damages caused by the lis pendens. *Id.* The trial court found the original Sales Agreement was unenforceable under the Statute of Frauds and that it had merged into the deed. *Id.* The trial court found the REPSA controlling and that it did not contain a repurchase option. *Id.* “The trial court awarded [the] Weir[s] damages and attorney fees caused by the lis pendens...” 135 Wn.App. at 911.

Like Ms. Thomas in this case, the Center in *Weir* argued that even though the ruling was not in the Center’s favor, the fee award was an error because the Center’s claim was substantially justified. *Id.* The Weirs argued there was no justification for the Center’s belief that it had a right

to the property because: (1) the original Sales Agreement was unenforceable under the Statute of Frauds, thus the REPSA controlled; and (2) the statutory warranty deed conveyed title to the Weirs in fee simple. 135 Wn.App. at 912. The Appellate Court agreed with the Weirs. *Id.* It is telling that the only case cited so far by Ms. Thomas regarding the lis pendens is a case where the Court held, “the [plaintiff] had no substantial justification for filing the lis pendens, [therefore defendant] is entitled to attorney fees under the lis pendens statute. RCW 4.28.328(3).” 135 Wn.App. at 914-15.

In agreeing with the Weirs that fees under the lis pendens statute were justified, the Court in *Weir* compared and contrasted two other Washington cases. In *Richau v. Rayner*, 98 Wn.App. 190, 988 P.2d 1052 (Div. 3 1999) an award of fees was upheld because in that case the plaintiff filed a lis pendens based only on a belief that the property would revert to them under certain conditions. Whereas in *Udall v. T.D. Escrow Services*, 132 Wn.App. 290, 130 P.3d 908 (Div. 2 2006) (*reversed by* 159 Wn.2d 903, 154 P.3d 882 (2007)), fees were not awarded because there the plaintiff had an auctioneers receipt stating the plaintiff had a vested interest in the property. In fact, in *Udall*, the Supreme Court reversed Division 2 and found for the plaintiff, which made the question of lis

pendens damages moot—so Division 2’s analysis of the lis pendens statute was not overruled.

Here, like in *Weir*, Ms. Thomas’ claim to title is based on an alleged agreement that is unenforceable under the Statute of Frauds. First, the agreement here was oral instead of in writing as required under RCW 19.36.010. Second, even if Ms. Thomas is believed, she avers that only her father was willing to put the alleged oral agreement in writing—thus, like in *Weir*, the agreement would be unenforceable because it requires the consent of both Mr. and Mrs. LeVasseur. See RCW 26.16.030. Unlike in *Udall*, Ms. Thomas has no document purporting to give her title to the Seattle condo. She simply has a belief/story that she was supposed to receive title contingent on her paying her parents back.

Like in *Weir*, title was conveyed to the LeVasseurs in fee simple by a statutory warranty deed. As such, there is no justification for Ms. Thomas’ claim that title was a mistake or that she has some right to title. Ms. Thomas argues, “[t]he trial court’s ruling that the LeVasseurs’ were entitled to attorney fees under RCW 4.28.328 should be viewed as a component of the court’s ruling on summary judgment.” Opening Brief at page 15. The LeVasseurs agree. And since the Trial Court correctly granted summary judgment, the Trial Court was correct in granting fees

based on the evidence in this case under RCW 4.28.328 and applicable case law.

iii. Appeal

The Trial Court found the LeVasseurs were entitled to an award of attorneys' fees pursuant to CR 11 and/or RCW 4.28.328. CP 364-367. For the reasons set forth above, the Trial Court's decision to award attorneys' fees should be affirmed.

The LeVasseurs additionally request an award of their reasonable attorneys' fees incurred on appeal pursuant to RAP 18.1 and RCW 4.28.328. "If a statute allows an award of attorney fees by the trial court, the statute is normally interpreted as allowing an award of attorney fees to the prevailing party on appeal as well." 14A Wash.Prac., Civil Procedure §37.21 (2d ed.) (citing *Besel v. Viking Ins. Co. of Wisconsin*, 105 Wn.App. 463, 21 P.3d 293 (Div. 3 2001); *Granite Falls Library Capital Facility Area v. Taxpayers of Granite Falls Library Capital Facility Area*, 134 Wn.2d 825, 953 P.2d 1150 (1998); other citations omitted).

In upholding an award of fees pursuant to the lis pendens statute, the Court in *Richau*, supra., additionally awarded the prevailing party their "reasonable attorney fees incurred in arguing this issue on appeal, in an amount to be determined by our court commissioner." 98 Wn.App. at 199

(citing RCW 4.28.328(3); *Puget Sound Plywood, Inc. v. Mester*, 86 Wn.2d 135, 144, 542 P.2d 756 (1975)). RCW 4.28.328 is clearly a statute that contemplates reasonable attorneys' fees being awarded on appeal in addition to fees awarded at the trial court level.

As the LeVasseurs previously pointed out, Ms. Thomas has argued “[t]he trial court’s ruling that the LeVasseurs were entitled to attorney fees under RCW 4.28.328 should be viewed as a component of the court’s ruling on summary judgment.” Opening Brief at page 15. When and if this Court affirms the Trial Court’s summary judgment ruling and related award of attorneys’ fees pursuant to RCW 4.28.328, this Court should award the LeVasseurs their reasonable attorneys’ fees incurred in arguing the lis pendens issue on appeal in accordance with the procedures set forth in RAP 18.1.

**C. The Court of Appeals should affirm the Trial Court’s ruling Denying Ms. Thomas’ Motion to Amend because the proposed amendments were/are futile and the Motion was untimely.**

- i. Washington case law permits an Appellate Court to affirm a Trial Court’s denial of a Motion to Amend even though the Trial Court may not have stated a reason for the denial.

The decision to deny leave to amend a Complaint is reserved to the discretion of the trial court. *Northwest Animal Rights Network v. State*, 158 Wn.App. 237, 247, 242 P.3d 891 (Div. 1 2010) (citing *Wilson v.*

*Horsley*, 137 Wn.2d 500, 505, 974 P.2d 316 (1999)). “[T]he case law permits us to affirm [an Order denying leave to amend] without an explicit explanation for the denial in some circumstances.” *Rodriguez v. Loudeye Corp.*, 144 Wn.App. 709, 730, 189 P.3d 168 (Div. 1 2008). Whether a trial court abuses its discretion in failing to explain its reason for denying leave to amend depends on whether the trial court’s reason is apparent from the record. *Rodriguez*, 144 Wn.App. at 729-30. For example, in *Rodriguez*, supra., the decision to deny leave to amend without explanation was upheld on appeal because it was apparent from the record that the trial court’s decision was based on the futility of the proposed amendment in that case.

If the trial court fails to state its reasoning and its reasoning is not apparent, “one remedy is to give the trial court the opportunity to [state its reasoning].” *Walla v. Johnson*, 50 Wn.App. 879, fn.2, 751 P.2d 334 (Div. 1 1988). But here, there are two apparent reasons: (1) futility; and (2) untimely/dilatory. In fact, the issue of futility was so apparent that Ms. Thomas devoted a substantial portion of her Motion for Leave to Amend to discussing that issue. CP 305-309. Further, the issue of the futility of a Breach of Contract type cause of action was discussed during oral argument on the LeVasseurs’ Motion for Summary Judgment. VRP page

17, line 21 – page 18, line 3; and page 25, lines 16-21. It would be inefficient and unfortunate for the LeVasseurs, who like the rest of us are not getting any younger, if this Court remanded the case back to the Trial Court to state its reasons for denying Ms. Thomas' request for leave to amend. The Court should review the Trial Court's Order for abuse of discretion based on the apparent fact that the Trial Court denied Ms. Thomas' Motion to Amend due to futility and untimeliness.

In an abundance of caution, the LeVasseurs will discuss the correctness of the Trial Court's decision to deny Ms. Thomas' request to amend based on each of the apparent reasons for denial mentioned above. However, at least with respect to futility, it must be pointed out that Ms. Thomas' Opening Brief argues only that the Court should not have considered futility as a reason for denying Ms. Thomas' request in the first place. Although Ms. Thomas discussed futility in her Motion for Leave to Amend, she fails to present argument on appeal supporting why her proposed Amended Complaint was not futile. Ms. Thomas should not be permitted to make an argument on this point in her Reply Brief. *Fosbre v. State*, 70 Wn.2d 578, 424 P.2d 901 (1967) (Contentions may not be presented for the first time in the reply brief). As such, the issue of whether Ms. Thomas' proposed Amended Complaint was futile is not an

issue on appeal—this issue is limited to whether the Trial Court abused its discretion by considering futility. If the Court of Appeals agrees that it was appropriate for the Trial Court to consider futility and not an abuse of discretion to omit explicitly citing futility as a reason for denying Ms. Thomas’ request to amend, then the Trial Court’s decision should be affirmed without further analysis.

ii. Ms. Thomas’ proposed amendments were/are futile.

The denial of a motion for leave to amend does not constitute an abuse of discretion if the proposed amendment was futile. *Rodriguez*, 144 Wn.App. at 729 (citing *Orwick v. Fox*, 65 Wn.App. 71, 89, 828 P.2d 12 (Div. 1 1992)). An amendment proposing new causes of action is futile where there is no evidence to support or prove the proposed allegations and causes of action. See *Nakata v. Blue Bird, Inc.*, 146 Wn.App. 267, 279, 191 P.3d 900 (Div. 3 2008) (citing *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 142, 937 P.2d 154, 943 P.2d 1358 (1997)). A court may consider the futility of a proposed amendment, including in cases where the amendment is proposed prior to a court granting a dismissal on summary judgment. *Nakata*, supra.

The prejudice that would result from requiring a party to defend futile claims is obvious—defending futile claims results in unnecessarily

expending substantial resources (e.g. time and money). Counsel for the LeVasseurs pointed out during oral argument on the LeVasseurs' Motion for Summary Judgment that prejudice "would be extra expenses." See VRP page 27, lines 7-21. While it is true that Ms. Thomas has filed a second lawsuit alleging causes of action similar to those alleged in her proposed Amended Complaint, the fact the LeVasseurs now have to address that second lawsuit should have no bearing on whether Ms. Thomas' proposed amendments in the instant case were futile.

In her Opening Brief, Ms. Thomas does not attempt to argue that her proposed new claims had/have merit—she only argues, incorrectly, that the Trial Court should not have considered the "merit or futility of the amended claim." Opening Brief at page 25. Ms. Thomas' decision not to argue the alleged merits of her proposed claims falls in line with Ms. Thomas' counsel admitting during oral argument that Ms. Thomas' proposed Amended Complaint is not justified by the facts. See VRP 22, line 21 to page 24, line 20. However, there was some briefing on the issue of futility in the trial court pleadings: namely in Defendants' Reply on Motion for Summary Judgment (CP 268-277); Plaintiff's Motion to Amend (CP 305-309); Defendants' Response to Plaintiff's Motion to

Amend (CP 348-354); and Plaintiff's Reply on Motion to Amend (CP 355-359).

First and foremost, whether Ms. Thomas' proposed amendments have merit should be considered in light of Ms. Thomas' lack of credibility. Ms. Thomas should not be permitted to string her parents along by keeping this lawsuit alive on the strength of declarations and pleadings that contradict Ms. Thomas' original Complaint—certainly not without some reasonable explanation for why Ms. Thomas changed her story. See, e.g. *Marshall v. AC & S, Inc.*, 56 Wn.App. 181, 185, 782 P.2d 1107 (Div. 1 1989).

Next, Ms. Thomas' proposed Amended Complaint is futile as a matter of law due to the Statute of Frauds even assuming her new story about the oral contract is true. The Statute of Frauds generally requires transfers of property, or contracts that take more than a year to perform, to be reduced to writing. See RCW 19.36.010; RCW 64.04.010. Washington courts may recognize some exceptions, if equitable. See *Richardson v. Taylor Land & Livestock Co.*, 25 Wn.2d 518, 171 P2d 703 (1946). However, equitable remedies are not available to persons with unclean hands. See *Walsh v. Wescoatt*, 131 Wash. 314, 316-18, 230 P. 160 (1924) (“[E]quity

will not help those who have been guilty of serious misconduct in the same transaction concerning which they seek relief”).

There is no question that the Statute of Frauds applies in this case absent some recognized exception: (1) the alleged contract involved real estate, but was oral; and (2) the alleged contract had an indefinite term. The potential exception for equity does not apply to Ms. Thomas because her stated reason for structuring the transaction the way she allegedly did (i.e. having her parents take title subject to an oral agreement) was to hide assets from her ex-husband. CP 161-162. The LeVasseurs believe that Ms. Thomas’ story about her ex-husband is made up, but, in any event, Ms. Thomas should not be allowed to be the judge and jury of whether her ex-husband and/or other potential creditors may have legitimate claims against Ms. Thomas’ assets. Ms. Thomas’ stated attempt to hide her assets gives her unclean hands and thus estops her from obtaining a remedy sounding in equity.

Ms. Thomas’ other argument for an exception to the Statute of Frauds is that the alleged oral contract was partially performed. See CP 307-308. However, the case Ms. Thomas principally relies upon to support her argument, *Berg v. Ting*, 125 Wn.2d 544, 886 P.2d 564 (1995), is a case that declined to “depart from the protections which the statute of frauds

and the part performance doctrine lend to real estate transactions.” 125 Wn.2d at 562.

The LeVasseurs recognize that the doctrine of part performance can provide for an exception to the Statute of Frauds in some cases; just as equity can be grounds for an exception in some cases. Three factors to examine “to determine if there has been part performance of the [alleged] agreement so as to take it out of the statute of frauds [are]: (1) delivery and assumption of actual and exclusive possession; (2) payment or tender of consideration; and (3) the making of permanent, substantial and valuable improvements, referable to the contract.” *Berg*, 125 Wn.2d at 556.

However, since Ms. Thomas is requesting specific performance in this case (i.e. for Ms. Thomas’ parents to transfer title of the Seattle condo into her name), Ms. Thomas must do more than simply establish there has been part performance—she must also “prove by clear and unequivocal evidence the existence and all the terms of the [alleged] contract.” *Id.* at 561.

The record in this case does not contain “clear and unequivocal evidence...[of] all the terms of the [alleged] contract.” Ms. Thomas’ contradicting/changing stories and the LeVasseurs’ opposition to Ms. Thomas’ claim that they agreed to transfer title to her highlight the less

than clear nature of the alleged contract. Moreover, Ms. Thomas' own notarized statement reflects the Seattle condo was meant to be sold with at least part of the proceeds used to repay the LeVasseurs. CP 74. This writing contradicts Ms. Thomas' story that her parents simply agreed to gift the Seattle condo to her or that they agreed to act as a bank and accept installment payments for years to come—they are too old for that to make any sense.

The Statute of Frauds exists to prevent the type of dispute Ms. Thomas' proposed Breach of Contract claims creates. Just as equity cannot create an exception to the Statute of Frauds in this case, neither can the doctrine of part performance. And there being no available exceptions for Ms. Thomas to the Statute of Frauds, her proposed Amended Complaint was/is futile.

iii. Ms. Thomas' Motion to Amend was untimely.

As acknowledged by Ms. Thomas in her citation to *Tagliani v. Colwell*, 10 Wn.App. 227, 233, 517 P.2d 207 (Div. 3 1973) (citing *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962)), reasons to deny a request to amend include “undue delay [and] bad faith or dilatory move on the part of the movant...” Opening Brief at page 24. In *Doyle v. Planned Parenthood of Seattle-King Cnty.*, 31 Wn.App. 126,

130-31, 639 P.2d 240 (Div. 1 1982) (citing *Servs v. Glasscar, Inc.*, 19 Wn.App. 736, 577 P.2d 980 (Div. 1 1978)) the Court noted, “[w]hen a motion to amend is made after the adverse granting of a summary judgment, the normal course of proceedings is disrupted and the trial court should consider whether the motion could have been timely made earlier in the litigation.” While here, Ms. Thomas moved to amend before summary judgment had been granted, she did not make any request to amend prior to oral argument of the summary judgment motion and she did not file a proposed Amended Complaint and Motion to Amend until several days after the hearing. See CP 294-296.

Untimeliness alone is generally an improper reason to deny a request to amend. The true test is whether the untimeliness causes prejudice. See *Quality Rock Products, Inc. v. Thurston County*, 126 Wn.App. 250, 273, 108 P.3d 805 (Div. 2 2005). Here, once again, the prejudice to the LeVasseurs includes the unnecessary expenditure of resources as a result of Ms. Thomas’ undue delay and dilatory conduct.

Ms. Thomas has no excuse for waiting until after the summary judgment hearing to attempt to amend her Complaint. In their Reply on the Motion for Summary Judgment, the LeVasseurs explicitly pointed out the failings of Ms. Thomas’ original Complaint and practically outlined a

path for Ms. Thomas to request leave to amend before oral argument on the LeVasseurs' Motion for Summary Judgment. CP 268-277. Ms. Thomas did not seek leave to amend any sooner because, according to her counsel during oral argument, she did not believe an amendment was necessary and because the evidence did not warrant making certain amendments. VRP page 24, lines 8-13. But as previously pointed out, the true reason Ms. Thomas did not seek to amend is likely her realization that attempting to amend would further destroy her credibility.

Nothing changed between the time the LeVasseurs replied on their Motion for Summary Judgment and the time Ms. Thomas filed her Motion to Amend except that Ms. Thomas was able to read the writing on the wall better after oral argument. It is apparent that Ms. Thomas' request to amend was a desperate attempt to keep a sinking ship afloat long enough to outlast her elderly parents and find some way to keep the improper lis pendens around—which Ms. Thomas has now done by filing a lis pendens in a second lawsuit; King County Case Number 14-2-14624-8SEA. Ms. Thomas' Motion to Amend was clearly untimely. Denying Ms. Thomas' motion due to untimeliness and related prejudice was not an abuse of discretion under the circumstances in this case.

**D. The Court of Appeals as an alternative could affirm the Trial Court's Summary Judgment Order and Decisions with respect to attorneys' fees while simultaneously reversing the Trial Court's Order denying Mr. Thomas' request for leave to amend.**

The LeVasseurs obviously believe all Orders of the Trial Court should be affirmed. The Trial Court made correct rulings and did not abuse its discretion. Further, the Trial Court's rulings appropriately compensate the LeVasseurs and penalize Ms. Thomas for her actions, which resulted in the LeVasseurs litigating against a Complaint that is essentially now withdrawn. It can be said that the original Complaint has essentially been withdrawn because the proposed Amended Complaint attempts to change the facts in a way that would significantly alter the previous causes of action while also adding new causes of action. See CP 1-14 and CP 319-326. At the very least, Ms. Thomas should be responsible for reimbursing her parents for their reasonable attorneys' fees, including fees incurred on appeal, related to litigating the original Complaint.

There is precedent for affirming a summary judgment ruling, but reversing the denial of a request to amend. See *Tagliani*, 10 Wn.App. 227. Here, the LeVasseurs suggest that the only justifiable alternative to affirming all of the Trial Court's Orders is to affirm the Summary Judgment Order, including the decision that an award of reasonable fees is appropriate, but reverse in part the Order denying Ms. Thomas' request to

amend. The LeVasseurs envision that such a ruling would strike the Quiet Title and Declaratory Relief causes of action from the Amended Complaint and reimburse the LeVasseurs for their attorneys' fees paid to date. The result would be that the parties start over with just the Breach of Contract type claims.

This is basically where the parties are at now in the second lawsuit (King County Case Number 14-2-14624-8SEA); except there are issues of res judicata and/or collateral estoppel in that case. This begs the question of whether the appeal relative to Ms. Thomas' Motion to Amend is a moot point. If she is allowed to argue the merits of her causes of action in the second lawsuit, she would surely be estopped from arguing the merits of her claims again in this case even if the Trial Court's Orders are reversed—assuming this appeal is decided after the second lawsuit is resolved. The LeVasseurs may file a Motion for Accelerated Review pursuant to RAP 18.12 due to the res judicata and/or collateral estoppel issues created by the simultaneous litigation of the two similar lawsuits.<sup>5</sup>

## V. CONCLUSION

The LeVasseurs tried to help their daughter by providing financial support so she could live wherever she wanted. The real reason why Ms.

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<sup>5</sup> The Trial Court in the second lawsuit denied the LeVasseurs' request for a stay pending this appeal.

Thomas quit claimed the Jefferson County property to the LeVasseurs and why she sought loans from boyfriends instead of going to her parents for all of the money she needed is anyone's guess. But the relevant point for purposes of this appeal is that Ms. Thomas filed a Complaint that was frivolous. Ms. Thomas played fast and loose with the facts and she alleged causes of action that did not mesh with even her made up story.

Ms. Thomas might at most be entitled to a portion of the sales proceeds from the sale of the Seattle condo. But this would only be if she can prove the amount of her contributions towards the purchase of the Seattle condo and that such amount is not offset by money Ms. Thomas owes her parents from other transactions (e.g. their loan to her for payment of attorneys' fees and personal use during Ms. Thomas' divorce). It is hard to feel bad for Ms. Thomas when she has received so much from her parents and has been so callous in this lawsuit. One example of Ms. Thomas' callousness, which cannot be overlooked, is that she has never really tried to plead for an equitable division of sales proceeds—she wants it all. In an attempt to concoct a story that might get Ms. Thomas everything she wants, she pled causes of action in this lawsuit that were frivolous and futile. Maybe she will have better luck in the second lawsuit.

The LeVasseurs request that the Court of Appeals affirm all Orders of the Trial Court. The Trial Court made appropriate rulings based on the pleadings and evidence that were presented to the Trial Court. Further, this Court should award the LeVasseurs' their reasonable attorneys' fees on appeal consistent with RAP 18.1 and RCW 4.28.328. Ms. Thomas' lis pendens was not justified in this case based on the allegations pled and Ms. Thomas' eventual admission that there was no mistake regarding the title.

RESPECTFULLY SUBMITTED this 4<sup>th</sup> day of September  
2014.

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**DECLARATION OF SERVICE**

I hereby certify that I caused to be served a true and correct copy of the foregoing document on all parties or their counsel of record on the date below as follows:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 4<sup>th</sup> day of September 2014, at Olympia,  
Washington.

  
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SHERRY CAMPBELL