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COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

NO. 71905-0-I

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SANDRA J. ARCHDALE,

Appellant/  
Cross-Respondent,

vs.

SHARYL L. O'DANNE,

Respondent/  
Cross-Appellant.

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BRIEF OF RESPONDENT

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**TABLE OF CONTENTS**

TABLE OF CONTENTS ..... i

TABLE OF AUTHORITIES ..... iii

APPENDICES ..... A-1

**I. RESTATEMENT OF THE ISSUES PRESENTED ON APPEAL AND CROSS-APPEAL ..... 1**

**II. ADDITIONAL STATEMENT OF THE CASE RELATING TO CROSS APPEAL ..... 2**

**III. ARGUMENT ..... 3**

A. ARCHDALE FAILED TO ASSIGN ERROR TO ANY FINDINGS OF FACT, AND THE ONLY FINDINGS ARGUABLY CONTESTED IN ARCHDALE'S BRIEF ARE IN ANY EVENT SUPPORTED BY SUBSTANTIAL EVIDENCE ..... 3

B. ARCHDALE CANNOT MEET HER BURDEN OF SHOWING AN ABUSE OF DISCRETION IN THE TRIAL COURT'S REFUSAL TO DECLARE A CONSTRUCTIVE TRUST, THE TERMS OF WHICH WOULD REQUIRE THE IMMEDIATE CONVEYANCE OF THE CONDO TO ARCHDALE WITHOUT A PAYOFF OF THE MORTGAGE ..... 11

C.	<u>ARCHDALE CANNOT SHOW ABUSE OF DISCRETION HERE WHERE THE TERMS OF THE CONSTRUCTIVE TRUST IMPOSED BY THE COURT DID SUBSTANTIAL JUSTICE TO BOTH PARTIES AND BROUGHT AN END TO THE LITIGATION.</u> . . . . .	15
D.	<u>THE COURT PROPERLY EXERCISED ITS DISCRETION IN DETERMINING THAT ARCHDALE'S COMPLAINT WAS FRIVOLOUSLY BROUGHT AND THAT O'DANNE WAS ENTITLED TO AN AWARD OF ATTORNEYS' FEES AND COSTS.</u> . . . . .	18
E.	<u>THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING O'DANNE'S MOTIONS FOR ORDER SHORTENING TIME AND TO STRIKE BASED ON A LACK OF TIME WITHIN WHICH ARCHDALE COULD RESPOND TO THE MOTIONS IN WRITING, WHERE INSUFFICIENT TIME REMAINED IN WHICH TO GIVE STANDARD NOTICE OF THE MOTION TO STRIKE.</u> . . . . .	25
F.	<u>ARCHDALE WOULD NOT BE ENTITLED TO AN AWARD OF ATTORNEYS' FEES EVEN IF THE CASE WERE REMANDED TO THE TRIAL COURT.</u> . . . . .	33
G.	<u>O'DANNE SHOULD HAVE AN AWARD OF HER REASONABLE ATTORNEYS' FEES ON APPEAL, BASED ON RCW 4.84.185.</u> . . . . .	36
IV.	<u>CONCLUSION</u> . . . . .	37

## TABLE OF AUTHORITIES

### Cases

<u>Alexander v. Sanford</u> , 181 Wn. App. 135, 325 P.3d 341, 369 (2014) .....	18
<u>Baker v. Leonard</u> , 120 Wn.2d 538, 843 P.2d 1050 (1993) ...	13, 22
<u>Biggs v. Vail</u> , 119 Wn.2d 129, 830 P.2d 350 (1992) .....	18, 20, 21, 23, 25, 37
<u>Childs v. Allen</u> , 125 Wn. App. 50, 105 P.3d 411 (2004) .....	13
<u>City of Lakewood v. Pierce Cnty.</u> , 144 Wn.2d 118, 30 P.3d 446 (2001) .....	12
<u>Ehsani v. McCullough Family P'ship</u> , 160 Wn.2d 586, 159 P.3d 407 (2007) .....	12
<u>Fisher Props., Inc. v. Arden–Mayfair, Inc.</u> , 115 Wn.2d 364, 798 P.2d 799 (1990) .....	5
<u>Granville Condo Homeowners Ass'n v. Keuhner</u> , 177 Wn. App. 543, 312 P.3d 702 (2013) .....	35
<u>Greenbank Beach and Boatclub, Inc., v. Bunney</u> , 168 Wn. App. 517, 280 Wn.2d 1183 (2012) .....	36
<u>Griggs v. Averbeck Realty, Inc.</u> , 92 Wn.2d 576, 599 P.2d 1289 (1979) .....	14
<u>Hough v. Stockbridge</u> , 150 Wn.2d 234, 76 P.3d 216 (2003) .....	15

<u>In re Marriage of Burrill</u> , 113 Wn. App. 863, 56 P.3d 993 (2002) .....	5
<u>In re Estate of Evans</u> , 181 Wn. App. 436, 326 P.3d 755 (2014) .....	32
<u>In re Estate of Jones</u> , 152 Wn.2d 1, 93 P.3d 147 (2004) .....	3, 4
<u>Isla Verde Int'l Holdings, Inc. v. City of Camas</u> , 99 Wn. App. 127, 990 P.2d 429 (1999), <i>rev. granted</i> , 141 Wn.2d 1011, 10 P.3d 1071 (2000) .....	6
<u>Jackowski v. Borchelt</u> , 151 Wn. App. 1, 209 P.3d 514 (2009), <i>aff'd</i> 174 Wn.2d 720 (2014) .....	15
<u>Kausky v. Kosten</u> , 27 Wn.2d 721, 179 P.2d 950 (1947) .....	12
<u>King Cnty. Fire Prot. Districts No. 16, No. 36 &amp; No. 40</u> <u>v. Hous. Auth. of King Cnty.</u> , 123 Wn.2d 819, 872 P.2d 516, 519 (1994) .....	26
<u>Lockhart v. Grieve</u> , 66 Wn. App. 735, 834 P.2d 64 (1992) .....	35
<u>Miller v. Paul M. Wolff Co.</u> , 178 Wn. App. 957, 316 P.3d 1113 (2014) .....	12
<u>N. Coast Elec. Co. v. Selig</u> , 136 Wn. App. 636, 151 P.3d 211 (2007) .....	18
<u>Norcon Builders, LLC v. GMP Homes VG</u> , 161 Wn. App. 464, 254 P.3d 385 (2011) .....	5

<u>Pilcher v. State</u> , 112 Wn. App. 428, 49 P.3d 947 (2002), <i>rev. denied</i> 149 Wn.2d 1004 (2003) .....	5, 6
<u>Recreational Equipment, Inc., v. World Wrapps Northwest, Inc.</u> , 165 Wn. App. 553, 266 P.3d 924 (2011) .....	8, 13
<u>Riss v. Angel</u> , 131 Wn.2d 612, 934 P.2d 669 (1997) .....	24
<u>Roger Hiller Corp. v. Port of Port Angeles</u> , 96 App. 918, 982 P.2d 131 (1999) .....	36
<u>Salas v. Hi-Tech Erectors</u> , 168 Wn.2d 664, 30 P.2d 583 (2010) .....	30
<u>Schatz v. State Department of Social and Health Services</u> , 178 Wn. App. 16, 314 P.3d 406 (2013) .....	5
<u>Smith v. Monson</u> , 157 Wn. App. 443, 236 P.3d 991 (2010) .....	14
<u>State ex rel. Citizens Against Tolls (CAT) v. Murphy</u> , 151 Wn.2d 226, 88 P.3d 375 (2004) .....	26
<u>Stocker v. Stocker</u> , 74 Wn. App. 1, 871 P.2d 1095 (1994), <i>rev. denied</i> , 125 Wn.2d 1001 (1994) .....	12
<u>Wright v. Dave Johnson Ins. Inc.</u> , 167 Wn. App. 758, 275 P.3d 339 (2012), <i>rev. denied</i> 175 Wn.2d 1008, 283 P.3d 885 (2012) .....	13, 22
<u>Xieng v. Peoples Nat. Bank of Washington</u> , 61 Wn. App. 572, 821 P.2d 520 (1991), <i>aff'd.</i> 120 Wn.2d 512, 844 P.3d 389 (1993) .....	37

Court Rules and Statutes

ER 408 ..... 11, 32

RAP 10.3(g) (amended 2010) ..... 3,

RAP 18.1 ..... 37

RCW 4.84.185 ..... 1, 18, 19, 20, 24, 25, 27, 32, 34, 35, 36, 37, 38

RCW 4.84.330 ..... 24, 34, 35

RCW 64.04.010 ..... 12

SCLCR 6 ..... 27, 28

## APPENDICES

<u>APP No.</u>	<u>Description</u>	<u>Page</u>
1	ER 408	A-1
2	RAP 10.3(g) (amended 2010)	A-2
3	RAP 18.1	A-3
4	RCW 4.84.185	A-4
5	RCW 4.84.330	A-5
6	RCW 64.04.010	A-6
7	SCLCR 6	A-7

- I. RESTATEMENT OF THE ISSUES PRESENTED ON APPEAL AND CROSS-APPEAL**
- A. Whether the Findings of Fact Are Verities on Appeal Where Archdale Failed to Assign Error to Any Findings?
- B. Whether the Findings of Fact, if not Verities, Are Supported By Substantial Evidence in the Record?
- C. Whether the Terms of the Constructive Trust Imposed by the Trial Court Constituted an Abuse of Discretion?
- D. Whether Archdale's Complaint Can Have Been Frivolously Brought Under RCW 4.84.185 Where A Constructive Trust was Ultimately Imposed, Albeit on Terms In Conflict with Those Sought by Archdale?
- E. Whether the Trial Court Erred in Denying O'Danne's Motion to Strike Portions of Archdale's Declaration In Opposition to Attorneys' Fees, Based on a Finding of Insufficient Time Before the Hearing on the Merits of the Attorneys' Fee Motion for Archdale to Respond to the Motion to Strike in Writing?
- F. Whether Archdale Would be Entitled to an Award of Attorneys' Fees on Remand on any Basis if Archdale Prevailed on her Substantive Appeal?
- G. Whether O'Danne is Entitled to an Award of Attorneys' Fees on Appeal Based on her Award at the Trial Court Level Under RCW 4.84.185?

**II. ADDITIONAL STATEMENT OF THE CASE  
RELATING TO CROSS APPEAL**

In response to a post-trial Motion for Attorneys' Fees filed by O'Danne, *see* Motion for Award of Attorneys' Fees, CP 64, that was set for hearing on the merits on Monday, March 10, 2014, *see* Declaration of Lorna S. Corrigan In Support of Motion to Strike at 1, ll. 22-24, CP 307, Archdale filed a declaration, *see* Declaration of Sandra J. Archdale in Response to Motion for Attorneys' Fees, CP 52, that related certain content from a judicial settlement conference between the parties. *Id.* at 1-2, ll. 17-20 and 1-9, CP 52-53. O'Danne timely served rebuttal documents, and included with those documents a Motion to Strike the portions of Archdale's declaration that revealed confidential settlement negotiations. *See* Motion to Strike at 4-5, ll. 14-26 and 1-11, CP 319-20. Following receipt of an objection to the Motion to Strike from Archdale's counsel, CP 334-35, O'Danne filed a motion for order shortening time on which to hear the Motion to Strike. CP 304-06.

Both of O'Danne's motions were denied by the court on March 10, 2014, in advance of the hearing on the merits of the motion for

attorneys' fees. *See* Corrected Findings and Order at 4, line 9, CP 13.

The basis for the denial was a lack of sufficient time for Archdale to respond in writing to the Motion to Strike. *Id.* at 3, ll. 24-25 and 1-3, CP 12-13. O'Danne cross-appeals from the trial court's denial of the Motion to Strike. In the alternative, O'Danne requests that this court simply disregard on this appeal the objectionable materials in Archdale's declaration.

### **III. ARGUMENT**

A. ARCHDALE FAILED TO ASSIGN ERROR TO ANY FINDINGS OF FACT, AND THE ONLY FINDINGS ARGUABLY CONTESTED IN ARCHDALE'S BRIEF ARE IN ANY EVENT SUPPORTED BY SUBSTANTIAL EVIDENCE.

An appellant must specifically assign error to any finding of fact he or she wishes to challenge, *see* RAP 10.3(g) (amended 2010), App. 2, as "[u]nchallenged facts become verities on appeal." In re Estate of Jones, 152 Wn.2d 1, 8, 93 P.3d 147 (2004). The only exception to this rule lies where a claimed error is "clearly disclosed in the associated issue pertaining thereto." RAP 10.3(g). *See* App. 2. In this case, the Archdale did not assign error to any findings of fact, so all of the

findings must be treated as verities. Jones at 8. Even if the court determines that findings of fact contained in paragraphs 3 and 4 of the court's memorandum decision are sufficiently discussed and contested in the Archdale's brief to expose them to review, there is substantial evidence in the record to support those findings, and they should be upheld.

The only findings in support of the court's Decision and Order that arguably are contested in the Archdale's brief are the findings to the effect that: 1) "Plaintiff promised to pay off the underlying mortgage with inheritance funds from their mother's pending estate", *see* Decision and Order at 2, ¶ 4, CP 152; 2) that "when Archdale received the inheritance funds, she refused to pay off the mortgage on the subject property, stating that it would deplete her funds", *id.* at 2, ¶ 3; and 3) that "[t]he Defendant agreed to transfer the title to the Plaintiff once the mortgage was paid off". *Id.* at 2, ¶ 3. With respect to the findings and conclusions in support of the award of attorneys' fees to O'Danne, *see* Corrected Findings and Order Granting . . . Award of Attorneys' Fees, CP 11, the only finding of fact that Archdale may claim to have contested in her brief is Finding of Fact No. 2.b. That finding states

that

Archdale had no need to resort to litigation or call upon the equitable powers of the court because O'Danne was willing without such a lawsuit to convey the condominium . . . upon a simultaneous payoff by Archdale of the existing mortgage balance, but Archdale needlessly declined to do so.

*Id.* at 3, Finding 2.b, CP 13. All of these findings are, however, supported by substantial evidence in the record.

The trial court's findings of fact are presumed to be correct, and "the party claiming error has the burden of showing that a finding of fact is not supported by substantial evidence." Norcon Builders, LLC v. GMP Homes VG, 161 Wn. App. 474, 497, 254 P.3d 835 (2011) (citing Fisher Props., Inc. v. Arden-Mayfair, Inc., 115 Wn.2d 364, 369, 798 P.2d 799 (1990)). Substantial evidence may be identified even where other evidence contradicts it, Schatz v. State Department of Social and Health Services, 178 Wn. App. 16, 25, 314 P.3d 406 (2013) (citing In re Marriage of Burrill, 113 Wn. App. 863, 868, 56 P.3d 993 (2002)), because the appellate court will "accept the fact finder's views regarding the credibility of witnesses and the weight accorded to reasonable but competing inferences." Pilcher v. State, 112 Wn. App.

428, 435, 49 P.3d 947 (2002), *rev. denied* 149 Wn.2d 1004 (2003) (quoting Isla Verde Int'l Holdings, Inc. v. City of Camas, 99 Wn. App. 127, 133-34, 990 P.2d 429 (1999), *rev. granted*, 141 Wn.2d 1011, 10 P.3d 1071 (2000) (Further citation omitted)).

Archdale may assert that the first two findings of fact referenced above were sufficiently disputed by the assertion in her brief that the trial court based its ruling "on the erroneous finding that Archdale promised to pay off the underlying mortgage 'as soon as she received her inheritance'". *See* Brief of App. at 8. Even if that statement is sufficient to preserve an issue as to these two findings, the findings are amply supported in the record.

The purchase of the condominium by O'Danne for her sister's benefit, VRP 14-15, ll. 19-25 and 1-11, occurred in August of 2004. VRP 153, ll. 21-24. Prior to that purchase, Archdale sent a number of e-mails to O'Danne about problems Archdale was having with her husband and entreating O'Danne to purchase the condo for Archdale. *See, e.g.*, EXS. 27 and 33. One of the e-mails clearly indicated that Archdale would pay off the mortgage on the condominium using Archdale's inheritance. *See* EX. 29. Sharyl O'Danne also testified at

trial that her understanding from the March, 26, 2004, e-mail, *id.*, was that she would take title, but that it would be followed quickly by a payoff of the new debt with Archdale's inheritance. VRP 17 at ll. 9-17. Archdale never denied having sent the e-mail, *see generally* trial testimony of Archdale, VRP 115-165 and 201-207, and the trial court obviously found the e-mails convincing and the testimony of Sharyl O'Danne to be credible.

Archdale has also failed in her burden of proof with respect to the second finding listed above, to the effect that Archdale refused to use her inheritance to pay off the mortgage based on her desire not to deplete her funds. *See* Decision and Order at 2, ¶ 3, CP 152. Archdale stated on direct examination that she had enough funds from her separate inheritance from her mother's estate to purchase the condominium outright. VRP 122 at ll. 1-4. She decided nevertheless that she would keep the cash and simply make mortgage payments and take advantage of the writeoffs. *Id.* at ll. 8-13. She also testified that she put her \$100,000.00 in inheritance funds into an annuity for herself "for later". VRP 123, ll. 2-10. These admissions by Archdale fully support the trial court's finding that "[i]nexplicably, when Archdale

received the inheritance funds, she refused to pay off the mortgage on the subject property, stating that it would deplete her funds." *See* Decision and Order at 2, ¶ 3, CP 152.

Archdale may assert that the third finding of fact cited above, to the effect that O'Danne had agreed to transfer title as soon as the mortgage was paid off, *id.*, was sufficiently contested in her brief to have preserved the issue on appeal. She may do so based on Archdale's assertion that O'Danne refused to convey because of a court order. Brief of App. at 16. She may also do so based on an assertion that O'Danne was not willing to convey in exchange for a payoff of the mortgage without the additional payment of a separate judgment that O'Danne held against Archdale. *Id.* at 12-13 and 18. Archdale did not, however, obtain a finding that O'Danne actually refused, on any grounds, to convey in exchange for a payoff. The absence of a finding of fact is presumed to be a finding against the existence of that fact. Recreational Equipment, Inc., v. World Wrapps Northwest, Inc., 165 Wn. App. 553, 565, 266 P.3d 924 (2011). The finding of the trial court that O'Danne was willing to convey in exchange for a payoff of the mortgage, Decision and Order at 2, ¶ 5, CP 152, is in any event

supported by substantial evidence in the record.

On November 20, 2008, O'Danne, who was then unrepresented, wrote to Archdale's then counsel, Larry Trivett. EX. 21. (*See* signature on letter by O'Danne, rather than an attorney.) In that letter, O'Danne referenced a court order that had issued in litigation in their mother's estate, which order O'Danne believed restricted her ability to convey the condo. *Id.* In the same letter, however, O'Danne also stated that the condo would be put in Archdale's name, but only when Archdale obtained financing to put it in her own name. *Id.* at 1.

That position was reiterated by O'Danne in a letter of June 14, 2010, to Ryan Sternoff, subsequent counsel to Archdale. EX. 34. O'Danne, who was still unrepresented, *id.* (letter signed by O'Danne alone), made it completely clear to Sternoff that despite the court order in the estate action restricting conveyance of the condo, she had been and remained willing to convey in exchange for release from the mortgage. *Id.* *See also* VRP 169-70, ll. 19-25 and 1-14.

That 2010 correspondence was followed up, on January 20, 2012, by a letter to Mr. Sternoff from Geoffrey Jones, who by then was counsel to O'Danne. VRP 173, ll. 6-22. *See also* EX. 37. In that letter

Mr. Jones stated that "there has been nothing that Sharyl O'Danne has done or failed to do which has prevented Sandra Archdale from obtaining clear legal title to the property . . .", VRP 176, ll. 1-10, and that "Sharyl O'Danne stands ready and willing to transfer title to Ms. Archdale as the arrangements are made to pay off this deed of trust." *Id.* at ll. 11-13. O'Danne also testified at trial that it had always been her intention to convey title to the condominium to Archdale as soon as Archdale got the mortgage out of O'Danne's name, VRP at 18, ll. 2-9, *see also* VRP 196, ll. 9-10, and that she had informed Sandra Archdale of that willingness on multiple occasions. VRP 199, ll. 7-11.

Archdale also offers, in her alternate effort to overturn the trial court's finding, evidence that when presented with an offer by Archdale to pay off the mortgage, O'Danne refused to transfer title "without a simultaneous payoff of a separate judgment against Archdale in the *Franzen Estate* action." [Emphasis in the original.] Brief of App. at 18. That evidence, however, was not offered at the trial. Rather it was contained in a post-trial declaration that Archdale submitted on March 6, 2014, in opposition to O'Danne's motion for attorneys' fees. CP 52. Consequently the trial court had no such evidence before it when it

made its findings of fact in support of its Decision and Order on the merits of the case, including the finding that O'Danne had agreed to transfer title for a payoff. The evidence of Archdale's offer was in any event the subject of a Motion to Strike, the denial of which is the subject of O'Danne's cross-appeal. *See* discussion *infra* Section III. E. That evidence should be stricken, or in the alternative, disregarded, as violative of ER 408.

The trial court's findings, both in its Decision and Order, CP 151, and in the Corrected Findings and Order, CP 11, are thus supported by credible and substantial evidence in the record. They should be upheld.

B. ARCHDALE CANNOT MEET HER BURDEN OF SHOWING AN ABUSE OF DISCRETION IN THE TRIAL COURT'S REFUSAL TO DECLARE A CONSTRUCTIVE TRUST, THE TERMS OF WHICH WOULD REQUIRE THE IMMEDIATE CONVEYANCE OF THE CONDO TO ARCHDALE WITHOUT A PAYOFF OF THE MORTGAGE.

Archdale argues that the court erred in refusing to quiet title in her name, subject only to existing encumbrances. *See* Brief of App. at 9. She did not at trial produce a written agreement with O'Danne

regarding the condo. Therefore, in her quest to obtain an immediate conveyance without payoff of the existing mortgage, *see* Complaint at 5, ll. 15-20, CP 302, she had to seek relief based on an equitable doctrine that would avoid RCW 64.04.010, the statute of frauds. *See* App. 6. One such doctrine is that of resulting trust. Kausky v. Kosten, 27 Wn.2d 721, 179 P.2d 950 (1947). Another is that of constructive trust, which also arises out of equity. *See* Stocker v. Stocker, 74 Wn. App. 1, 7, 871 P.2d 1095 (1994), *rev. denied*, 125 Wn.2d 1001 (1994). Archdale proceeded to trial only on the latter theory. VRP 4, ll. 8-9. While a constructive trust was ultimately imposed by the court, the terms of that trust denied Archdale the very relief she was seeking. That denial did substantial justice to the parties, will prevent future litigation between the parties, and should be upheld.

As an equitable remedy, *see* City of Lakewood v. Pierce Cnty., 144 Wn.2d 118, 126, 30 P.3d 446, 450 (2001), a constructive trust is fashioned in the discretion of the trial court. Ehsani v. McCullough Family P'ship, 160 Wn.2d 586, 589, 159 P.3d 407, 408 (2007); Miller v. Paul M. Wolff Co., 178 Wn. App. 957, 963-64, 316 P.3d 1113 (2014). That discretion will not be overturned absent a showing of

abuse of discretion. *Id.* at 591. The burden of proof of such abuse lies with the appellant, Childs v. Allen, 125 Wn. App. 50, 58, 105 P.3d 411 (2004), and that burden cannot be satisfied here.

A constructive trust is typically imposed in situations involving fraud, misrepresentation, or undue influence. *See* Wright v. Dave Johnson Ins. Inc., 167 Wn. App. 758, 774, 275 P.3d 339 (2012), *rev. denied* 175 Wn.2d 1008, 283 P.3d 885 (2012) (citing Baker v. Leonard, 120 Wn.2d 538, 547, 843 P.2d 1050 (1993)). The trial court here found no evidence of fraud, misrepresentation or bad faith on the part of O'Danne. The lack of such a finding is the equivalent of a finding that no such conduct occurred. *See* Recreational Equipment, 165 Wn. App. 553 at 564.

Indeed the court expressly found, to the contrary, that it was Archdale who had acted in bad faith. Decision and Order at 2, ¶ 3, CP 5. She had done so by refusing to use her inheritance to pay off the mortgage as promised. *Id.* The court also found that O'Danne had acted reasonably in refusing to convey to her sister when Archdale broke her promise to pay off the mortgage with Archdale's inheritance, *id.* at ¶ 3; that Archdale admitted that she had withheld payments on the

mortgage; *id.* at 4; that Archdale had admitted she had not paid her sister back for reinstating that mortgage, *id.*; that O'Danne had repeatedly indicated her willingness to quit-claim the property when the debt was paid, *id.* at ¶ 5; and that O'Danne had acted in good faith toward Archdale. *Id.* There was no fraud or bad faith here by O'Danne.

The trial court's refusal to order a conveyance to Archdale without a contemporaneous payoff of O'Danne was in keeping with the Supreme Court's assessment of the equities in Smith v. Monson, 157 Wn. App. 443, 236 P.3d 991 (2010), a case relied upon by Archdale. *See* Brief of App. at 9. The court there, in a case involving a claim of equitable mortgage, *id.* at 448, stated that "Ms. Monson could not convey that property to the Masons because she had an equitable duty to convey it back to the Smiths *once they paid off the mobile home loan.*" *Id.* [Emphasis added.] The Smith case lends support to the trial court's ruling here.

Abuse of discretion occurs when no reasonable person would take the position adopted by the trial court. Griggs v. Averbek Realty, Inc., 92 Wn.2d 576, 584, 599 P.2d 1289, 1293 (1979). Archdale has not satisfied her burden of showing that no reasonable person would

have declined to order O'Danne to convey to Archdale without a payoff of the underlying mortgage, and the trial court's refusal to do so was not error.

C. ARCHDALE CANNOT SHOW ABUSE OF DISCRETION HERE WHERE THE TERMS OF THE CONSTRUCTIVE TRUST IMPOSED BY THE COURT DID SUBSTANTIAL JUSTICE TO BOTH PARTIES AND BROUGHT AN END TO THE LITIGATION.

Archdale also appeals from the terms of the constructive trust that was imposed by the trial court. *See generally* Brief of App. at 7-11. In matters of equity, the court has "broad discretion in shaping relief", Jackowski v. Borchelt, 151 Wn. App. 1, 16, 209 P.3d 514 (2009), *aff'd* 174 Wn.2d 720 (2014) (citing Hough v. Stockbridge, 150 Wn.2d 234, 236, 76 P.3d 216 (2003)), in a manner that does "substantial justice to the parties and put[s] an end to litigation." Hough at 235 (citations omitted). The terms of the constructive trust that was imposed here were specifically intended and are effective to do substantial justice to both parties and to put an end to litigation between them.

The constructive trust provided Archdale, despite the fact that

she had reneged on her promise to use her inheritance to pay off the mortgage, *see* Decision and Order at 2, ¶ 3, CP 5, and despite the fact that she had never applied for financing with which to purchase the condo, VRP 134, ll. 6-8, with another for six months in which she could obtain such financing and purchase the property. Decision and Order at 3, ¶ 8.a, CP 153. Then if Archdale did not purchase, O'Danne could obtain a release through the provision of the order requiring a sale to a third party. *Id.* at ¶ 8.b.

The court also justly allocated the net proceeds, if any, of such a third party sale. In recognition of the mortgage payments made by Archdale, the court ordered that Archdale receive 75% of any such proceeds. *Id.* at ¶ 8.c. In recognition of nine years that O'Danne had borne the risk, and sometimes the consequences, of default, *id.* at 8.c.ii, the court ordered that O'Danne receive 25% of any such proceeds. *Id.* All of these terms did substantial justice to both parties. The terms also operated to put an end to litigation between Archdale and O'Danne.

For example, the court found that Archdale had intentionally defaulted on the mortgage and left O'Danne to reinstate it. Decision and Order at 2, ¶ 4, CP 152. The potential for future litigation was real,

in that had the court simply left the parties where it found them, Archdale might subsequently default on the mortgage again, leading to renewed conflict. (Moreover, Archdale herself rejected the option of imposing a trust that would simply have her to pay off the mortgage over time. VRP 127-28, ll. 23-25 and 1.) The court instead provided O'Danne with relief from the uncompensated consumption of her credit, Decision and Order at 3, ¶ 8.c.ii, CP 153, and from the risk of future default by Archdale. It did so by imposing deadlines by which the property would be sold, *id.* at ¶¶ 8.a - 8.b, so that O'Danne, who had by that time waited some nine years, *id.* at ¶ 8.c.ii, would finally be released from liability on the mortgage. Those deadlines also provided a methodology by which Archdale could either purchase the condo, *id.* at ¶ 8.a, or be compensated for her investment through a third party sale. *Id.* at ¶ 8.b. That methodology ensures that the parties will go their separate ways. Finally, the court retained jurisdiction to enforce the terms of its order, Judgment Confirming Decision and Order at 2, line 22, CP 2, such that no further litigation with O'Danne will be necessary.

The terms of the trust imposed were the result of the reasonable

exercise of the court's equitable discretion. Those terms should be upheld.

D. THE COURT PROPERLY EXERCISED ITS DISCRETION IN DETERMINING THAT ARCHDALE'S COMPLAINT WAS FRIVOLOUSLY BROUGHT AND THAT O'DANNE WAS ENTITLED TO AN AWARD OF ATTORNEYS' FEES AND COSTS.

An award of fees under RCW 4.84.185, *see* App. 4, is discretionary in the trial court, Alexander v. Sanford, 181 Wn. App. 135, 184, 325 P.3d 341 (2014), but must be based on a determination that the lawsuit was "frivolous in its entirety and 'advanced without reasonable cause.'" *Id.* (citing N. Coast Elec. Co. v. Selig, 136 Wn. App. 636, 650, 151 P.3d 211 (2007)). Archdale's claim was both.

Archdale attempts to avoid the court's determination of frivolousness based on her assertion that her lawsuit was not frivolous in its entirety, Brief of App. at 13, citing Biggs v. Vail, 119 Wn.2d 129, 133, 830 P.2d 350 (1992), and on an argument that O'Danne did not qualify as a "prevailing party" under RCW 4.84.185, *see* App. 4, because she did not obtain an affirmative judgment in her favor. Brief of App. at 19. These arguments misconstrue the nature of the relief

Archdale was in fact seeking, and fail to account for the relief afforded O'Danne and the purpose behind RCW 4.84.185. *See* App. 4.

Before trial Archdale abandoned her theory of resulting trust, VRP 4, ll. 8-9, and at trial she produced no evidence of or argument on the claim for damages that she asserted in her complaint. *See generally* Verbatim Report of Proceedings. *See also* Complaint at 5, ll. 21-22, CP 302 (claim for damages). The entirety of Archdale's case as presented at trial, therefore, was her claim to have title instantly quieted in her, subject only to encumbrances of record. Complaint at 5, ll. 15-20, CP 302. The constructive trust was a theory on which she based her asserted right to legal title, *see, e.g.*, Complaint at 4, ll. 19-23, CP 301, but it was not the relief that she sought. On the contrary she rejected the suggestion of a trust with ongoing provisions. VRP 127-28, ll. 23-25 and 1. The entirety of her claim was thus that title be quieted immediately in her name, without a simultaneous payoff of the mortgage.

It is true that the trial court's decision states that a constructive trust had been imposed "in Archdale's favor", Decision and Order at 2, ¶ 7, CP 5, but the trust actually contained no terms that supported

Archdale's claim to quiet title without a payoff. *See generally* Decision and Order, CP 4-7. Tellingly, while O'Danne had represented to the court before trial that she would not object to the imposition of a constructive trust if it protected her interests and "would resolve all current issues between the parties . . .", VRP 6, ll. 10-20, she reserved her argument that the litigation was unnecessary and frivolous. VRP 5-6, ll. 5-18 and 4-22. Thus Archdale's argument on appeal is that the mere fact that a constructive trust was imposed, on any conditions, meant that her suit was not entirely frivolous.

She relies for her argument on the authority of Biggs v. Vail, 119 Wn.2d 129, 830 P.2d 350 (1992). *See* Brief of App. at 13. The Supreme Court in Biggs did state that a lawsuit must be frivolous "in its entirety", Biggs at 133, before an award of fees may be made under RCW 4.84.185. Biggs, however, involved case in which the trial court had found that only three of the four claims asserted were frivolous. *Id.* at 137. The Supreme Court agreed that the plaintiff's contract claim had been well-founded, and reversed the trial court's award of fees under RCW 4.84.185, because that award had been based on the frivolousness of only three of the four claims made. *Id.* Consequently

the case "*as a whole*" could not be deemed frivolous. *Id.* [Emphasis in the original.] Here, in contrast, the "whole", *id.*, of Archdale's action and request for relief at trial was only to obtain immediate legal title in her name. Complaint at 5, ll. 15-21, CP 302. *See also* VRP 127-28, ll. 23-25 and 1. (Archdale not content to continue making payments.) That request for relief was the "entirety", Biggs at 136, of her case, and she failed entirely in that effort.

The question then remains whether the claim to quiet title was asserted without reasonable cause. *Id.* The answer, must be "yes", for Archdale had no factual or legal basis for attempting to force a conveyance of the condo without a payoff of the mortgage.

The suit was factually without merit. Archdale testified that O'Danne had orally agreed to purchase the condo and then convey it immediately to Archdale so that Archdale could seek to refinance, VRP 117-18, ll. 22-25 and 1. No other witness asserted personal knowledge of an agreement that O'Danne would convey without a payoff, however, *see generally* Verbatim Transcript, and no finding was entered that accepted Archdale's testimony as to such an agreement. *See generally* Decision and Order, CP 151. Instead the court found that Archdale had

promised to use her inheritance to pay off the financing, but that she had failed, in bad faith, to do so. *Id.* at 2, ¶ 3, CP 152. Because the conflicting evidence was resolved in favor of O'Danne, and because there was no other evidence of an agreement by O'Danne to convey immediately, and without a payoff, the claim to quiet title based on an oral agreement to convey as asserted by Archdale was without basis in fact. *Compare Wright v. Dave Johnson Ins. Inc.*, 167 Wn. App. 758 at 787. (Unsuccessful claim could not be deemed frivolous for purposes of attorneys' fee award despite rejection of plaintiff's testimony where other evidence in the record supported the claim.)

Archdale's claim was also without basis in law. Constructive trusts arise out of equity, and are employed to "compel the holder of legal title to convey the beneficial interest to the one who justly deserves it". *Baker v. Leonard*, 120 Wn.2d 538 at 547. The trial court in this case exercised its equitable discretion to determine that while title should not ultimately remain with O'Danne, *see* Decision and Order at 2-3, ¶ 8, CP 152-53, O'Danne had never contested that result, *id.* at 2, ¶ 5, CP 152, and Archdale did not justly deserve the relief she sought. Archdale acted in bad faith in breaking her promise to pay off

the mortgage with her inheritance, Decision and Order at 2, ¶ 3, CP 152, and the equities instead "favor[ed] . . . O'Danne, who received no benefit from having held title over the course of this dispute, and who did not deny Archdale's entitlement to clear title upon a payoff of the existing mortgage." *See* F of F No. 2.e, Corrected Findings and Order Granting Defendant's Motion for Attorneys' Fees at 3, CP 13. Archdale also had advance notice of the futility of her claim. She pursued the litigation despite her own counsel's warning, years before she commenced the litigation, that if she did not qualify to either assume the mortgage or pay off the mortgage balance, he did not "believe a court would order that Ms. O'Danne transfer ownership of the condo to . . . [her]." EX. 32.

Most important, the court specifically concluded that Archdale "had no need to call upon equitable powers of the court because O'DANNE was willing without such a lawsuit to convey the condominium to Archdale . . . upon a simultaneous payoff . . . but Archdale needlessly declined to do so." Corrected Findings and Order at 3, ll. 7-10, CP 13. In other words, the suit was "advanced without reasonable cause", Biggs at 137, thereby necessitating the expenditure

of thousands of dollars in attorneys' fees by O'Danne in defending Archdale's spurious claim. *See* Corrected Findings and Order at 3, ll. 20-21, CP 13. This case was not simply meritless; it was advanced without reasonable cause.

Finally, Archdale's argument that O'Danne cannot receive an award under RCW 4.84.185 because she did not receive an affirmative judgment in her favor, Brief of App. at 19, is untenable. She relies for her argument on Riss v. Angel, 131 Wn.2d 612, 934 P.2d 669 (1997). *See* Brief of App. at 19. The court in Riss, however, applied RCW 4.84.330, *see Riss* at 633, a statute that gives bilateral effect to contractual provisions for attorneys' fees. *See* App. 5. RCW 4.84.330 by its terms requires a final judgment, and hence the construction of that statute as requiring an affirmative judgment in a party seeking fees is unsurprising. There is no such language in RCW 4.84.185, in contrast. Indeed the latter statute clearly applies in circumstances other than that of an affirmative award to a defendant, such as that of a voluntary dismissal by a plaintiff. *See* App. 4.

In any event, the trial court here expressly determined that O'Danne had obtained affirmative relief in multiple forms. *See*

Corrected Findings and Order at 2, ll. 16-24, CP 12. (O'Danne received relief in that she will be removed from title through a sale to Archdale or to a third party, and, in the latter event, through compensation for the consumption over the years of her good credit.) O'Danne was not required to, but did, effectively obtain an affirmative judgment in this case.

The trial court's determination that Archdale's claim was without rational basis in law or fact, Corrected Findings and Order at 3, ll. 2-3, CP 13, and was thus frivolous within the meaning of RCW 4.84.185, furthers the purpose of RCW 4.84.185 of discouraging frivolous lawsuits and compensating "the targets of such lawsuits for fees and expenses incurred in fighting meritless cases," Biggs at 137. The court here found that O'Danne had incurred significant attorneys' fees in defending against the frivolous claims, and should be compensated therefore. Corrected Order at 3, ll. 20-21, CP 13. The award of attorneys' fees under RCW 4.84.185 was appropriate and should be affirmed.

E. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING O'DANNE'S MOTIONS FOR ORDER SHORTENING TIME AND TO STRIKE BASED ON A LACK OF TIME WITHIN WHICH ARCHDALE COULD RESPOND TO THE MOTIONS IN WRITING, WHERE INSUFFICIENT TIME REMAINED IN WHICH TO GIVE STANDARD NOTICE OF THE MOTION TO STRIKE.

Motions for orders shortening time are determined in the discretion of the court, *see* State ex rel. Citizens Against Tolls (CAT) v. Murphy, 151 Wn.2d 226, 239-40, 88 P.3d 375 (2004), as are motions to strike. King Cnty. Fire Prot. Districts No. 16, No. 36 & No. 40 v. Hous. Auth. of King Cnty., 123 Wn.2d 819, 826, 872 P.2d 516 (1994). In the present case, the trial court denied O'Danne's Motions for Order Shortening Time and to Strike portions of a declaration from Archdale that was filed in opposition to O'Danne's Motion for Award of Attorneys' Fees. *See* Corrected Findings and Order at 4, line 9, CP 14. Those portions included material from confidential settlement negotiations between the parties. *See* Declaration of Lorna S. Corrigan In Support of Motion to Strike, CP 307-09. The basis on which the court denied the motions to shorten time and to strike was that Archdale did not have sufficient time before the hearing on the merits of the

motion for attorneys' fees to respond to the Motion to Strike in writing. *Id.* at 3-4, ll. 23-24 and 1-3 and 9, CP 13-14. The denial was error.

The offensive declaration in this case was filed in response to O'Danne's Motion for Award of Attorneys' Fees. *See* Declaration of Archdale in Response to Motion for Attorneys' Fees, CP 52. The declaration related certain of the contents of confidential settlement negotiations of the parties, which contents were clearly offered for the purpose of disproving Archdale's liability for attorneys' fees under RCW 4.84.185. *Id.* at 1-2, ll. 17-19 and 1-11, CP 52-53.

That Declaration was served on O'Danne on March 6, 2014, *see* Declaration of Lorna S. Corrigan In Support of Motion to Strike at 1, ll. 22-26, CP 307, leaving O'Danne until Friday noon under the local court rules to file and serve rebuttal documents. *See* SCLCR 6, App. 7. *See also* Declaration of Lorna S. Corrigan In Support of Motion to Strike at 2, ll. 1-3, CP 308. The hearing on the merits of O'Danne's motion for attorneys' fees was set for 1:00 p.m. on March 10, 2014, *see* Note for Presentation, CP 336. There was therefore no five-day period remaining between the filing of Archdale's Declaration on March 6, 2014, Declaration of Lorna S. Corrigan In Support of Motion to Strike

at 1, ll. 22-24, CP 307, and the hearing on the merits. *Id.* at 23. Moreover, March 6, 2014, was a Thursday, *id.* at l. 25, so a weekend intervened between O'Danne's receipt of the objectionable material and the hearing on the merits of the claim for attorneys' fees. Consequently, O'Danne's counsel, Lorna Corrigan, had twenty-four hours in which to prepare and serve her rebuttal materials, *see* SCLCR 6, App. 7, and only the equivalent of two court days in which to present and obtain an order shortening time for hearing on the Motion to Strike. Ms. Corrigan prepared and served by noon on Friday, March 7, 2014, *See* Declaration of Lorna S. Corrigan In Support of Motion to Strike at 2, ll. 2-5, CP 308, both a rebuttal to Archdale's response to the motion for an award of attorneys' fees, and a Motion to Strike. *Id.* at 3-5.

Rather than use his time to respond to the Motion to Strike, counsel to Archdale, Joel Nichols, chose to serve O'Danne, on the afternoon of Friday, March 7, 2014, with an objection to that motion. CP 334-35. Ms. Corrigan then contacted Mr. Nichols, Declaration of Lorna S. Corrigan In Support of Motion to Strike at 2, line 12, CP 308, who insisted that an order to shorten time be obtained. *Id.* at 15-16. He did so even while indicating that he would not make himself available

that afternoon for a hearing on a motion to shorten time because he had a client coming in late that afternoon. *Id.* at line 20. Mr. Nichols indicated that it would be an "abuse of process" if such a motion were nonetheless presented that afternoon. *Id.* at ll. 20-21.

Archdale's counsel made those statements knowing that it was extremely unlikely that O'Danne's counsel could obtain a hearing before a judge on Monday morning, before a 1:00 p.m. hearing the same day. *Id.* at ll. 21-23. Mr. Nichols never suggested or requested a continuance of the hearing on the merits. Instead he insisted that his materials were appropriate and that the parties should just go forward with the main motion on Monday. *Id.* at ll. 16-19.

O'Danne's counsel then attempted to secure a hearing on the motion to shorten time, but was informed by the law clerk to the court that there was no court time remaining on Monday morning before the hearing on the merits. *Id.* at 2-3, ll. 24-25 and 1-3, CP 308-09. Counsel to O'Danne therefore gave notice *via* e-mail and voicemail, on Friday, March 7, 2014, of her intent to present the motions for order shortening time and to Strike immediately prior to the hearing on the merits on

Monday at 1:00 p.m. *Id.* at 3, ll. 1-3, CP 309.<sup>1</sup>

O'Danne's counsel did present those motions immediately prior to the hearing on the merits, but both motions were denied. *See* Corrected Findings at 4, line 9, CP 14. The court's reasoning was simply that Archdale did not have adequate time to respond in writing to the Motion to Strike. *Id.* at 3-4, ll. 24-25 and 1-3.

This determination by the court was an abuse of discretion because it was manifestly unreasonable and was based on untenable grounds. *See Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 669, 230 P.2d 583 (2010). Archdale's counsel had more time to respond in writing to the Motion to Strike, *see* Declaration of Lorna S. Corrigan at 2, ll. 1-3 (all day on Friday, all weekend, and all of Monday morning before the hearing), than did O'Danne's counsel in which to prepare her rebuttal documents and the Motion to Strike. *Id.* at 1-2, ll. 25 and 1-5, CP 307-08. There was adequate time for Mr. Nichols to either respond in writing or to seek a continuance of the main motion. He did neither,

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<sup>1</sup> The Motion to Strike was re-filed with the court and re-served on Archdale on March 10, 2014, *see* CP 310, but the relevant portions of the Motion to Strike remained the same as those found in the Motion to Strike filed on March 7, 2014. *Compare* Motion filed March 7, 2014, CP 316-17, ll. 21-25 and 1-3 *with* Motion to Strike filed March 10, 2014, CP 310-11, ll. 15-25 and 1-14.

preferring instead to simply object to a hearing on the Motion to Strike.

*Id.* at 2, ll. 16-23.

It was unreasonable and untenable for the court to reward that conduct by denying the Motion to Strike simply on grounds that Archdale did not have adequate time to prepare a *written* response. The result was that Archdale succeeded in peppering her response to the motion for attorneys' fees with inadmissible evidence, for which conduct O'Danne's counsel was afforded no remedy other than to ask the court for a continuance of her main motion for attorneys' fees. O'Danne should not, however, have been required to seek a continuance of her main motion because Archdale submitted privileged and inadmissible matter in her response to the motion or attorneys' fees. Under the circumstances of this case, the denial of the motions to shorten time and to strike based on the lack of time for a written response was an abuse of discretion.

It is true that the court ultimately granted O'Danne's motion for attorneys' fees, *see* Corrected Order and Findings, CP 11, despite the submission of objectionable material by Archdale. However, the denial of the Motion to Strike is not harmless error here, where Archdale has

cited to the inadmissible material in her brief on appeal. *See* Brief of App. at 17-18. (Relying on material in Archdale's Declaration in Response to Motion for Attorneys' Fees at 2, ll. 5-11, CP 53, that was the subject of the Motion to Strike. *See* Motion at 1-2, ll. 23-24 and line 1, CP 310-11.)

This court should reverse the trial court's denial of the Motion to Strike, or in the alternative disregard the improper materials on this appeal. *See, e.g., In re Estate of Evans*, 181 Wn. App. 436, 326 P.3d 755 (2014) (citations omitted). (Party may argue that immaterial matter be disregarded in an appellate brief rather than filing a motion to strike in the Court of Appeals.) Archdale clearly offered material from confidential settlement negotiations, *see* Declaration of Sandra J. Archdale In Response to Motion for Attorneys' Fees at 1-2, ll. 17-20 and 1-10, CP 52-53, to disprove her liability for attorneys' fees under RCW 4.84.185. *See* Response to Motion for Attorneys' Fees at 4, ll. 9-12, CP 65 (arguing that Archdale had to resort to trial because O'Danne refused to convey in response to an offer to pay off the judgment). That offer contained precisely the material that is addressed and prohibited by ER 408. *See* App. 1.

The evidence offered by Archdale also failed to provide the full context of the settlement negotiations, which occurred only a few months before trial, and only after O'Danne had incurred significant attorneys' fees in defending against Archdale's action. *See* Supplemental Declaration of Lorna S. Corrigan at 1-2, ll. 24-25 and 1-3. At one point, in response to an offer by Archdale to pay off the judgment for conveyance of title and a dismissal of O'Danne's counter-claim for attorneys' fees, O'Danne counter-offered that she would do so if Archdale paid off the outstanding judgment already owed her by Archdale. *Id.* at 2, ll. 5-10.

The trial court's refusal to strike the material from confidential settlement negotiations should be reversed as error, and the improper material should be stricken. In the alternative, the court should simply disregard that material on appeal.

F. ARCHDALE WOULD NOT BE ENTITLED TO AN AWARD OF ATTORNEYS' FEES EVEN IF THE CASE WERE REMANDED TO THE TRIAL COURT.

Archdale requests that this matter be remanded to the trial court for the determination of an award of attorneys' fees to her under RCW

4.84.330, RCW 4.84.185, or on equitable principles. Even if this court were to reverse the trial court's decision on the merits of this case, an award of fees to Archdale on any basis would be an abuse of discretion.

Archdale first asserts that she is the de facto borrower under the deed of trust that currently burdens the condo property. Brief of App. at 22. She then argues that she is entitled on remand to an award of fees pursuant to RCW 4.84.330, which statute operates to make unilateral fee provisions in contracts bilateral in application when fees are incurred "to enforce the provisions of such contract. . . ." Brief of App. at 21 (citing RCW 4.84.330). *See also* App. 5. Archdale relies for her argument on a provision in the deed of trust that states that the "Lender shall be entitled to recover . . . attorney's fees and costs in any action or proceeding to construe or enforce any term of this Security Instrument." *See* Brief of App. at 21. *See also* EX. 39.

Archdale's claim in this case, however, was to quiet title, not to "construe or enforce . . .", *id.*, any term of the deed of trust. Moreover, even if Archdale could be deemed to be the de facto beneficiary of the deed of trust, she and O'Danne could not be opposing parties under the deed of trust who could each claim the benefit, against each other, of

a provision of that deed. There is no reason to remand the case for a determination of fees under RCW 4.84.330 where no reasonable person would take the position that Archdale is entitled to an award of fees against O'Danne under the deed of trust.

Nor would Archdale succeed, even if this matter were remanded, in a request for fees under RCW 4.84.185. *See* App. 4. As she herself concedes, even claims, and hence defenses, that are found to be meritless are not by that reason alone deemed to be frivolous. *See* Brief of App. at 13 (citing Lockhart v. Grieve, 66 Wn. App. 735, 744, 834 P.2d 64 (1992)). It cannot be said by any reasonable person that a defense by O'Danne that she should not be ordered to convey without a simultaneous payoff would have been without rational argument in law or fact. *See* Granville Condo Homeowners Ass'n v. Keuhner, 177 Wn. App. 543, 556, 312 P.3d 702 (2013).

Finally, Archdale would not, even in the event of remand, successfully assert a claim for attorneys' fees on grounds of bad faith conduct by O'Danne. In order to qualify for such an award based on pre-litigation conduct, Archdale would have to show obstinate *pre-litigation* behavior that "necessitate[d] . . . legal action to enforce a

clearly valid claim or right." Greenbank Beach and Boatclub, Inc., v. Bunney, 168 Wn. App. 517, 526, 280 P.3d 1133 (2012). Archdale obtained no such findings of fact, and indeed the trial court found that Archdale had no need to resort to litigation. Corrected Findings and Order at 3, ll. 7-10, CP 13.

Nor can Archdale succeed in establishing procedural bad faith, which arises out of vexatious conduct in the course of litigation that is unrelated to the merits of the case. Roger Hiller Corp. v. Port of Port Angeles, 96 App. 918, 928, 982 P.2d 131 (1999). Again, Archdale obtained no findings of fact as to the allegations made in her brief, and her citations to the record relate in any event to the merits and not to the conduct of the litigation itself.

There is no basis on which remand should be granted for a determination of attorneys' fees to be awarded to Archdale, even if this court otherwise found error in the decision of the trial court. Archdale's request should be denied.

G. O'DANNE SHOULD HAVE AN AWARD OF HER REASONABLE ATTORNEYS' FEES ON APPEAL, BASED ON RCW 4.84.185.

The general rule in Washington is that a party who is entitled to

an award of attorneys' fees at trial is also entitled to them on appeal. Xieng v. Peoples Nat. Bank of Washington, 61 Wn. App. 572, 587, 821 P.2d 520 (1991), *aff'd*. 120 Wn.2d 512, 844 P.3d 389 (1993). In this case, O'Danne received an award of her attorneys' fees and costs pursuant to RCW 4.84.185. *See* App. 4. The purpose of that statute, of compensating the target for the fees and costs incurred in defending against a frivolous action, Biggs, 119 Wn.2d 129 at 137, would be undermined if the party obtaining that award was not also permitted an award for defending against an appeal from that award. Sharyl O'Danne requests an award of her reasonable attorneys' fees and costs in the defense of plaintiff's appeal, pursuant to RAP 18.1.

#### IV. CONCLUSION

The terms of the constructive trust imposed by the trial court should be upheld as a reasonable exercise of the court's equitable jurisdiction, which exercise afforded and affords substantial justice to both parties, and which will bring an end to litigation between them. Further, because Archdale had no need to resort to litigation to obtain the relief afforded by the trial court, and because Archdale's claim to quiet title was frivolous in its entirety, the trial court's discretionary act

in awarding fees to O'Danne under RCW 4.84.185 should be upheld. Finally, Archdale's request for a remand to determine an award of attorneys' fees to her should be denied, and O'Danne should have an award of her reasonable attorneys' fees and costs on appeal, pursuant to RCW 4.84.185.

Respectfully submitted this 24<sup>th</sup> of October, 2014.

NEWTON ♦ KIGHT L.L.P.

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## **APPENDIX 1**

ER 408

### **COMPROMISE AND OFFERS TO COMPROMISE**

In a civil case, evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution. [Adopted effective April 2, 1979; amended effective September 1, 2008]

**APPENDIX 1**

ER 408

**A-1**

## **APPENDIX 2**

### **RAP RULE 10.3 CONTENT OF BRIEF**

...

(g) Special Provision for Assignments of Error. A separate assignment of error for each instruction which a party contends was improperly given or refused must be included with reference to each instruction or proposed instruction by number. A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number. The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto. [Originally effective July 1, 1976; amended effective September 1, 1985; September 1, 1994; September 1, 1997; September 1, 1998; December 24, 2002; September 1, 2006; amended effective September 1, 2010; September 1, 2014.]

## **APPENDIX 2**

## **APPENDIX 3**

### **RAP RULE 18.1 ATTORNEY FEES AND EXPENSES**

(a) Generally. If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule, unless a statute specifies that the request is to be directed to the trial court.

(b) Argument in Brief. The party must devote a section of its opening brief to the request for the fees or expenses. Requests made at the Court of Appeals will be considered as continuing requests at the Supreme Court, except as stated in section (j). The request should not be made in the cost bill. In a motion on the merits pursuant to rule 18.14, the request and supporting argument must be included in the motion or response if the requesting party has not yet filed a brief.

## **APPENDIX 3**

## **APPENDIX 4**

RCW 4.84.185

**Prevailing party to receive expenses  
for opposing frivolous action or defense.**

In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense. This determination shall be made upon motion by the prevailing party after a voluntary or involuntary order of dismissal, order on summary judgment, final judgment after trial, or other final order terminating the action as to the prevailing party. The judge shall consider all evidence presented at the time of the motion to determine whether the position of the nonprevailing party was frivolous and advanced without reasonable cause. In no event may such motion be filed more than thirty days after entry of the order.

The provisions of this section apply unless otherwise specifically provided by statute.

[1991 c 70 § 1; 1987 c 212 § 201; 1983 c 127 § 1.]

## **APPENDIX 4**

RCW 4.84.185

**A-4**

## APPENDIX 5

### RCW 4.84.330

Actions on contract or lease which provides that attorneys' fees and costs incurred to enforce provisions be awarded to one of parties — Prevailing party entitled to attorneys' fees — Waiver prohibited.

In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorneys' fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he or she is the party specified in the contract or lease or not, shall be entitled to reasonable attorneys' fees in addition to costs and necessary disbursements.

Attorneys' fees provided for by this section shall not be subject to waiver by the parties to any contract or lease which is entered into after September 21, 1977. Any provision in any such contract or lease which provides for a waiver of attorneys' fees is void.

As used in this section "prevailing party" means the party in whose favor final judgment is rendered.

[2011 c 336 § 131; 1977 ex.s. c 203 § 1.]

## APPENDIX 5

## **APPENDIX 6**

RCW 64.04.010

Conveyances and encumbrances to be by deed.

Every conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed: PROVIDED, That when real estate, or any interest therein, is held in trust, the terms and conditions of which trust are of record, and the instrument creating such trust authorizes the issuance of certificates or written evidence of any interest in said real estate under said trust, and authorizes the transfer of such certificates or evidence of interest by assignment by the holder thereof by a simple writing or by endorsement on the back of such certificate or evidence of interest or delivery thereof to the vendee, such transfer shall be valid, and all such assignments or transfers hereby authorized and heretofore made in accordance with the provisions of this section are hereby declared to be legal and valid.

[1929 c 33 § 1; RRS § 10550. Prior: 1888 p 50 § 1; 1886 p 177 § 1; Code 1881 § 2311; 1877 p 312 § 1; 1873 p 465 § 1; 1863 p 430 § 1; 1860 p 299 § 1; 1854 p 402 § 1.]

## **APPENDIX 6**

RCW 64.04.010

**A-6**

## APPENDIX 7

### SCLCR RULE 6. TIME

(d) For Motions--Affidavits.

(1) *Notes for Civil Motions Calendar.* Responding documents and briefs must be filed with the clerk and copies served on all parties and the court no later than 12 noon two (2) court days prior to the hearing. Copies of any documents replying to the response must be filed with the clerk and served on all parties and the court not later than 12 noon of the court day prior to the hearing. This section does not apply to CR 56 summary judgment motions. Absent prior approval of the court, responsive or reply materials will not include either audio or video tape recordings.

## APPENDIX 7

COURT OF APPEALS, DIVISION 1  
SEATTLE, WASHINGTON

SANDRA J. ARCHDALE, )  
 )  
 Appellant/ )  
 Cross-Respondent, )  
 )  
 vs. )  
 )  
 SHARYL L. O'DANNE, )  
 )  
 Respondent/ )  
 Cross-Appellant. )  
 \_\_\_\_\_ )

NO. 71905-0-I

CERTIFICATE OF  
SERVICE BY MAIL

STATE OF WASHINGTON )  
 ) SS.  
COUNTY OF SNOHOMISH )

2014 OCT 27 AM 9:27  
COURT OF APPEALS  
STATE OF WASHINGTON

VALETA G. KING, being first duly sworn on oath, deposes and  
states:

I am over the age of twenty-one years and a resident of the County of  
Snohomish, State of Washington.

On October 24, 2014, I caused the Brief of Respondent to be served  
on Appellant/Cross-Respondent, SANDRA J. ARCHDALE, by depositing

CERTIFICATE OF SERVICE BY MAIL - 1.  
O'Danne2.cos.wpd  
10/15/14

**NEWTON + KIGHT L.L.P.**  
ATTORNEYS AT LAW  
1820 32ND STREET  
P.O. BOX 79  
EVERETT, WA 98206  
(425) 259-5106  
FAX: (425) 339-4145

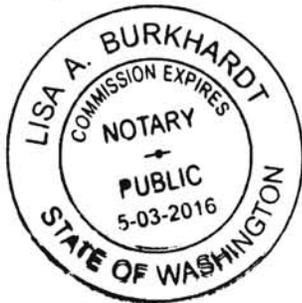
in the United States mail at Everett, Washington, an envelope with first-class postage prepaid, by regular mail, containing said document, to:

Joel P. Nichols  
Attorney at Law  
DENO MILLIKAN LAW FIRM, PLLC  
3411 Colby Avenue  
Everett, WA 98201  
(Attorney for Appellant/Cross-Respondent)

Valeta G. King  
VALETA G. KING

SUBSCRIBED AND SWORN TO before me this 24<sup>th</sup> day of October, 2014.

(SEAL)



Lisa A. Burkhardt  
LISA A. BURKHARDT, NOTARY  
PUBLIC in and for the  
State of Washington.  
My appointment expires: 5/3/2016

CERTIFICATE OF SERVICE BY MAIL - 2.  
O'Danne2.cos.wpd  
10/15/14

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