

No. 45043-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

RICHARD SORRELS and CHRISTOPHER SORRELS,

Appellants,

v.

SAM CHUI, et al.,

Respondents.

BRIEF OF RESPONDENT CHUI

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I. INTRODUCTION

For over 10 years, appellant Richard Sorrels has been fighting to retain possession and then recover possession of the property located at 9410 Glencove Road in Gig Harbor, Washington, without ever repaying the money he borrowed against the property. Sorrels has been unsuccessful at every step.

A. Summary of Related Case and Proceedings Below.

This is the latest chapter in a long-running real property dispute. The dispute was apparently resolved once and for all in 2009 when Judge Frederick W. Fleming of the Pierce County Superior Court quieted title in respondent Sam Chui.¹ This Court affirmed by published opinion in September 2010. *Westar Funding, Inc., et al., v. Sorrels*, 157 Wn. App. 777, 239 P.3d 1109 (2010). This Court's opinion also included a finding that the appeal was frivolous.

But on December 27, 2011, Mr. Sorrels brought the dispute back to life by filing a Complaint in Pierce County Superior Court against Mr. Chui and others. The Complaint seeks in part to retake ownership of the real property he lost to foreclosure in 2007. Judge Stephanie Arend dismissed all claims against respondent Chui by a summary judgment

¹ In the previous litigation, Mr. Chui was named as Xianju Xui. When Sorrels filed his lawsuit in 2011 he named him as Sam Chui. They are the same person. It is this sort of confusion which led Mr. Chui to pursue a legal name change. His legal name is now Sam Xianju Chui. Chui Dec., p. 2, ¶ 2, CP 49.

order on November 9, 2012. Once again Mr. Sorrels appeals.

B. Standard of Review.

1. The Standard of Review for a Summary Judgment Order.

The appellate courts review questions of law *de novo*. “In reviewing an order granting summary judgment, the appellate court engages in the same inquiry as the trial court.” *Champagne v. Thurston County*, 163 Wn.2d 69, 76, 178 P.3d 936 (2008), quoting *Wingert v. Yellow Freight Sys., Inc.*, 146 Wn.2d 841, 847, 50 P.3d 256 (2002).

2. The Standard of Review for Denying a Motion Filed Pursuant to CR 56(f).

A trial court decision on a CR 56(f) motion seeking to continue a summary judgment hearing is reviewed for abuse of discretion. *Mossman v. Rowley*, 154 Wn. App. 735, 742, 229 P.3d 812 (2009), *review denied*, 169 Wn.2d 1018, 238 P.3d 502 (2010).

3. The Standard of Review for Decisions Exercising Inherent Authority to Control and Manage Calendars.

Trial courts have the inherent authority to control and manage the proceedings before them. Decisions enforcing that authority are reviewed for abuse of discretion. *Cowles Publishing Co. v. Murphy*, 96 Wn.2d 584, 588, 637 P.2d 966 (1981) (*citing Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 55 L. Ed. 2d 570, 98 S. Ct. 1306 (1978)).

II. RESPONSES TO ASSIGNMENT OF ERROR

A. Assignments of Error.

It appears that four of the five Assignments of Error object to the two Orders entered in the Trial Court on November 9, 2012. The other Assignment of Error (number 4) pertains to the Orders entered on May 24, 2013. Respondent Chui submits that no error occurred on either date, but since he was no longer a party on May 24, 2013, this Brief will limit itself to the four assignments regarding the November 9, 2012 orders.

B. Issues Pertaining to Assignment of Error.

Appellant raises six issues pertaining to his Assignments of Error. All are fallacious, and all ignore the critical fact that appellant did not respond to either motion decided on November 9, 2012.

Issue No. 1: Appellant argues that the Trial Court should have considered his “responsive motions,” when in fact the motion for continuance did not respond to either motion and was never confirmed.

Issue No. 2: Appellant argues that the Trial Court did not have jurisdiction to issue a Writ of Restitution, ignoring the fact that (1) the Legislature assigned this issue to the superior courts in RCW 61.24.060(1) and (2) the Motion for Writ of Restitution was filed in the pending unlawful detainer case as well as the Sorrels case, giving the Court jurisdiction.

Issue No. 3: Appellant argues that the authority cited to support issuance of the Writ of Restitution does not support issuance of a Writ. This argument ignores RCW 61.24.060(1).

Issue No. 4: Appellant merely recites the unarguable proposition that summary judgment will not be granted if issues of material fact are present. This assertion ignores the fact that appellant did not respond to the motion and thus did nothing to raise an issue of material fact.

Issue No. 5: Appellant argues that somehow one of the two orders entered November 9, 2012 precludes the other as a matter of *res judicata*, ignoring the fact that the two orders did not have the same subject matter, which is a prerequisite for *res judicata*.

Issue No. 6: Appellant asserts incorrectly that the summary judgment order should have been without prejudice.

III. COUNTERSTATEMENT OF THE CASE

In this case, “what’s past is prologue.”² An understanding of the long history of this dispute is necessary to reach an understanding of the present posture. This is the second attempt by Richard Sorrels to take back the property he lost to foreclosure in 2007, but without paying for it. The first attempt came to a crashing halt on September 14, 2010, when this Court handed down its published opinion in *Westar Funding Inc., et*

² William Shakespeare, *The Tempest*, Act II, Scene I.

al. v. Sorrels, 157 Wn. App. 777, 239 P.3d 1109 (2010). The background facts are well explained in the published opinion, a copy of which is attached as Appendix A.

In brief summary, Sorrels in June 2002 used a living trust he owns to borrow \$61,500 from Westar Funding. The loan was secured by a first mortgage on the Gig Harbor real property owned by the trust, which is the subject of both actions.

Sorrels soon defaulted on the loan, and foreclosure proceedings were begun in March 2003. Sorrels used multiple bankruptcy filings and multiple actions in state court to delay the foreclosure for over four years. The trustee's sale finally took place on April 13, 2007 and respondent Chui was the successful bidder.

Of course, the effect of a trustee's sale is to discharge the debt in exchange for the foreclosed property. Having been relieved of the debt without paying it, Sorrels immediately took steps to recover the real property without paying for it. The mechanism for this unscrupulous ploy was a 15-year-old promissory note which the Sorrels trust supposedly owed to Sorrels. He commenced a non-judicial foreclosure in order to foreclose Chui out of the property. Chui tendered the matter to his title insurance carrier and an action was begun to quiet Mr. Chui's title. The trustee's sale commenced by Sorrels was enjoined by Judge Bryan

Chushcoff on May 16, 2007. Next, a summary judgment motion was filed, and on March 6, 2009, Judge Frederick Fleming very forcefully quieted title in Mr. Chui:

I'm not buying it. I think this looks to me like – an appellate court can tell me I'm wrong, but it looks to me like this is an abuse of the justice system. And I'm not going to be part of it. So I'm going to grant the motion for summary judgment and quiet title in Mr. Xui.

Report of Proceedings on March 6, 2009, 5:23-6:13, copy attached as Appendix B.

Sorrels filed a Notice of Appeal on March 25, 2009. Eighteen months later, this Court not only affirmed the Trial Court, but also found that Sorrels' appeal "presents no debatable issues or legitimate arguments for an extension of the law and is frivolous." Appendix A, p. A-6. Soon after, a Motion for Reconsideration was also denied.

During all this time, from the foreclosure sale on April 13, 2007, to the denial of the Motion for Reconsideration on November 9, 2010, Sorrels had continued to occupy the property owned by Mr. Chui, using it to store used auto parts and large quantities of other salvaged or junk items.

After the first appeal was over, Sorrels still refused to vacate and instead consulted a different lawyer and came up with a different theory to take back the property without paying for it. On December 27, 2011,

Sorrels filed and served a new lawsuit in the Pierce County Superior Court against Chui and others. He now claimed that he owned the property by adverse possession. Other claims were also asserted, including conversion. Chui again notified his title insurance carrier and a defense was provided.

On July 2, 2012, a Summary Judgment motion was filed, seeking dismissal with prejudice of all the claims against respondent Chui. CP 29-47. The Motion was noted for August 3, 2012 but the hearing was postponed several times at Sorrels' instance.³ Finally the Motion was renoted by agreement for argument on November 9, 2012, more than four months after it was served. The preassigned judge was the Honorable Stephanie A. Arend.

Mr. Sorrels elected not to respond to the summary judgment motion. Instead, he filed a CR 56(f) motion (CP 82-87) and gambled that he would receive yet another continuance.

Unfortunately for Mr. Sorrels, he did not confirm his motion for continuance, so it could not be heard. It is not clear if this failure occurred by accident or by design. Judge Arend declined to postpone the matter any further and granted summary judgment dismissing all claims against

³ The first continuance was to August 24, 2012 to accommodate Sorrels' attorney. The second was to September 7 for a court recess. The third continuance was for over 60 days, to November 9, 2012 by stipulation of the parties. CP 60-61.

Mr. Chui with prejudice. CP 279-81.

There was a second motion noted by Chui on the same calendar that day. Frustrated with years of delay in recovering possession, he filed a Motion for Writ of Restitution. CP 90-112. That Motion was also granted. CP 277-78.

Of course, Sorrels moved for reconsideration (CP 282-88) and his motion was denied (CP 363-64) on December 12, 2012. Other aspects of the case continued in litigation until a Final Judgment was entered on May 24, 2013. CP 450-52. Sorrels filed his Notice of Appeal on June 24, 2013. CP 458-477.

IV. ARGUMENT

A. The Motion for Continuance Was Properly Denied.

Continuance of a summary judgment motion is not granted as a matter of right. Civil Rule 56(f) sets out specific requirements:

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

In this case, appellant asked repeatedly for a continuance, and the hearing was postponed three times. On September 7, 2012, the parties

stipulated to a postponement to November 9, 2012. CP 60-61. Once that date was chosen, appellant waited 52 days before filing his Second Motion for Continuance on October 29, 2012. CP 82-87. He asked for an additional 30 days, which he said he needed to conduct discovery. He admitted, at CP 86, that “discovery is complete” on the issues of adverse possession and quieting of title, but requested additional time to track down a missing defendant, one Terry Eastwood, and take his deposition. The Second Motion for Continuance and its supporting Declaration by Mr. Sorrels are replete with insinuation, innuendo and allegations of bad faith in discovery, but offer no coherent explanation of how Mr. Eastwood’s deposition, if taken, would defeat the summary judgment motion filed by Mr. Chui.

This case does not present an issue of first impression. The trial courts are frequently asked to continue a summary judgment motion. Some of those motions are granted and some are denied. The appellate courts have frequent opportunity to review such decisions and several published opinions are clearly on point.

In *Turner v. Kohler*, 54 Wn. App. 688, 775 P.2d 474 (1989), the trial court denied a CR 56(f) continuance where the plaintiff sought more time to obtain medical expert affidavits. The affidavit of counsel in support of a continuance “did not state what discovery was contemplated

or why the discovery could not have been pursued prior to the summary judgment proceeding.” *Turner*, 54 Wn. App. at 693. The Court of Appeals affirmed the denial of a continuance, and in so doing identified three situations where the trial court may deny a CR 56(f) motion, as follows:

(1) the requesting party does not offer a good reason for the delay in obtaining the desired evidence; (2) the requesting party does not state what evidence would be established through the additional discovery; or (3) the desired evidence will not raise a genuine issue of material fact.

All three situations are present in this case.

In *Mutual of Enumclaw v. Archer*, 123 Wn. App. 728, 751, 97 P.3d 751 (2004), an insurance carrier commenced a declaratory judgment action against its insured, a contractor, to determine coverage issues. The plaintiff carrier moved for summary judgment. The defendant contractor moved for continuance of the motion under CR 56(f), to allow additional discovery regarding missing endorsements to the policy. The trial court denied the continuance and granted summary judgment in favor of the plaintiff carrier. The Court of Appeals, Division I, affirmed, noting that a trial court decision regarding a CR 56(f) motion is reviewed for abuse of discretion. *Archer*, 123 Wn. App. at 743. Concluding that the desired evidence would not raise a genuine issue of material fact, the Court of Appeals found no abuse of discretion.

In *Mossman v. Rowley*, 154 Wn. App. 735, 229 P.3d 812 (2009), Division Three reviewed an order denying a CR 56(f) continuance, which was requested to allow plaintiff to take six depositions, and concluded that none of the requested depositions would affect the summary judgment hearing or give rise to a material dispute of fact. *Mossman*, 154 Wn. App. at 743-44. Therefore, the trial court's denial of a CR 56(f) continuance was affirmed.

The foregoing precedents mandate that the Trial Court be affirmed in this case. Not only did Sorrels fail to identify how his intended discovery could raise a material dispute of fact, but he even admitted that his discovery was complete regarding the summary judgment issues. CP 86.

When Judge Arend denied the Second Motion for Continuance she did so because it had not been confirmed. RP on November 9, 2012, p. 4. That exercise of discretion will be discussed elsewhere in this Brief. But even if the Motion had been argued, it did not comply with CR 56(f) and it violated all three strictures set forth in *Turner v. Kohler, supra*.

On the issue of diligence, it should be noted that the Chui summary judgment motion was filed on July 2, 2012 and noted for August 3, 2012. CP 29. The motion was postponed to August 24, 2012 to accommodate the vacation of Mr. Sorrels' attorney, and further postponed to September

7 to accommodate a court recess. Before that date could arrive, Mr. Sorrels' attorney withdrew on August 21, 2012. CP 57. Sorrels asked for more time, to find a new attorney and prepare for the motion. CP 59. Respondent Chui agreed to the 60 day continuance Sorrels requested and a Stipulated Order was signed by the Trial Court on September 7, 2012, postponing the summary judgment hearing to November 9, 2012. CP 60-61.

Thus, when Mr. Sorrels filed his Second Motion for Continuance on October 29, 2012, he had already been in possession of the motion since July 2, and the hearing date had already been thrice postponed, for a total delay of more than four months. The Second Motion for Continuance offered no coherent explanation of why four months was not enough time to respond to the motion.

Second, the Second Motion for Continuance is based almost entirely on Sorrels' inability to serve and depose another party, and offers no explanation of what evidence pertinent to the summary judgment motion he could obtain with a 30 day delay. CP 82-87.

Finally, the Second Motion for Continuance does not explain what material dispute of fact could be demonstrated with the requested extra time. Thus, all three of the grounds set forth in *Turner* for denying a CR 56(f) motion, any one of which would be sufficient, are present in this

case.

B. The Trial Court Has the Discretion to Manage Its Calendar.

Rather than respond to the two pending motions noted for November 9, 2012, Sorrels chose to file two motions of his own. His Second Motion for Continuance was filed on October 29, 2012. CP 82-87. He also filed a curious Motion for Severance of Claims. CP 115-18. It is not clear how the severance motion related to the two pending motions, but it was noted for the same calendar on the same day and at the same time as Chui's two motions. CP 113-14.

Pierce County Superior Court Local Rule 7(a)(8) requires a moving party to confirm his or her motion before noon two days before the hearing, either by contacting the departmental judicial assistant or electronically through LINX. By its terms, the confirmation requirement applies to self-represented parties. The rule further provides that the trial court may strike motions that are not timely confirmed.

When Mr. Sorrels appeared on the motion calendar on November 9, 2012, his motion for continuance had not been confirmed and so it was struck. RP November 9, 2012, p. 2, ll. 21-23.

The trial courts of this State have the inherent authority to control and manage proceedings before them, and decisions enforcing that authority are reviewed for abuse of discretion. *Cowles Publishing Co. v.*

Murphy, 96 Wn.2d 584, 588, 637 P.2d 966 (1981) (citing *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 55 L. Ed. 2d 570, 98 S. Ct. 1306 (1978)).

At the hearing on November 9, Judge Arend explained why motions must be confirmed:

THE COURT: I didn't read their paperwork either on the motion for continuance. I don't read – as I'm sure you can appreciate, I have a lot of motions every Friday. I think today we started off with nine pages, and it was some 40 cases total that we originally started with. I didn't read all 40 of those because many of them were not confirmed or were set over. I read what was confirmed. That's what I do. I read what's confirmed, the people who I expect are actually going to show up, ready to argue their motions. So I didn't read anything regarding a continuance. I didn't read any response to the motion for continuance because it's not before me.

RP November 9, 2012, p. 5, ll. 7-19. This explanation surely justifies the Trial Court's actions, and precludes any conceivable abuse of discretion.

Furthermore, it is possible that the failure to confirm was tactical. Mr. Sorrels is a very experienced pro se litigator, well known to this Court and to most of the Pierce County Superior Court judges. It can safely be presumed that he knows of the confirmation requirement. He may have decided that a tactical failure to confirm would result in a postponement of all the motions.

But regardless of Sorrels' motivations, he was the author of his fate

that day. His failure to confirm was his own fault and it was not error to strike his motions.

C. The Motion for Summary Judgment Was Properly Granted.

Despite receiving more than four months' notice of the summary judgment motion, appellant Sorrels elected to not respond to the motion. Instead he asked for yet another continuance. This was a risky gamble.⁴ If the continuance was not granted, he would have no opportunity to submit evidence or testimony to demonstrate material disputes of fact.

When the continuance was denied, Sorrels was left with no facts or evidence before the Trial Court to oppose the summary judgment motion. Therefore, Chui's evidence was not disputed. Undisputed facts make the job of the judge easier, but this summary judgment was not granted by default. It is not enough that the facts are undisputed; the moving party must also demonstrate that he is entitled to judgment as a matter of law. CR 56.

Here, the Trial Court helpfully explained the decision to grant summary judgment.

THE COURT: Dealing with the motion for summary judgment, it's for a dismissal of the adverse action, forcible entry, and to find that the case is frivolous. I have reviewed

⁴ Most attorneys would respond to the motion as well as ask for a continuance, or else file the motion early enough to still respond to the summary judgment motion if continuance is denied. Mr. Sorrels is a seasoned litigator, and a pro se party should be held to the same standards as an attorney.

all the materials that I have received relevant to the motion for summary judgment including the Court of Appeals' decision in what I would say would be a related case, and I would agree that even if Mr. Sorrels had chosen to file something responsive to the motion for summary judgment, there is no basis for this action to proceed based on the Court of Appeals' prior ruling.

RP November 9, 2012, p. 3, ll. 8-18.

With undisputed facts before it, the Trial Court concluded that Chui was entitled to summary judgment. To assist this Court with its *de novo* review, Chui will describe the legal issues presented on November 9, 2012 and explain why he was entitled to prevail as a matter of law.

1. The Plaintiffs' Claim of Adverse Possession Is Barred by the Doctrine of Res Judicata.

On March 6, 2009, in a previous action, Judge Frederick Fleming quieted title in Mr. Chui and "forever extinguished" any claim by plaintiff Richard Sorrels to own the Gig Harbor property. Judge Fleming's decision was affirmed by the Court of Appeals in a published opinion. Thus, when Mr. Sorrels asserted another claim to own the same subject property, his claim was barred by the doctrine of Res Judicata.

The appellate courts of this State have repeatedly and consistently held that res judicata is a "doctrine of claim preclusion" which bars relitigation of a claim that has already been determined by a final judgment. *See, e.g., Williams and Leone v. Keeble, Inc.*, 171 Wn.2d 726,

730, 254 P.3d 818 (2011), citing *Schoeman v. N.Y. Life Ins. Co.*, 106 Wn.2d 855, 860, 726 P.2d 1 (1986).

The threshold requirement of res judicata is a final judgment on the merits in a prior suit. *Hisle v. Todd Pacific Shipyards Corp.*, 151 Wn.2d 853, 865, 93 P.3d 108 (2004). It cannot be disputed that Judge Fleming's decision in March 2009 was a final judgment. Not only did it conclude the case, but Mr. Sorrels filed an appeal as a matter of right, and the Court of Appeals affirmed the trial court's decision. The fact that Judge Fleming decided the case on summary judgment does not affect the claim preclusion; a summary judgment is a final judgment on the merits with the same preclusive effect as a full trial. *DeYoung v. Cenex Ltd.*, 100 Wn. App. 885, 892, 1 P.3d 587 (2000); *Estate of Black*, 153 Wn.2d 152, 170, 102 P.3d 796 (2004).

The appellate decisions identify four elements for a res judicata determination. A subsequent action is barred where it involves:

- (1) the same subject matter;
- (2) the same cause of action;
- (3) the same persons or parties; and
- (4) the same quality of persons for or against whom the decision is made, as did the prior action.

In re Estate of Black, 153 Wn.2d 152, 170, 102 P.3d 796 (2004); *Williams v. Leone & Keeble, Inc.*, 171 Wn.2d 726, 730 (2011).

The first element – identical subject matter – cannot be disputed.

Both the 2007 action decided by Judge Fleming and the adverse possession action involved the title and ownership of the same parcel of land in Gig Harbor, Pierce County, Washington. Both complaints recited this identical metes and bounds legal description:

Beginning 760 feet South and 482 feet East of the Northwest corner of Lot 4, Section 6, Township 21 North, Range 1 East of the W.M., in Pierce County, Washington, thence North 47 feet; thence East 280 feet, more or less, to meander line of Glencove; thence South 44°15' East 65.61 feet along meander line; thence West 325.78 feet to the point of beginning.

Mr. Sorrels claimed an interest in the subject property, just as he did in the prior action.

The second element is “the same cause of action” in both cases. That element is supplied by the identical claims to quiet title in the Gig Harbor property. In the earlier action, Sam Chui, also known as Xianju Xui, sued to quiet title against the claims of Richard Sorrels. Even though Judge Fleming ruled for Mr. Chui, and quieted title in him, Mr. Sorrels again asserted claims against the same property. The second time it was Mr. Sorrels who sought in his complaint to quiet title, the same cause of action previously asserted by Mr. Chui.

To determine whether causes of action are identical, the Courts of this State consider whether (1) prosecuting the second action would destroy rights or interests established in the first judgment; (2) the

evidence presented in the two actions is substantially the same; (3) the two actions involve infringement of the same right, and (4) the two actions arise out of the same transactional nucleus of facts. *Marshall v. Thurston County*, 165 Wn. App. 346, 354, 267 P.3d 491 (2011), citing *Rains v. State*, 100 Wn.2d 660, 664, 674 P.2d 165 (1983).

All four of the enumerated factors weigh against Mr. Sorrels and in favor of res judicata preclusion. Prosecution of Mr. Sorrels' claim in the second action would necessarily be destructive of the legal ownership of Mr. Chui, as established by Judge Fleming in the earlier judgment, and affirmed by the Court of Appeals. The evidence in the second case would be the same as the first: Mr. Chui would show that he acquired title to the Gig Harbor property by a Trustees Deed in 2007 and that Mr. Sorrels has no valid claim to the property. The two actions clearly involve infringement of the same legal right, namely Mr. Chui's quiet title to the subject property. Finally, the two actions arise out of the same nucleus of facts: Mr. Chui acquired title by a Trustee's Deed in 2007 and Mr. Sorrels has been scheming, maneuvering and litigating ever since to try to take it away from him. And underlying the entire scenario presented by both actions is the ineluctable fact that Mr. Sorrels failed to repay a loan. All his claims and efforts are aimed at undoing the rightful consequences he suffered because of his default.

Mr. Sorrels may argue that he is basing his present claim on adverse possession, whereas his previous claim was not based on adverse possession.⁵ But he does not explain why he did not raise this claim in the previous action, when title was placed at issue. Res judicata applies to bar claims that were actually litigated and also to bar those claims that “could have been raised, and in the exercise of reasonable diligence should have been raised, in the prior proceeding.” *DeYoung v. Cenex Ltd.*, 100 Wn App. at 891-92, quoting *Kelly-Hansen v. Kelly-Hansen*, 87 Wn. App. 320, 328-29, 941 P.2d 1108 (1997).

Mr. Sorrels could offer no plausible explanation for failing to assert his adverse possession claim in the previous action. Civil Rule 13(a) – the Compulsory Counterclaim Rule – requires a defendant to plead any counterclaim he has which arises out of the transaction or occurrence which is the subject matter of the plaintiff’s claim. This means that a counterclaim must be pleaded if it is “logically related” to the plaintiff’s claim. *Chee Chew v. Lord*, 143 Wn. App. 807, 813, 181 P.3d 25 (2008). When Mr. Chui sued Mr. Sorrels in 2007 to quiet title to the Gig Harbor property, Mr. Sorrels did not counterclaim to establish adverse possession, even though he now claims that he has been adversely possessing the Gig

⁵ The basis of Mr. Sorrels’ previous claim was an outlawed Deed of Trust, a claim so bizarre that Judge Fleming called it “abuse of the justice system.” Appendix B, Verbatim Report of Proceedings, p. 6, l.l.

Harbor property since 1992. A claim to quiet title to real property is clearly logically related to the other party's claim of adverse possession, yet it was not even mentioned. When a party fails to plead a compulsory counterclaim, he is barred from subsequently bringing a separate action on that claim. *Schoeman v. New York Life*, 106 Wn.2d 855, 867, 726 P.2d 1 (1986). The unavoidable inference of his failure to counterclaim in 2007 is that Sorrels' adverse possession claim is an opportunistic fabrication of a new claim out of whole cloth, in order to vex innocent parties and take unfair advantage of the legal system.

The third element of res judicata is that the second action involves the same persons or parties. In these two cases, the parties are identical: Sam Chui and Richard Sorrels. In the 2007 action, Mr. Chui was a plaintiff. (In that Complaint, his name is spelled Xianju Xui.) Mr. Sorrels was the defendant. In the 2011 action, Mr. Sorrels was the plaintiff and Mr. Chui was a defendant.

It is true that the Amended Complaint added a second plaintiff, Mr. Sorrels' son Christopher. Res judicata does not apply against a person who was not a party to the previous litigation. *All-Pure Chemical Co. v. White*, 127 Wn.2d 1, 5, 896 P.2d 697 (1995). However, there are other reasons to dismiss Christopher Sorrels' claims, which will be set forth below.

The fourth element of res judicata is that the parties are of the same quality in both actions. Not only are the two parties – Sam Chui and Richard Sorrels – identical in the two actions, but they are also of the same quality in both actions. Mr. Chui is the titled owner of the subject real property in both cases, and Mr. Sorrels claimed in both cases to hold an interest which ousts Mr. Chui from title. The fact that Mr. Chui was the plaintiff seeking to quiet title in the first action, whereas in the second he was the defendant, opposing Mr. Sorrels' claim to quiet title, does not diminish the identity of quality of parties.

2. Entry Onto the Subject Property Was Permissive, Not Adverse, by Plaintiff's Own Admission.

When Mr. Sorrels filed his pro se Complaint in December 2011, he also filed a pro se Motion and Declaration seeking a Temporary Restraining Order. CP 9-10. In the third paragraph of his Declaration, Mr. Sorrels made this statement:

I have been in possession of and the sole occupant of real property commonly known as 9410 Glencove Road, Gig Harbor, Washington, since I obtained permission for such from a prior owner, David Brown, in August of 1992.

Apparently Mr. Sorrels does not understand that a claim for adverse possession requires exactly that – ADVERSE possession. It is well established that permissive possession, such as granted by David Brown in 1992, does not rise to the level of adverse possession. One of

the necessary elements of adverse possession is hostile possession of real property. *Chaplin v. Sanders*, 100 Wn.2d 853, 857, 676 P.2d 43 (1984). Where the true owner has given the claimant permission to occupy the land, that permission operates to negate the element of hostility. *Miller v. Anderson*, 91 Wn. App. 822, 828, 964 P.2d 365 (1998). “Use with the true owner’s permission thus cannot be use hostile to the true owner’s title.” *Id.*

Whether use is permissive or hostile is normally a question of fact, but here Mr. Sorrels has already testified in his declaration quoted above, under penalty of perjury, that he took possession in 1992 with the permission of the true owner. The doctrine of judicial estoppel prevents Mr. Sorrels from changing his story.

Because prescriptive rights such as adverse possession are not favored in the law, once permission is granted it is presumed to continue. *Miller v. Anderson*, 91 Wn. App. at 831. Thus the burden shifted to Sorrels to rebut this presumption and show that something changed his permissive use to an adverse or hostile use. He failed to make any such showing.

3. The First and Foremost Element of Adverse Possession – Hostility – Is Demonstrably Not Present in This Case.

Not only did Mr. Sorrels enter into occupancy with permission of

David Brown, but his continued occupancy was not hostile – because he was the owner himself. In 1994, Mr. Brown deeded the property to the R.E.S. Trust, of which Richard Sorrels is the sole trustee. In other words, from 1994 to 2007, the property used and occupied by Richard Sorrels was owned by Richard Sorrels in his capacity as trustee of the R.E.S. Trust. Defendant submits that it is both a physical and a legal impossibility for Mr. Sorrels to have used the land all those years adversely to himself. This is exactly the sort of oxymoron that got Sorrels into trouble with Judge Fleming. The claim that he remained in possession adversely and with hostility to his own ownership is an absurdity. Sorrels can offer no authority that a person can adversely possess against himself.

4. Respondent Chui Was Not Guilty of Conversion.

Conversion is rooted in the common law action of trover. Conversion occurs when a person intentionally interferes with chattel belonging to another person by taking the chattel or by unlawfully detaining the chattel, thereby depriving the rightful owner of possession. *Alhadeff v. Meridian on Bainbridge*, 167 Wn.2d 601, 619, 220 P.3d 1214 (2009). Defendant Chui did not take any chattel or other personal property belonging to either of the two plaintiffs. Chui Dec., ¶ 15, CP 51. He instructed no one else to take such property or deprive Mr. Sorrels of

any such property. *Id.* These facts were undisputed at the hearing on November 9, 2012. Consequently, the claim for conversion was without merit and was correctly dismissed.

5. Chui Was Not Guilty of Trespass.

Trespass is defined as an “interfere[nce] with the right to exclusive possession of property.” *Grundy v. Brack Family Trust*, 151 Wn. App. 557, 566, 213 P.3d 619 (2009) (quoting *Gaines v. Pierce County*, 66 Wn. App. 715, 719, 834 P.2d 631 (1992)). A tort action for trespass can be based on intentional trespass or negligent trespass. Since the Amended Complaint made no mention of negligence, it must be assumed that Sorrels was claiming intentional trespass.

There are four elements of intentional trespass, and the tort occurs only when those four elements are all present. *Grundy v. Brack Family Trust*, 151 Wn. App. at 567. The necessary elements are “(1) an invasion of property affecting an interest in exclusive possession, (2) an intentional act, (3) reasonable foreseeability that the act would disturb the plaintiff’s possessory interest, and (4) actual and substantial damages.” *Wallace v. Lewis County*, 134 Wn. App., 1, 15, 137 P.3d 101 (2006).

There was no invasion by Sam Chui of any property. The only thing Mr. Chui did was list his own property for sale with a realtor and authorize the realtor to change the locks at the structure on the property.

Even if sending a realtor to change the locks could be an “invasion” under other circumstances, it cannot be an “invasion” when it is an owner dealing with his own property. The first element requires an invasion of the rights of someone entitled to exclusive possession. In other words, only if Mr. Sorrels held a right of “exclusive possession” of Chui’s property could he be the victim of a trespass.

Respondent has found no case to support the proposition that a person can commit trespass against his own property. Since 2007, Sam Chui has owned fee title in the real property located at 9410 Glencove Road in Gig Harbor. As such, he is entitled to exclusive possession, and it cannot be trespass for him to go on his own property. Respondent submits it is a legal impossibility for the same actor to be both the perpetrator and the victim of the same trespass.

6. Chui Was Not Guilty of Unlawful Entry.

Unlawful entry is a statutory cause of action, created by our Legislature in 1891, in what is now Chapter 59.16 RCW, which is entitled Unlawful Entry and Detainer. The definition of unlawful entry is set forth at RCW 59.16.010:

That any person who shall, without the permission of the owner and without having any color of title thereto, enter upon the lands of another, and shall refuse to remove therefrom after three days' notice, shall be deemed guilty of unlawful detainer and may be removed from such lands.

This provision does not describe the actions of Sam Chui, who did not enter upon the lands of another without the permission of the owner. As to the subject property, Mr. Chui is the owner of the property, so any action he took would be with the permission of the owner, not without. Mr. Chui has more than “color of title,” he holds the title. Furthermore, even if Mr. Chui committed unlawful entry of his own property, he has not received a three day notice from Mr. Sorrels. Chui Dec., ¶ 16, CP 51. Not one of the requirements of unlawful entry was met and the claim was properly dismissed.

7. Chui Was Not Guilty of Forcible Detainer.

Forcible detainer is also a statutory cause of action, codified at RCW 59.12.020. The operative provision states as follows:

Every person is guilty of a forcible detainer who either --
(1) By force, or by menaces and threats of violence, unlawfully holds and keeps the possession of any real property, whether the same was acquired peaceably or otherwise; or -- (2) Who in the nighttime, or during the absence of the occupant of any real property, enters thereon, and who, after demand made for the surrender thereof, refuses for the period of three days to surrender the same to such former occupant.

This definition, like the unlawful entry discussed above, is not even remotely descriptive of any action by Sam Chui with regard to the subject property.

Furthermore, no three day notice was given to Mr. Chui to do or not do anything. Chui Dec., ¶ 16, CP 51. This claim is utterly frivolous and was properly dismissed with prejudice.

D. Defendant Chui Was Also Entitled to Summary Judgment Dismissing the Adverse Possession Claim of Christopher Sorrels.

For some reason, when Mr. Sorrels' attorney amended the adverse possession Complaint, he added his son, Christopher Sorrels, as an additional plaintiff. CP 17-23. There is no explanation in the Amended Complaint explaining how Christopher Sorrels meets the elements of adverse possession independently of his father. Furthermore, Richard Sorrels filed a Declaration in this case on December 27, 2011 saying that he has been the sole occupant since 1992. CP 10.

Unfortunately for both Sorrels, father and son, the unusual addition of a second adverse possession claimant negates both claims. One of the necessary elements of adverse possession is that the occupancy by the claimant is exclusive. It has long been established that only exclusive possession, excluding others, will give rise to adverse possession. In *Wood v. Nelson*, 57 Wn.2d 539, 540, 358 P.2d 312 (1961), our Supreme Court explained:

It is *possession* that is the ultimate fact to be ascertained. Exclusive dominion over land is the essence of possession, and it can exist in unused land if others have been excluded therefrom.

More recently, the Supreme Court followed the *Wood v. Nelson* decision in denying a claim for adverse possession because there were multiple parties using the claimed property. The case was *ITT Rayonier v. Bell*, 51 Wn. App. 124 (1988), affirmed by the Supreme Court in a unanimous decision at 112 Wn.2d 754 (1989). Mr. Bell for many years tied up his houseboat on Lake Ozette and used a small piece of land on the shore for an outhouse and similar uses. ITT Rayonier owned the land but admitted that it rarely visited or inspected the land. When Bell sued for adverse possession, ITT obtained declarations from other houseboat owners who had also lived aboard for many years at the same location as Mr. Bell and had used the same land on the shore of the lake. The trial court granted summary judgment to ITT, because the use by Bell was not exclusive. The Court of Appeals affirmed, holding that the shared use with others was not exclusive.

We agree with the trial court that Bell's use of the property, though considerable, was not exclusive. The facts are that Klock and Olesen used the same land as Bell and Bell did not interfere with their use of it.

51 Wn. App. At 128. The Supreme Court also affirmed, holding as follows:

As the Court of Appeals correctly held, Bell's shared and occasional use of the property simply did not rise to the

level of exclusive possession indicative of a true owner for the full statutory period.

112 Wn.2d at 759-60.

If both Richard and Christopher Sorrels were occupying the property during the prescriptive period, neither can claim their use was exclusive.

Furthermore, it would be difficult for Christopher to establish the element of hostility against the true owner, where that owner was his own father, in his capacity as trustee of the R.E.S. Trust.

E. The Motion for Writ of Restitution Was Properly Granted.

Appellant also challenges the granting of respondent's Motion for Writ of Restitution, even though he failed to respond to the motion.

The Motion for Writ of Restitution (CP 90-112) was filed on October 31, 2012 and noted for November 9, 2012 at 9:00 a.m. – the same time and place as the previously filed Motion for Summary Judgment. The Motion assumed that summary judgment would be granted and asked for the writ as additional relief, in order to restore possession of the real property to Mr. Chui.

Appellant filed no response to the Motion for Writ of Restitution, just as he filed no response to the summary judgment motion. He appeared in open court at the appointed time and place to argue against the

two motions, but both were granted over his objections.

The history of the issue of possession is as long and egregious as the rest of this case. After four years of delay, the real property which secured the loan was foreclosed at a non-judicial trustee's sale on April 13, 2007. Mr. Chui was the successful bidder and he received a trustee's deed to the property. Chui Dec., p. 3, ¶ 7, CP 50. The Deed of Trust statute provides RCW 61.24.060(1) that the purchaser at a trustee's sale is entitled to possession "on the twentieth day following the sale," but Sorrels did not vacate within 20 days of the sale on April 13, 2007, and he was still in possession five years later when the parties appeared before Judge Arend on November 9, 2012. He had successfully blocked the owner, Mr. Chui, from possession for over five years, using two Superior Court actions and a lengthy appeal to the Court of Appeals. The Motion for Writ of Restitution was filed on October 31 to bring this egregious situation to an end at the hearing on November 9, 2012.

Appellant Sorrels offers this Court a number of reasons why the Motion for Writ should not have been granted. None of those reasons were presented to the Trial Court.

The Deed of Trust statute not only provides for possession to the purchaser within 20 days, it also provides the enforcement mechanism to make that happen, that is, "the summary proceedings to obtain possession

of real property provided in 59.12 RCW.” See RCW 61.24.060(1).

The summary procedure to obtain possession under Chapter 59.12 RCW is contained in RCW 59.12.090, which provides that a plaintiff “may apply to the judge of the court in which the action is pending for a writ of restitution restoring to the plaintiff the property in the complaint described, and the judge shall order a writ of restitution to issue.” By the use of the word shall, the Legislature makes mandatory the issuance of the writ in an appropriate case.

Moving party Chui anticipated Sorrels’ groundless argument that no Writ of Restitution can issue in a regular civil case. To defeat this argument, the Motion for Writ of Restitution was filed and noted in two separate cases – cause number 11-2-16925-7 (*Sorrels v. MacFarlane, et al.*) and 11-2-17078-6 (*Chui v. Sorrels*, an earlier action filed by Mr. Chui’s previous attorney to recover possession).

Mr. Sorrels also argues that no Writ of Restitution may issue except following a Show Cause hearing. This argument is obviously fallacious. There is no provision in RCW 59.12 for show cause hearings; only the Residential Landlord Tenant Act, RCW 59.18, provides for show cause hearings. Since this property is not residential, there can be no valid argument for a show cause hearing.

As expected, Mr. Sorrels argues that the Trial Court did not have the power or authority to grant the requested relief. Fortunately, the Court of Appeals did speak on this issue in a published opinion the month before the November 9, 2012 hearing. In *Excelsior Mortgage Equity Fund II LLC v. Schroeder*, 171 Wn. App. 334 (2012), Division III affirmed the broad discretion of the trial courts to shape an appropriate remedy for trustee sale purchasers.

In the *Excelsior* case, Excelsior conducted a trustee's sale on February 19, 2010 and foreclosed Mr. Schroeder's interest in a 200 acre ranch. As the Court of Appeals recognized, Mr. Schroeder was required to turn over possession twenty days later, on March 11, 2010.

However, like Mr. Sorrels, Mr. Schroeder had a great deal of personal property on the premises, which he did not remove, as well as livestock. Excelsior extended the time, but Mr. Schroeder still did not remove his vehicles and livestock. Therefore, Excelsior commenced an unlawful detainer action, as Mr. Chui has done, and obtained a writ of restitution.

The Court of Appeals affirmed in *Excelsior* that obtaining a writ of restitution is a correct procedure for a trustee sale purchaser to take possession, and held that the writ extends to the personal property as well as the person of the occupant. The Court of Appeals went further and also

affirmed an alternative procedure employed by Excelsior based on the abandonment provisions of the residential landlord tenant act.

Moreover, this issue is probably moot, since Sorrels was not evicted by the Sheriff under the Writ of Restitution. Therefore any error would be harmless.

F. The Motion for Reconsideration Was Properly Denied.

Mr. Sorrels on November 19, 2012 moved for reconsideration of the two orders entered on November 9, 2012. CP 282-88. The motion was denied on December 12, 2012. CP 363-64.

The Motion for Reconsideration lists ten separate reasons that the November 9 orders should not have been entered. CP 283. The Appellants' Opening Brief expands on several of these reasons. *See* Appellants' Brief, pp. 11-14. None of these issues or arguments were before the trial court on November 9, 2012 because Sorrels chose not to respond to the two pending motions.

A party who does not submit evidence or argument at the time of a summary judgment hearing and then moves for reconsideration must demonstrate that the newly submitted items could not have been discovered and offered prior to the entry of the summary judgment. *King v. Rice*, 146 Wn. App. 662, 672, 191 P.3d 946 (2008). Sorrels made no such showing in his Motion for Reconsideration.

This Division concluded in *Wagner Development, Inc. v. Fidelity & Deposit Co. of Maryland*, 95 Wn. App. 896, 907, 977 P.2d 639 (1999), as follows:

Both a trial and a summary judgment hearing afford the parties ample opportunity to present evidence. If the evidence was available but not offered until after that opportunity passes, the parties are not entitled to another opportunity to submit that evidence.

In light of Sorrels' failure to respond to the two motions when he had the opportunity to do so, his Motion for Reconsideration was frivolous and was properly denied. Denial of a Motion for Reconsideration will not be reversed absent a showing of manifest abuse of discretion. *Perry v. Hamilton*, 57 Wn. App. 936, 938, 756 P.2d 150 (1988).

G. Respondent Is Entitled to an Award of Attorney Fees and Costs on Appeal.

It is difficult to imagine a more frivolous claim than the plaintiff's current claim. In 2002, Mr. Sorrels borrowed \$61,500 from Westar and pledged the Gig Harbor property as collateral for the loan. When he defaulted on the loan, Westar began foreclosure, as any other lender would. For almost five years, Sorrels delayed the foreclosure by serial bankruptcies and unsuccessful attempts to enjoin the foreclosure sale. At any time during those five years, he could have repaid the loan and kept his property.

Finally, in April 2007, the property was sold at a trustee's sale, and Mr. Chui was the only bidder. The effect of a non-judicial foreclosure is to wipe out the debt, so the \$61,500 debt owed by Sorrels was eliminated by the foreclosure. When Mr. Sorrels attempted to get the property back, both in 2007 and in the present case, he was attempting to keep the property without paying for it and without repaying the money he borrowed. This maneuver in itself is unprecedented and unscrupulous.

In 2007, Mr. Sorrels tried to retake the property using an outlawed deed of trust, far beyond the running of the six year statute of limitations. Judge Chushcoff enjoined Mr. Sorrels' putative foreclosure. Judge Fleming quieted title in Mr. Chui, after stating on the record that Mr. Sorrels was trying to perpetrate "an abuse of the justice system." Appendix B., p. B-6. When Mr. Sorrels filed an appeal, the Court of Appeals firmly rejected it and ruled that the appeal was frivolous, saying "Sorrels' appeal presents no debatable issues or legitimate arguments for an extension of the law and is frivolous." Appendix A, p. A-6.

After all these negative rulings, Mr. Sorrels is back, trying once again to use the courts improperly to take the Gig Harbor property away from Mr. Chui, and still without repaying the money he borrowed twelve years ago. There is absolutely no justification for this repetitive, mindless litigation, which has no basis in law or fact. None of the theories

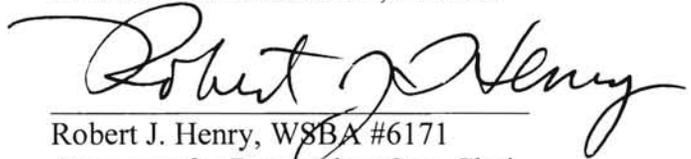
advanced have any merit. The Order by Judge Fleming barred the adverse possession claim under the doctrine of res judicata, and Sorrels' own declaration admits his use of Mr. Chui's property was permissive, not hostile. The other claims – conversion, trespass, unlawful entry and forcible detainer – are preposterous on their face. In the trial court, Judge Arend found the action to be frivolous. CP 280.

The Legislature enacted RCW 4.84.185 in 1983. The statute provides that where an action is “frivolous and advanced without reasonable cause,” the trial court may require the nonprevailing party to pay the attorney fees of the prevailing party. The purpose of the statute is to discourage abuse of the legal system, by awarding attorney fees to any party required to defend itself against meritless claims. *Suarez v. Newquist*, 70 Wn. App. 827, 832, 855 P.2d 1200 (1993). The statute has survived constitutional challenge; it is not unconstitutionally vague. *Rhinehart v. Seattle Times*, 59 Wn. App. 332, 340, 798 P.2d 1155 (1990), *rev. denied*, 124 Wn.2d 1010 (1994), *cert. denied*, 513 U.S. 1017, 115 S. Ct. 578 (1994). In the *Rhinehart* case, a defamation action was found to be frivolous, where most of the issues had been rejected in prior cases, and there was no reasonable possibility of success. *Rhinehart*, 59 Wn. App. at 341. This test applies equally well to Mr. Sorrels' adverse possession claim. Title had already been quieted in Chui. Sorrels did not plead

adverse possession when he should have, back in 2007. Despite repeated and unmistakable rulings from numerous judges, Sorrels has continued to advance one crazy theory after another. It is up to the courts to stop him; the victims of his persecution cannot.

Respectfully submitted this 5th day of May, 2014.

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CERTIFICATE OF SERVICE

I certify that on May 8, 2014, I caused a copy of the foregoing document to be served via first class U.S. mail, postage prepaid, to the following counsel of record:

Christopher Sorrels
Richard Sorrels
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Key Peninsula Real Estate
11607 State Route 302
Gig Harbor, WA 98329

Mingxia Wang
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Bellevue, WA 98006



Lee Brewer



view, Borden elicited statements from Hickman that indicated he had been in violation of reporting requirements. Because failing to register as a sex offender, former RCW 9A.44.130, is a status offense, Hickman's pre-*Miranda* statement informing Borden of his current address, coupled with the date of the move, amounted to a confession that he had been in violation of his reporting requirements. Thus, Borden's two-part interview placed Hickman in the impossible position of choosing between confessing to a past registration violation or committing a new violation by refusing to participate in Borden's "administrative" interview.

¶16 Under these unique facts and circumstances, Detective Borden's midstream *Miranda* warnings, without a significant break in time or place and without informing Hickman that his pre-*Miranda* statements could not be used against him in a subsequent criminal prosecution, did not inform Hickman of his Fifth Amendment right to silence sufficiently to enable him to knowingly determine whether to exercise that right. Accordingly, the trial court erred by admitting Hickman's post-*Miranda* statements.³

¶17 We reverse Hickman's failure to register as a sex offender conviction and remand for further proceedings consistent with this opinion.

BRIDGEWATER and ARMSTRONG, JJ., concur.

³ Because we hold that the trial court erred by refusing to suppress Hickman's statements, we do not address his corpus delicti claim.

[No. 39070-1-II. Division Two. September 14, 2010.]

WESTAR FUNDING, INC., ET AL., *Respondents*, v. RICHARD E. SORRELS ET AL., *Appellants*.

- [1] **Judgment — Summary Judgment — Review — Undisputed Facts — Standard of Review.** A party's entitlement to summary judgment is a question of law that is reviewed de novo if there are no disputed facts.
- [2] **Limitation of Actions — Deeds of Trust — Nonjudicial Foreclosure — Limitation Period — In General.** The six-year limitation period of former RCW 4.16.040(1) (1989) for actions on written contracts applies to promissory notes secured by deeds of trust encumbering real property. A holder of a promissory note secured by a deed of trust is time barred from enforcing the note by foreclosing on the deed if foreclosure proceedings are not initiated within six years after the note becomes due.
- [3] **Limitation of Actions — Deeds of Trust — Nonjudicial Foreclosure — Limitation Period — Expiration — Effect — Right to Quiet Title.** When foreclosure of a deed of trust is statutorily time-barred, RCW 7.28.300 authorizes an action to quiet title to the property by the record owner of the property.
- [4] **Credit — Payment of Debt — Third Party Agreement To Pay — Oral Agreement — Validity — Statute of Frauds.** Under RCW 19.36.010(2), an oral contract assuming and agreeing to pay the debt of another is unenforceable. RCW 19.36.010(2) is a statute of frauds that requires a writing, signed by the party to be charged, for "every special promise to answer for the debt, default, or misdoings of another person."
- [5] **Appeal — Review — Issues First Raised in Reply Brief — In General.** An appellate court may decline to consider an issue raised for the first time in a reply brief.
- [6] **Appeal — Review — Issues Not Properly Raised — Not Developed in Brief — Absence of Authority.** An appellate court may decline to consider an issue raised by an appellant that was not developed in the briefs and in regard to which the appellant does not cite authority.
- [7] **Appeal — Frivolous Appeal — Sanctions — Scope — Attorney Fees — In General.** Under RAP 18.9(a), an appellant may be sanctioned for filing a frivolous appeal by requiring the appellant to pay attorney fees and costs to the respondent. An appeal is frivolous if it does not present any debatable issues or legitimate arguments for an extension of the law.

Nature of Action: The record owner of property purchased in a trustee's sale in foreclosure of a deed of trust

Appendix A-1

recorded in 2002 and the lender that had foreclosed the deed and forced the sale sought to quiet title to the property in favor of the record owner and moved for a preliminary injunction to restrain the prior owner of the property from conducting a foreclosure sale of the property under a 1992 deed of trust securing a 1992 promissory note.

Superior Court: After granting the plaintiffs' motion for a preliminary injunction, the Superior Court for Pierce County, No. 07-2-07660-9, Frederick W. Fleming, J., on March 6, 2009, entered a summary judgment in favor of the plaintiffs, quieting title to the property in the record owner. The court also awarded attorney fees to the plaintiffs.

Court of Appeals: Holding that the applicable statutory time limitation and the statute of frauds prohibit the prior owner from foreclosing on the 1992 note and deed of trust and that the plaintiffs are entitled to attorney fees and costs for defending against a frivolous appeal, the court *affirms* the judgment and *awards* appellate attorney fees and costs to the plaintiffs.

Frederick L. Hetter III, for appellants.

Robert J. Henry (of *Lasher Holzapfel Sperry & Ebberson PLLC*), for respondents.

LexisNexis® Research References

Washington Rules of Court Annotated (LexisNexis ed.)
Annotated Revised Code of Washington by LexisNexis

[As amended by order of the Court of Appeals November 9, 2010.]

¶1 QUINN-BRINTNALL, J. — Richard E. Sorrels appeals from a summary judgment quieting title to a piece of Gig Harbor property in Xianju Xui. Sorrels contends that the trial court erred when it found that he had no right to foreclose on a 1992 promissory note secured by a 1992 deed against the property. We hold that the statute of limitations and the statute of frauds prohibit Sorrels from foreclosing on the 1992 note. Because there are no disputed issues of material

fact, we affirm the Pierce County Superior Court's judgment quieting title to the property in Xui. In addition, because Sorrels's appeal is frivolous, we award Xui appellate attorney fees.

FACTS

¶2 This appeal arises from the sale of real property located in Gig Harbor, Washington.¹ Sorrels sold the property to David Brown in 1992. In conjunction with the sale, Sorrels had Brown execute a promissory note. The note was a two-year note that contemplated a single repayment of all principal and interest in the amount of \$33,167 upon maturity on August 3, 1994. As security for the note, Brown executed a deed of trust (1992 deed) against the Gig Harbor property. He recorded it in Pierce County on August 4, 1992.²

¶3 According to Sorrels, Brown did not pay the 1992 note when it matured on August 3, 1994. Nevertheless, Sorrels took no action to collect the note or to foreclose on the 1992 deed at that time.

¶4 In 1995, Brown executed a statutory warranty deed (1995 deed) conveying the Gig Harbor property to The R.E.S. Trust.³ Brown specifically conveyed the Gig Harbor property to Sorrels as trustee for The R.E.S. Trust. On behalf of The R.E.S. Trust, Sorrels recorded the deed on

¹ The legal description of the property at issue is

[beginning 760 feet South and 482 feet East of the Northwest corner of Lot 4, Section 6, Township 21 North, Range 1 East of the W.M., in Pierce County, Washington, thence North 47 feet; thence East 280 feet, more or less, to meander line of Glencove; thence South 44°15' East 65.61 feet along meander line; thence West 325.78 feet to the point of beginning.

Clerk's Papers at 4.

² The 1992 deed was recorded under Pierce County Auditor number 9208040744.

³ According to Sorrels, he formed The R.E.S. Trust as a revocable living trust in 1993 but by 1994, he had converted it to an irrevocable trust. R.E.S. stands for Richard E. Sorrels.

November 13, 1995.⁴ As a part of the transaction, Sorrels and Brown signed an excise tax affidavit noting that Brown executed the 1995 deed conveying the Gig Harbor property to The R.E.S. Trust, and expressly to Sorrels as trustee, in lieu of foreclosure.

¶5 In 2002, acting in his capacity as The R.E.S. Trust trustee, Sorrels borrowed \$61,500 from Westar Financial, Inc. To secure the loan, The R.E.S. Trust executed a promissory note (Westar note) and a deed of trust in the Gig Harbor property (2002 deed) in favor of Westar. Westar recorded the deed on June 19, 2002.⁵ In his copy of the loan application, Sorrels represented that the Gig Harbor property was free and clear of encumbrances. He further verified that the loan would be secured by “a first mortgage or deed of trust on the property.” Clerk’s Papers (CP) at 133.

¶6 Soon after acquiring the loan, The R.E.S. Trust defaulted on the Westar note.⁶ Westar first instigated nonjudicial foreclosure proceedings in March 2003. In total, Westar commenced four separate nonjudicial foreclosures on the Gig Harbor property. In the first three nonjudicial foreclosures, The R.E.S. Trust cured the defaults and/or reached an agreement with Westar at the last minute.

¶7 During pendency of the third foreclosure, Sorrels filed a petition for chapter 13 bankruptcy on behalf of The R.E.S. Trust. Along with the petition, Sorrels filed a schedule of assets and liabilities. He listed Westar as a secured creditor holding a secured claim against The R.E.S. Trust, but he did not list himself as a secured creditor. The chapter 13 trustee eventually moved to dismiss the petition. Sorrels responded by moving to convert the action to a chapter 11 bankruptcy. He later voluntarily dismissed The R.E.S. Trust’s bankruptcy petition.

⁴ The 1995 deed was recorded under Pierce County Auditor number 9511130390.

⁵ The 2002 deed was recorded under Pierce County Auditor number 200206210932.

⁶ Sorrels admits that The R.E.S. Trust defaulted on the Westar note.

¶8 Westar commenced the fourth nonjudicial foreclosure on January 31, 2006, after the The R.E.S. Trust did not make a promised balloon payment. During the fourth foreclosure, Sorrels filed two motions in Pierce County Superior Court to restrain the trustee sale; both were denied. Westar and The R.E.S. Trust then entered a foreclosure extension agreement. By the terms of the agreement, Sorrels acknowledged the default under the Westar note and acknowledged the amount The R.E.S. Trust owed Westar. In addition, on behalf of The R.E.S. Trust, Sorrels released any and all other claims against Westar, including “all rights, claims, demands and damages of any kind, known or unknown, existing or arising in the future.” CP at 137. In exchange for Westar’s postponement of the foreclosure sale, The R.E.S. Trust agreed to pay off the debt in full on or before February 2, 2007. At that time, The R.E.S. Trust owed Westar \$69,999.21. The parties signed the agreement on October 5, 2006.

¶9 Less than three weeks after signing the foreclosure extension agreement, John Mills, an attorney representing The R.E.S. Trust and Sorrels, sent a letter to Westar’s trustee who had commenced the fourth nonjudicial foreclosure sale of the Gig Harbor property. In the letter, Mills alleged that Sorrels individually held the 1992 note secured by a deed of trust on the Gig Harbor property. Mills further suggested that Westar would have to pay a large sum of money to Sorrels personally to avoid losing its security interest:

Anyway, it seems to me . . . that Westar is going to end up paying Rick Sorrels personally to avoid his foreclosure of the [1992] Brown Deed of Trust, and then Rick is going to turn around and loan enough money to the Trust so it can pay Westar the amount set out in the settlement agreement.

CP at 140. Stated another way, Mills suggested that Sorrels and The R.E.S. Trust could extract the money to repay the Westar loan from Westar itself.

¶10 The R.E.S. Trust did not pay its obligation to Westar by February 2, 2007, as it had promised under the foreclo-

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sure extension agreement. Instead, Sorrels filed another chapter 11 bankruptcy petition on behalf of The R.E.S. Trust on February 1, 2007. The petition automatically stayed the nonjudicial foreclosure sale of the Gig Harbor property scheduled for the next day. Then, on February 20, Sorrels voluntarily dismissed The R.E.S. Trust's chapter 11 bankruptcy petition. After the automatic stay was lifted, the Westar trustee rescheduled the nonjudicial foreclosure sale of the Gig Harbor property on April 13, 2007.

¶11 In the meantime, Mills, acting as trustee for Sorrels, recorded a notice of trustee's sale, purporting to schedule a trustee's nonjudicial foreclosure sale for the 1992 deed of trust on the Gig Harbor property. He set the foreclosure sale for May 18, 2007, approximately one month after Westar's scheduled nonjudicial foreclosure sale of the same property. He sought to recover principal, interest, late charges, fees, and costs totaling \$225,532.

¶12 On April 13, 2007, Westar foreclosed on its 2002 deed by a nonjudicial trustee's sale. No bidders appeared for the sale; consequently, the lender was the only bidder and the trustee issued a trustee's deed to Xui. Xui recorded the deed on April 30, 2007. The effect of the deed was to vest title in Xui and to divest The R.E.S. Trust from title to the property.

¶13 Despite the nonjudicial foreclosure on the Westar deed of trust, Sorrels attempted to go forward with his threatened nonjudicial foreclosure sale based on the 1992 deed. In an attempt to prevent that sale, Westar and Xui filed this lawsuit against Sorrels, individually, and Mills, in his capacity as a trustee, seeking to quiet title in favor of Xui and moving for a preliminary injunction to restrain Sorrels from conducting a nonjudicial foreclosure sale on the Gig Harbor property.

¶14 Sorrels opposed Westar and Xui's motion for preliminary injunction. In a declaration supporting his opposition, he stated,

First of all, as described on the face of the note, it matured August 23, 1994. However, the court can see that the principal

effect of the passing of maturity was to increase the interest payable from 8 1/2 % to 12 %. Thus, after August 23, 1994, [Sorrels] held a note paying 12% fully secured by waterfront property in Washington.

....

[I]n 1995, Mr. Brown transferred his title to the property to R.E.S. Trust because he was unable to pay a Note held by the R.E.S. Trust. At that time, *although nothing was reduced to writing, quite obviously R.E.S. Trust assumed the obligation to pay [Sorrels]*. Mr. Brown left town, and had turned over his property to the Trust, so he obviously wasn't going to pay [Sorrels] back. The trust acquired title to the property, but again obviously it would have to pay on the note eventually, or [Sorrels would] foreclose [his] Deed of Trust and take the property away.

Still, [Sorrels] did not ever need the cash, so on an ongoing basis, the due date was extended by agreement. Certainly, [Sorrels] never called the note in default. And, that was a mutually beneficial arrangement. The Trust held title to the property and benefited by the amount waterfront property in Washington appreciated in excess of the interest accruing on the note to [Sorrels]. [Sorrels] earned 12% on [his] money, which [he] could not possibly have received from a bank, and it was tax deferred since [he] wasn't actually getting paid annually. So, it was a win-win deal.

Throughout all this time, the R.E.S. Trust was waiving any statute of limitations on the note. . . .

....

[I]t should be pretty obvious that [Sorrels] never intended to just waive [his] right to repayment of the note. So, for years and years, what happened is that, by mutual agreement [between Sorrels and his R.E.S. Trust], the note's due date was extended, the Trust got property appreciation and [Sorrels] got 12% interest which was tax deferred because it simply accrued as a debt secured by the Deed of Trust.

CP at 33 (emphasis added).

¶15 Sorrels made no attempt to explain why he had previously represented to Westar that the Gig Harbor property was free of liens and encumbrances. The trial court granted Westar's motion for a preliminary injunction.

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¶16 On January 20, 2009, Westar and Xui filed a motion for summary judgment seeking to quiet title of the Gig Harbor property. In addition, they sought attorney fees and costs. Following briefing and argument, the trial court granted Westar and Xui's motion and awarded them reasonable attorney fees and costs. Sorrels appeals. Westar and Xui respond jointly.

ANALYSIS

STANDARD OF REVIEW

[1] ¶17 Where, as here, there are no disputed facts, the issue of summary judgment is a question of law we review de novo. *Walcker v. Benson & McLaughlin, PS*, 79 Wn. App. 739, 741, 904 P.2d 1176 (1995) (citing *Rivett v. City of Tacoma*, 123 Wn.2d 573, 578, 870 P.2d 299 (1994)), review denied, 129 Wn.2d 1008 (1996). Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. CR 56(c).

¶18 Here, the trial court granted Westar and Xui's motion for summary judgment as a matter of law. In doing so, it ordered that title to the property at issue is quieted in Xui under the deed he recorded on April 30, 2007. Because the statute of limitations and statute of frauds bar Sorrels's foreclosure on the 1992 deed as a matter of law, we affirm the trial court's summary judgment quieting title to the property in Xui.

STATUTE OF LIMITATIONS

[2, 3] ¶19 Sorrels contends that the statute of limitations does not bar him from collecting on the 1992 deed. The 1992 deed came due in 1994 and the six-year statute of limitations on collection of the note expired in 2000. The statute of limitations bars Sorrels's collection action and the trial court did not err in granting Xui quiet title to the property.

¶20 Former RCW 4.16.040 (1989) governs the statute of limitations on promissory notes and deeds of trust. That

statute imposes a six-year limitation for "[a]n action upon a contract in writing, or liability express or implied arising out of a written agreement." Former RCW 4.16.040(1). When an action for foreclosure on a deed of trust is barred by the statute of limitations, RCW 7.28.300 authorizes an action to quiet title. *See Walcker*, 79 Wn. App. at 742-46; *Jordan v. Bergsma*, 63 Wn. App. 825, 828-31, 822 P.2d 319 (1992).

¶21 In 1992, Brown executed a \$33,167 promissory note in favor of Sorrels. That same year, he recorded the deed of trust against the property to secure the note. Brown was to repay the note on August 3, 1994, but he failed to do so. Sorrels did not file an action to collect on the 1992 note until February 16, 2007, over 12 years after it came due. Because he did not initiate his foreclosure within the six-year limitation period, Sorrels is time barred from foreclosing on the 1992 promissory note. RCW 4.16.005; RCW 7.28.300; *Walcker*, 79 Wn. App. at 742-46.

¶22 Sorrels maintains that only defendants may plead RCW 7.28.300 as a bar to foreclosure. He contends that, as plaintiffs, Westar and Xui may not plead the statute of limitations because they initiated the quiet title action. We disagree. Sorrels's argument conflicts with RCW 7.28.300's plain language. RCW 7.28.300 states,

The record owner of real estate may maintain an action to quiet title against the lien of a mortgage or deed of trust on the real estate where an action to foreclose such mortgage or deed of trust would be barred by the statute of limitations, and, upon proof sufficient to satisfy the court, may have judgment quieting title against such a lien.

(Emphasis added.)

¶23 Xui is a record owner of the Gig Harbor property. As such, RCW 7.28.300 authorizes him to maintain an action to quiet title of that property.

¶24 The facts here are undisputed and simple. Sorrels failed to foreclose on the 1992 deed within the six-year statute of limitations; accordingly, he lost the right to do so.

Appendix A-5

RCW 7.28.300. Xui legally acquired the Gig Harbor property through Westar's nonjudicial foreclosure sale and, under RCW 7.28.300, he was a record owner of the property and had a right to maintain an action to quiet title to the property. The trial court properly granted summary judgment and quieted title in Xui's favor. *See* CR 56(c).

STATUTE OF FRAUDS

¶25 Sorrels also contends that he and The R.E.S. Trust tolled the statute of limitations through a series of ratified agreements. He argues that Brown transferred title to the property to The R.E.S. Trust and The R.E.S. Trust then assumed the obligation to pay the note. According to Sorrels, The R.E.S. Trust tolled the debt through partial payments and use of the property that Sorrels authorized.

[4] ¶26 Under the statute of frauds, an oral contract assuming and agreeing to pay the debt of another is unenforceable. RCW 19.36.010(2), the statute of frauds, requires a writing, signed by the party to be charged, for "every special promise to answer for the debt, default, or misdoings of another person." Sorrels provided no documentary evidence that The R.E.S. Trust assumed an obligation to pay Brown's debt to Sorrels.⁷ Moreover, Sorrels stated in his declaration that "nothing was reduced to writing." CP at 33. Accordingly, there is insufficient evidence supporting his contention that, through a series of agreements, he and The R.E.S. Trust properly tolled the six-year statute of limitations. Therefore, the statute ran and bars Sorrels's attempt to foreclose. Because there are no genuine issues of material fact, the trial court did not err when it granted

⁷ The document relied by on Sorrels, "Addendum to Promisory [sic] Note" (CP at 187), does not support his claim that The R.E.S. Trust assumed any obligation to pay Brown's debt to Sorrels. Contrary to Sorrels's contention, the fact that The R.E.S. Trust received legal ownership of the property at issue does not, by itself, obviate Brown's original obligation to pay Sorrels. The addendum, signed twice by Sorrels as both "Beneficiary" and "Trustee for R.E.S. Trust" but not by Brown, shows only that the deed of ownership had passed from Brown to The R.E.S. Trust and that Sorrels and The R.E.S. Trust agreed Sorrels would have "unrestricted use of the entire garage portion of the subject property without cost until such time that the Promissory Note is paid in full." CP at 187. Neither does the fact that the addendum purports to extend "the due date of the final payment" to December 2013 affect our analysis. CP at 187. On its face, the addendum appears to extend *Brown's* due date to pay Sorrels to December 2013, but the debt at issue here is The R.E.S. Trust's debt owed to Westar.

summary judgment and quieted title in Xui's favor. *See* CR 56(c).⁸

ATTORNEY FEES

A. ATTORNEY FEES ON SUMMARY JUDGMENT

[5, 6] ¶27 The trial court awarded Westar and Xui reasonable attorney fees and costs based on the 1992 promissory note's attorney fees provision. Sorrels did not raise a timely challenge to the trial court's attorney fee award in his opening brief. Instead, without citing any authority, Sorrels asserts that the trial court's attorney fee award was improper for the first time in his reply brief. An issue raised and argued for the first time in a reply brief is too late to warrant consideration. *In re Marriage of Sacco*, 114 Wn.2d 1, 5, 784 P.2d 1266 (1990). Moreover, we do not consider arguments that are not developed in the briefs and for which a party has not cited authority. *Smith v. King*, 106 Wn.2d 443, 451-52, 722 P.2d 796 (1986). The trial court's attorney fee award stands.

B. ATTORNEY FEES ON APPEAL

[7] ¶28 Both parties request attorney fees on appeal under RAP 18.1. Sorrels's appeal presents no debatable issues or legitimate arguments for an extension of the law and is frivolous. Accordingly, under RAP 18.9(a), we award Westar and Xui reasonable appellate attorney fees and costs on compliance with RAP 18.1.

BRIDGEWATER and ARMSTRONG, JJ., concur.

After modification, further reconsideration denied November 9, 2010.

[Nos. 38156-7-II; 38376-4-II. Division Two. September 21, 2010.]

THE STATE OF WASHINGTON, *Respondent*, v. THOMAS W.
DECLUE, *Appellant*.

[1] **Criminal Law — Plea of Guilty — Withdrawal — Review — Standard of Review.** A trial court's ruling on a defendant's motion to withdraw a plea of guilty is reviewed for abuse of discretion.

⁸ Because we affirm the trial court's grant of summary judgment and order quieting title to the property, we do not address Westar's remaining issues.

Appendix A-6

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

WESTAR FUNDING, INC., et al.,)
)
 Plaintiffs,)
)
 vs.)
) No. 07-2-07660-9
RICHARD E. SORRELS, et al.,)
)
 Defendants.)

VERBATIM REPORT OF PROCEEDINGS
CIVIL MOTION HEARING
PAGES 1 - 7

BE IT REMEMBERED that on the 6th day of March, 2009, the above-entitled cause came on duly for hearing before the HONORABLE FREDERICK W. FLEMING, Superior Court Judge in and for the County of Pierce, State of Washington; the following proceedings were had, to-wit:

REPORTED BY:
Dorylee Reyes, CRR
Official Reporter to Superior Court Dept. 7
COA NO. 82192

Appendix B-1

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APPEARANCES

FOR THE PLAINTIFF:

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FOR THE DEFENDANT:

FREDERICK L. HETTER, III

Attorney at Law

913 Powell Street

Steilacoom, WA 98388

(253) 759-6853

1 MARCH 6, 2009

2 CIVIL MOTION DOCKET

3 * * * * *

4 THE COURT: Westar Funding v. Sorrels.

5 MR. HETTER: That matter is ready.

6 THE COURT: All right. This is Cause Number
7 07-2-07660-9.

8 And your name, for the record?

9 MR. HENRY: Robert Henry, representing the
10 plaintiff, Your Honor.

11 THE COURT: All right.

12 MR. HETTER: Frederick Hetter, representing
13 Sorrels.

14 THE COURT: All right. What do you want to tell
15 me?

16 MR. HENRY: Your Honor, this little problem began
17 in 2002 when my client, Westar Funding, loaned Mr. Sorrels
18 \$61,000; actually, loaned it to -- Mr. Sorrels has a trust
19 which he calls the RES Trust. Those are Mr. Sorrels'
20 initials.

21 And at the time of this loan in 2002, Mr. Sorrels
22 signed a loan application in which he agreed to pledge some
23 property he owns in Gig Harbor and give the lender first
24 position deed of trust. And he did sign a note and gave a
25 deed of trust, and it was recorded, and then the problems

1 began. Mr. Sorrels never was able to pay the loan back.

2 Mr. Froland, the trustee under the deed of trust,
3 commenced four different deed of trust foreclosures, each
4 one with a cure at the last minute; the fourth one ending
5 in a trustee sale in April of 2007. The property was
6 foreclosed and it was sold at trustee sale to the other
7 plaintiff here, Mr. Xui.

8 THE COURT: What year was that trustee sale?

9 MR. HENRY: April 13th, 2007.

10 During the time that it took between the defaults
11 in '03 and the actual foreclose sale in '07, Mr. Sorrels
12 tried to stop these proceedings twice, with bankruptcy, and
13 failed. He tried twice here in superior court to stop the
14 foreclosure, and he failed. And so, finally, it was sold
15 at the trustee sale.

16 Just before that happened, Mr. Sorrels, through
17 his attorney J. Mills, sent a letter to the lender saying,
18 "Oh, by the way, your first deed of trust isn't really a
19 first deed of trust. It is actually second. Actually,
20 there's a 17-year-old deed of trust in favor of me." In
21 other words, my trust owes money to me, and I'm going to
22 foreclose it. So we had to stop that and we came in here
23 and we appeared a year and a half ago.

24 THE COURT: And you did stop that. And what you
25 want, now, today --

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MR. HENRY: A quiet title.

THE COURT: You want a summary judgment quieting title --

MR. HENRY: That is correct.

THE COURT: -- in -- How do you spell that name?

MR. HENRY: In Mr. Xui. X-U-I.

THE COURT: And it is pronounced "chewy"?

MR. HENRY: That's what he tells me.

THE COURT: What do you want to tell me, Mr. Hetter?

MR. HETTER: Well, there's no way that can happen. What really happened here is that there is a first primary underlying recorded interest in this property which is of record with the Pierce County Auditor. And they purchased it subject to that because they bought out the second priority note, the second mortgage. You can never gain priority over a first filed recorded interest by any recorded sale which doesn't have an impact on that sale. So, everybody knew. Mr. Xui bought this from this sale, and they foreclosed on the second, but that was all recorded after -- after, in time, on the first. So, there's absolutely no way that, legally --

THE COURT: I'm not buying it. I'm not buying it. I think this looks to me like -- An appellate court can tell me I'm wrong, but it looks to me like this is an

1 abuse of the justice system. And I'm not going to be part
2 of it. So I'm going to grant the motion for summary
3 judgment and quiet title in Mr. Xui.

4 Do you have an order?

5 MR. HENRY: I do, Your Honor. I just handed it
6 to the clerk. It's the same order that I served my motion.
7 I just added the additional pleadings that came in after I
8 filed my motion.

9 And here's a copy for you.

10 MR. HETTER: Your Honor, has the Court had an
11 opportunity to review all the materials?

12 THE COURT: I did, and that's why I said what I
13 said. And somebody can read it just like I did, on the
14 appellate level, and see if they disagree with me.

15 MR. HETTER: Yes, sir.

16 (Proceeding concluded.)
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CERTIFICATE

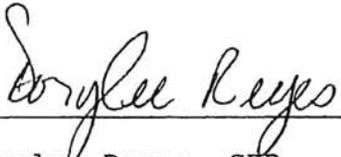
STATE OF WASHINGTON

COUNTY OF PIERCE

I, Dorylee Reyes, Official Shorthand Reporter in and for the County of Pierce, State of Washington, do hereby certify that the foregoing proceedings were reported by me on said date and reduced to computer-aided transcript form.

I further certify that the foregoing transcript of proceedings is a full, true and correct transcript of my machine shorthand notes of the aforementioned matter.

Dated this 1st day of May, 2009.



Dorylee Reyes, CRR