

No. 47988-5-II

Court of Appeals, Div. II,
of the State of Washington

Patrick Cuzdey,

Appellant,

v.

Patricia Landes, et al.,

Respondents.

Brief of Appellant

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1. Introduction

Patrick Cuzdey entered into an oral agreement with his in-laws (Benny and Patricia Landes) to purchase from them a five-acre parcel of land and a mobile home to live in with his wife (Landes' daughter, Karla Wallen¹) and their children. Cuzdey immediately moved in and began improving the land. Over the next 12 years, Cuzdey paid off the agreed purchase price through a combination of cash payments and labor on behalf of Landes.

With Cuzdey's permission, Landes retained paper title to the property, at least in part to enable them to obtain financing for a second mobile home, which was installed on the property as a residence for Landes, enabling them to be closer to the family. These informal arrangements between family members worked fine for many years, until Wallen divorced Cuzdey in 2014. Suddenly, Cuzdey was an outsider. Landes refused to acknowledge any obligations to Cuzdey. Landes initiated eviction proceedings. In order to protect the property he believed to be his, Cuzdey filed this quiet title action.

The proceedings in this action have been contentious and confusing, even, it seems, to the trial court judge. After a series of amended summary judgment motions, supported by over 500 pages of unauthenticated documents without any foundational testimony, the trial court dismissed all of Cuzdey's claims. Cuzdey appeals. Material facts remain in dispute.

¹ Ms. Wallen was born Karla Landes. She was known as Karla Cuzdey while married to Patrick Cuzdey. She has since remarried and is known as Karla Wallen. To avoid confusion, this brief will refer to her throughout by her current name.

2. Assignments of Error

Assignments of Error

1. The trial court erred in dismissing Cuzdey's quiet title action on summary judgment.
2. The trial court abused its discretion in awarding attorney's fees and costs under RCW 4.84.185.

Issues Pertaining to Assignments of Error

1. Whether Landes waived the protections of the Deadman's Statute through testimonial statements submitted in support of her motion for summary judgment (assignment of error #1).
2. Whether the Declaration of Jacob Cuzdey is not barred by the Deadman's Statute where Jacob Cuzdey has no direct, immediate interest in the outcome of the litigation (assignment of error #1).
3. Whether Cuzdey's quiet title action is not barred by any applicable statute of limitations (assignment of error #1).
4. Whether Cuzdey presented sufficient admissible evidence to create genuine issues of material fact in support of his quiet title claims to the real property and the NOVA mobile home (assignment of error #1).
5. Whether Cuzdey's quiet title action was not frivolous as a whole where at least one claim was supported by undisputed facts (assignment of error #2).
6. Whether the trial court's award of fees was based on untenable grounds where, contrary to the court's mistaken belief, Cuzdey had made no prior, binding statement that he had no property (assignment of error #2).

3. Statement of the Case

The facts in this matter are hotly contested. *See* CP 72-83;² RP, Aug. 7, 2015, at 39:7-10.³ Because the trial court decision was for summary judgment, Cuzdey presents here the facts and inferences therefrom in a light most favorable to Cuzdey, the nonmoving party.

3.1 Cuzdey entered into an oral contract to purchase real property and a mobile home from Landes, took possession of the property, and performed his obligations in full.

Landes purchased the real property in 1983 for \$9,000 or \$10,000. CP 162; Attachments 2, 3.⁴ In 1984, Cuzdey and Landes agreed that Landes would sell the real property to Cuzdey for \$10,000, which Cuzdey would repay through a combination of cash payments and labor performed on other property owned by Landes. CP 162-64, 190, 192. Cuzdey cleared trees from the property, moved a single-wide mobile home onto the property, and installed a well, power, and septic system. CP 163, 189-90. Landes' name appears on the associated paperwork because Landes still held title while Cuzdey was making payments and because Landes sometimes paid upfront

² The contest is well-illustrated by the Declarations of Patricia Landes and Karla Wallen, submitted in support of Landes' original summary judgment motion, which relate the allegations of Cuzdey's amended complaint, followed by Landes and Wallen's contrary version of the facts.

³ The Court: "To say this is a litigious matter is a real understatement. And I understand that there are strong feelings and emotions on the part of both sides. I am not going to go there."

⁴ Counsel does not yet have CP numbers for the Second Amended Memorandum and its Attachments, which were designated in a supplemental designation of clerk's papers. This brief will cite the Attachments by number as "Att."

for materials or labor, for which Cuzdey would pay them back over time. CP 190, 198; *e.g.*, CP 105-07.

In 1985, Landes purchased a NOVA mobile home and agreed to sell it to Cuzdey for the same price Landes paid, on the same installment terms that Landes obtained from the bank. CP 115, 191. Cuzdey made monthly payments directly to the bank. CP 191. Landes admits that Cuzdey paid off the loan for the NOVA several years ago. CP 7, 73.

Over the next 13 years, Cuzdey made numerous improvements to the property for his own benefit, including clearing and re-grading portions of the property; making improvements to the NOVA; and building several large buildings (a 1,200 square foot barn, a 2,480 square foot shop for Cuzdey's business, and a 950 square foot utility building). CP 164, 192. Cuzdey would not have performed such extensive work, or operated a heavy-equipment and material-intensive business on the property if he did not believe he was the true owner. CP 192, 196. Cuzdey had exclusive control of the property for those 13 years. CP 201.

By 1997, Cuzdey had paid off the purchase price of the real property, through a combination of cash payments and labor, including extensive work on Landes' Lacey home; repairing and rebuilding Landes' vehicles, motor homes, and equipment; and performing repairs for Landes' friends. CP 192. Cuzdey was not paid for this work, but he did not do it as a volunteer; he understood that Landes accepted the work as part of Cuzdey's payment for the property. CP 192-93.

3.2 Cuzdey extended the time for Landes to transfer title to Cuzdey.

Cuzdey never expected to receive paper title to the property right away. CP 197. Landes asked Cuzdey on multiple occasions to allow them to stay on title in order to use the land as collateral for loans or purchases. *Id.* For example, in 1997, Landes purchased a Goldenwest mobile home, which Cuzdey agreed could be located on a portion of the property for Landes to live out the rest of their days. CP 163, 199-200; 2nd Am. Memo. at 3. After Benny Landes' death in 2001, Patricia Landes refinanced. CP 148; Att. 69. Cuzdey agreed to these arrangements, relying on Landes' promises that they would transfer title eventually. CP 197.

Since 1997, Landes and Cuzdey have lived on the property in their respective mobile homes. Neither charged rent from the other. *See* CP 195, 200. All parties were, apparently, satisfied with their unwritten arrangements and trusted that they could rely on family to be true to their word.

3.3 Immediately after Cuzdey's divorce from Landes' daughter, Landes claimed ownership and sought to evict Cuzdey from the property.

Everything changed in 2014, when Wallen petitioned for divorce from Cuzdey. *See* CP 310.⁵ The divorce was uncontested. CP 202. Cuzdey and Wallen agreed between them how to divide the marital property and did not ask the court to get involved. CP 82, 202. The divorce was final in May

⁵ The same document was presented to the trial court in connection with the summary judgment motion, at Att. 72.

2014. CP 152-54. Landes served Cuzdey a 20-day notice to terminate tenancy the very next month. CP 155.

Prior to the divorce, Patricia Landes had always acknowledged Cuzdey's rights to the land and the NOVA. CP 167, 197. The initiation of the eviction process immediately after the divorce in 2014 was the first notice to Cuzdey that Landes was claiming full ownership. CP 197. In order to defend his rights to the land and the NOVA, Cuzdey filed this quiet title action. CP 1-5.

3.4 After Cuzdey sued, Landes filed multiple iterations of a motion for summary judgment.

Landes filed a motion for summary judgment in February 2015, seeking dismissal of Cuzdey's claims and an award of attorney fees under CR 11 or RCW 4.84.185. CP 10,19-20. The motion was supported by numerous unauthenticated documents (CP 22-71) as well as declarations of Patricia Landes and Karla Wallen, in which they testified, among other things, that there was never any agreement between Cuzdey and Landes regarding the land (CP 73, 79, 82); that there **was** an agreement between Cuzdey and Landes regarding the NOVA (CP 73, 80); that Cuzdey had paid off the NOVA (CP 73, 80); that any work Cuzdey did to improve the land was as part of family projects, not as payment (CP 74, 80); and that Cuzdey and Wallen handled the division of their marital property by verbal agreement outside of court (CP 73, 80, 82).

In the motion, Landes argued that Cuzdey's claim was barred by collateral estoppel because Cuzdey and Wallen did not list any real property

in their divorce decree (CP 13-15); that Cuzdey could not prove adverse possession because his possession was not exclusive or hostile (CP 15-16); that Cuzdey's claim was barred by the statute of frauds (CP 17-18); and that Cuzdey's claim would result in unjust enrichment (CP 18-19).

Landes filed an "amended" motion in March. The amended motion was supported by largely the same, unauthenticated documents as the original motion (CP 104-47, 151-55), with the addition of Benny Landes' death certificate (CP 148) and a community property agreement between Benny and Patricia Landes (CP 149-50). The declarations of Patricia Landes and Karla Wallen were not included with the amended motion.

In the amended motion, Landes added arguments that the Deadman's Statute barred all of Cuzdey's evidence of oral agreements or transactions with Benny Landes (CP 88-92); and that Cuzdey failed to join an indispensable party by failing to serve Karla Wallen (CP 99-102). Landes repeated all of the other arguments from the original motion. CP 92-98, 102-03. The amended motion does not explain the reasons for the amendment or the intended effect of the amendment. Landes did not move to strike the previously filed declarations.

Cuzdey, represented by new counsel, sought leave to file a Second Amended Complaint. *See* CP 172. The parties agreed to the filing of the Second Amended Complaint, to be followed by a Second Amended Motion for Summary Judgment. CP 172-74.

The Second Amended Complaint expressly states that the claims relate to both the real property and the NOVA mobile home. CP 161.

Cuzdey stated four claims: 1) Quiet title, based on theories of oral contract with partial performance, adverse possession, or other equitable grounds (CP 167-68); 2) Quantum meruit, an alternative claim for the value of improvements Cuzdey made to the property (CP 168); 3) Conversion of Cuzdey's personal property (CP 168); and 4) Constructive trust (CP 169).

The Second Amended Motion for Summary Judgment made all of the arguments previously raised in the first amended motion, and added new arguments that Cuzdey could not prove the elements of an oral contract, quantum meruit, or constructive trust; that Cuzdey's claims were barred by the statute of limitations; and that Cuzdey's claims were barred by the doctrine of laches; *See* CP 175-76. The Second Amended Motion was supported by nearly 600 pages of unauthenticated documents without any foundational testimony.

Cuzdey responded by requesting a continuance under CR 56(f) because of the unduly burdensome volume of attachments to the second amended motion and because Landes had failed to properly respond to Cuzdey's discovery requests. CP 220-22. Cuzdey moved to strike Landes' attachments because they were submitted without authentication or foundation. CP 222-23. On the merits, Cuzdey argued that the Deadman's Statute did not apply (CP 223-25); that Cuzdey had presented evidence of the elements of an oral contract (CP 225-26); that Cuzdey had presented evidence of the elements of part performance as an exception to the statute of frauds (CP 226); that there were genuine issues of material fact on Cuzdey's adverse possession claim (CP 226-27); that the statute of limitations

and the doctrine of laches did not bar Cuzdey's claims (CP 227-28); that collateral estoppel did not bar Cuzdey's claims (CP 228-29); that there were genuine issues of material fact on Cuzdey's alternative claims of quantum meruit and constructive trust (CP 229-30); that there were genuine issues of material fact on Landes' defense of unjust enrichment (CP 230); and that Cuzdey's quiet title action was not frivolous (CP 230-31).

In reply, Landes argued that Cuzdey failed to meet the standard for a CR 56(f) continuance (CP 233-34); attempted to justify or cure the lack of authentication (CP 234-37); objected to Cuzdey's responsive declarations (CP 237-40); and argued that any admissible evidence was insufficient to raise a material issue of fact (CP 240-42).

3.5 The trial court dismissed Cuzdey's claims.

The trial court denied Cuzdey's motion for a continuance, without explaining its reasons. RP 62.⁶ The trial court indicated that it was deciding the matter on the basis of the first amended summary judgment motion. RP 64.⁷ The trial court held that much of Cuzdey's evidence was barred by the Deadman's Statute, and any that was admissible failed to raise a defense to the Statute of Frauds. RP 64-65. In the alternative, the trial court reasoned that had it considered the second amended motion and its attachments, it

⁶ Except as otherwise noted, all citations to "RP" refer to the Verbatim Report of Proceedings transcribed by Pamela R. Jones, which combined the hearings of April 24, May 15, and June 19, 2015.

⁷ At RP 64, the trial court says "the original" motion, but later in the same hearing clarifies that it meant the first amended motion. RP 67-68.

could also have dismissed Cuzdey's claims on the basis of statute of limitations, laches, or estoppel. RP 65.

In a subsequent hearing, the trial court held that Cuzdey's action was frivolous under RCW 4.84.185. RP, Aug. 7, 2015, at 22. The trial court based its decision on Landes' reading of the divorce decree as a statement by Cuzdey that he owned no real property, as well as on the reasons for dismissal indicated in the summary judgment ruling. RP, Aug. 7, 2015, at 23. The trial court awarded \$36,000 in attorney fees, without any findings or analysis on the record. RP, Aug. 7, 2015, at 25; CP 382-83.

4. Summary of Argument

The trial court erred in dismissing Cuzdey's claims on summary judgment because there were genuine issues of material fact. In Part 5.1.2, Cuzdey will demonstrate that Landes waived the protections of the Deadman's Statute and that the Declaration of Jacob Cuzdey is not subject to those protections even if the statute had not been waived. Part 5.1.3 will show that Cuzdey presented sufficient admissible evidence to remove the oral agreement from the operation of the Statute of Frauds. Part 5.1.4 will demonstrate that the statute of limitations does not bar Cuzdey's quiet title action. Part 5.1.5 will argue that, after a proper resolution of these issues, there remain genuine issues of material fact that preclude summary judgment dismissal, including the undisputed fact that Cuzdey has paid off the loan for the NOVA mobile home. This Court should reverse the trial court's summary judgment order, vacate the judgment, and remand for further proceedings.

Even if this Court does not agree with all of Cuzdey's arguments above, the trial court still abused its discretion in awarding attorney fees under RCW 4.84.185. Part 5.2.2 will argue that Cuzdey's action could not be frivolous as a whole because the undisputed evidence established that Cuzdey had paid in full for the NOVA, making at least one claim supported by reasonable arguments in law and fact. Additionally, Part 5.2.3 will demonstrate that the trial court's decision rested on untenable grounds because, contrary to the trial court's mistaken belief, Cuzdey never stated that he owned no property. This Court should reverse the trial court's award of fees under RCW 4.84.185, vacate the judgment, and remand for further proceedings on any remaining claims.

5. Argument

5.1 The trial court erred in dismissing Cuzdey's claims on summary judgment because there were material facts in dispute.

5.1.1 Summary judgment decisions are reviewed de novo.

This Court reviews summary judgment orders de novo. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). This Court engages in the same inquiry as the trial court, considering all facts and reasonable inferences in the light most favorable to the nonmoving party. *Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 491, 183 P.3d 283 (2008). Summary judgment must be denied if reasonable persons can reach more than one conclusion from the all of the evidence. *Hansen v. Friend*, 118 Wn.2d 476,

485, 824 P.2d 483 (1992). This Court should reverse dismissal of Cuzdey's claims because there are genuine issues of material fact. *See* CR 56(c).

5.1.2 Cuzdey's quiet title action, and supporting evidence, was not barred by the Deadman's Statute.

The Deadman's Statute, RCW 5.60.030, is intended to protect a party who derives title from a deceased person, on the theory that it would be unfair for the court to decide an issue based only on the opposing party's side of the story. "Death having closed the lips of one party, the law closes the lips of the other." *In re Cunningham's Estate*, 94 Wash. 191, 193, 161 P. 1193 (1917). The statute is intended as a shield from the enforcement of claims that would otherwise be impossible to defend. *Id.*

The statute provides, in relevant part:

[I]n an action or proceeding where the adverse party sues or defends as ... deriving right or title by, through or from any deceased person, ... a party in interest or to the record, shall not be admitted to testify in his or her own behalf as to any transaction had by him or her with, or any statement made to him or her, or in his or her presence, by any such deceased ... person.

RCW 5.60.030.

The Deadman's Statute bars testimony of an interested party about a transaction with the deceased. For purposes of the statute, an interested party is one who stands to gain or lose in the action in question. *Bentzen v. Demmons*, 68 Wn. App. 339, 344, 842 P.2d 1015 (1993). A transaction is any event of which the deceased, if still living, would have been able to contradict the interested party from his own personal knowledge. *Id.*

Testimony of a negative character—that is, what a transaction was not—is also excluded. *Id.* at 345. Documentary evidence is not excluded, but testimony about the meaning of the documents is excluded. *Erickson v. Kerr*, 69 Wn. App. 891, 899-901, 851 P.2d 703 (1993).

“The protection of the statute may be waived, however, when the protected party introduced evidence concerning a transaction with the deceased. Once the protected party has opened the door, the interested party is entitled to rebuttal.” *Bentzen*, 68 Wn. App. at 345. Submission of testimony in connection with a summary judgment proceeding waives the statute, opening the door to rebuttal testimony in that proceeding and at a subsequent trial. *Id.*

The trial court erred in applying the Deadman’s Statute in this case. First, Landes waived the protections of the statute through her submissions to the court in connection with her summary judgment motion. Second, Jacob Cuzdey’s testimony is not barred because he is not an interested party under the statute.

5.1.2.1 Landes waived the protections of the Deadman’s Statute through declarations submitted with the original summary judgment motion.

Landes testified by way of declaration submitted in connection with her original summary judgment motion. CP 72-78. In that declaration, Landes testified, “There was never a written or an oral contract between my late husband, myself, and the Plaintiff.” CP 73. “There were no cash payments and no payments of monies in any form, with the exception of the

monthly loan payments and yearly property tax payments on the Nova mobile home.” CP 75. This testimony went to the heart of Cuzdey’s claims and opened the door to rebuttal testimony from Cuzdey regarding these transactions. *See Bentzen*, 68 Wn. App. at 345. Landes never withdrew the declaration or moved to have it stricken from the record prior to the trial court’s ruling on the summary judgment motion.

Landes admitted that this testimony would waive the statute. When the trial court indicated it was deciding the case based on the original motion, Landes objected:

Your Honor, I have to raise an issue there because the first original amend -- the original complaint contains a declaration from Patricia Landes. I cannot rely on that. It was amended to not include that. **If you rely on that original summary judgment, you are allowing waiver of the Deadman’s** ... You have to rely on the first amended summary judgment or the second amended summary judgment for your Deadman arguments to apply.

RP 67 (emphasis added).

Landes argued that there was no waiver because there was no contested hearing. *E.g.*, CP 239 (citing *Estate of Lennon v. Lennon*, 108 Wn. App. 167, 176, 29 P.3d 1258 (2001)). In *Estate of Lennon*, the court held that the protected party did not waive the protections of the statute by failing to object to testimony from an interested party that was presented in uncontested hearings. *Estate of Lennon*, 108 Wn. App. at 176. When the same testimony was presented in connection with a summary judgment motion, the protected party objected and thereby preserved the protections of the

statute. *Id.* That is not what has happened in this case. Here, waiver has occurred by Landes herself submitting testimony in connection with her summary judgment motion—a contested hearing. Landes never formally withdrew that testimony or moved to strike it from the record. Landes could only avoid waiver if all “evidence of transactions between the interested party and the decedent have been completely purged.” *Id.*⁸

5.1.2.2 Landes waived the protections of the Deadman’s Statute through testimony of counsel in the first and second amended memoranda.

Even if the declaration submitted with the original motion is not a waiver, Landes’ first and second amended memoranda in support of the motion waived the statute through the testimony of counsel. Both memoranda include a Statement of Facts, supported only by the unauthenticated documents attached without any foundational testimony. Both Statements of Facts go far beyond the evidence in the documents themselves, providing context that does not claim to be supported by any testimony.⁹ This additional context is improper testimony by counsel, to which Cuzdey must have an opportunity to respond (and he did, through his own testimony). The import of counsel’s testimony is that Landes were the true owners of the property and never had any agreement to sell to Cuzdey.

⁸ In *Estate of Lennon*, the estate submitted deposition transcripts that had been redacted to remove all evidence of a transaction with the decedent, and therefore had not waived the statute. *Id.* at 175-76. Here, Landes submitted the testimony in connection with a contested hearing and never removed it from the record.

⁹ Indeed, if they are supported by any testimony at all, it could only be by the declarations of Landes and Wallen submitted with the original motion.

For example, counsel testified,

- “Landes ... purchased [the property] **for their future primary residence.**” CP 86 (emphasis added); 2nd Am. Memo. at 1.
- “[**Cuzdey**] **needed a place to live.** Landes ... purchased and placed a single-wide mobile home on a portion of the subject property **for the Cuzdeys to live.**” CP 87 (underline in original, bold emphasis added); 2nd Am. Memo. at 2.
- “[**Cuzdey**] **paid no rent** to live on the real property that the Nova Commodore was placed on **as Mr. and Mrs. Landes were helping their daughter.**” 2nd Am. Memo. at 3 (emphasis added).
- “Landes purchased for themselves a 1996 Goldenwest double wide manufactured home and installed it **on the portion of the subject property that they had reserved for their retirement residence.**” CP 87 (emphasis added)
- “Patricia Landes has continued to live on the subject property and **continues to exercise all rights of a property owner.**” CP 87 (emphasis added); 2nd Am. Memo. at 6.

These testimonial statements have the effect of denying the existence of the alleged oral agreement. Landes is testifying, through counsel, that the only reason Cuzdey lived rent-free on the property was out of the goodness of Landes’ hearts, not because of any agreement to sell to Cuzdey.

Testimony that “concerns the transaction **or justifies an inference** as to what it really was,” whether positive or negative, falls within the reach of the statute. *Martin v. Shaen*, 26 Wn.2d 346, 352, 173 P.2d 968 (1946) (emphasis added). These statements were designed to create an inference that there was no oral agreement, and therefore open the door to rebuttal testimony by Cuzdey.

Whether through the declarations submitted with the original motion or through the testimony of counsel in the first and second amended memoranda, Landes waived the protections of the Deadman's Statute. The trial court erred in applying the statute. This Court should reverse and should consider Cuzdey's testimony.

5.1.2.3 The Deadman's Statute does not bar the testimony of Jacob Cuzdey, who is not an interested party.

Even if Landes did not waive the protections of the statute through her testimonial submissions on summary judgment, the Deadman's Statute does not bar the testimony of Jacob Cuzdey. For purposes of the Deadman's Statute, an interested party is a witness who stands to gain or lose as a direct result of the judgment in the case. *In re Estate of Sloan*, 50 Wash. 86, 91, 96 P. 684 (1908). An uncertain, remote, or contingent interest is insufficient to trigger the statute. *Id.* An heir-apparent is a competent witness in support of the claim of his ancestor. *Id.*

Jacob Cuzdey is the son of the plaintiff-appellant, Patrick Cuzdey. CP 204. He has no present interest in the property at issue in this case, and therefore is not an interested party under the statute. To the extent his testimony was excluded, the trial court erred. This Court should consider Jacob Cuzdey's testimony.

5.1.3 Cuzdey’s quiet title action was not barred by the statute of frauds because Cuzdey presented evidence of part performance.

The Statute of Frauds generally requires that any transaction for the conveyance of real property must be in writing. RCW 64.04.010. However, part performance removes a contract from the statute of frauds if a party is able to show: “(1) delivery and assumption of actual and exclusive possession; (2) payment or tender of consideration; and (3) the making of permanent, substantial and valuable improvements, referable to the contract.” *Pardee v. Jolly*, 163 Wn.2d 558, 567, 182 P.3d 967 (2008). In such a case, the contract is enforceable even if some or all of the ordinary requirements of a writing (*e.g.*, a legal description) are missing. *Id.* at 568.

Here, Cuzdey has presented evidence to establish each of these three elements. Cuzdey had actual and exclusive possession of the property from 1984 until 1996, when Landes installed their Goldenwest home with Cuzdey’s permission. In 1984, Cuzdey cleared trees from the property, moved a single-wide mobile home onto the property, and installed a well, power, and septic system. CP 163, 189-90. Over the next 13 years, Cuzdey made numerous improvements to the property for his own benefit. CP 164, 192. Cuzdey had exclusive control of the property for those 13 years. CP 201. Landes did not reside on the property until 1997 or ‘98. CP 197.

Cuzdey paid consideration to Landes for the real property. Cuzdey and Landes had agreed that Cuzdey would pay for the property through work for Landes. CP 190 (P. Cuzdey decl.), 205 (J. Cuzdey decl.). By 1997, Cuzdey had paid off the purchase price of the real property, through a combination

of cash payments and labor, including extensive work on Landes' Lacey home; repairing and rebuilding Landes' vehicles, motor homes, and equipment; and performing repairs for Landes' friends. CP 192(P. Cuzdey), 206 (J. Cuzdey).

Cuzdey made permanent, substantial and valuable improvements to the real property. These improvements included clearing and re-grading portions of the property; making improvements to the NOVA; and building several large buildings (a 1,200 square foot barn, a 2,480 square foot shop for Cuzdey's business, and a 950 square foot utility building). CP 164, 192. Cuzdey would not have performed such extensive work, or operated a heavy-equipment and material-intensive business on the property if he did not believe he was the true owner. CP 192, 196.

Even if some of Patrick Cuzdey's testimony is barred by the Deadman's Statute, he has still presented sufficient admissible testimony to remove the oral contract from the effect of the Statute of Frauds. Cuzdey's testimony that he had exclusive possession of the property for 13 years is not testimony of a transaction with the deceased. Jacob Cuzdey's testimony, which cannot be excluded under the Deadman's Statute, establishes the payment of consideration for the real property. Patrick Cuzdey's testimony that he made improvements to the land relates what he, himself, did with the property, not any transaction with the deceased. All of this testimony is admissible even if Landes had not waived the Deadman's Statute.

Cuzdey has presented sufficient testimony to remove the oral agreement from the Statute of Frauds. Thus, neither the Deadman's Statute

nor the Statute of Frauds is a bar to Cuzdey's quiet title action. The trial court erred in dismissing Cuzdey's claims on that basis. This Court should reverse.

5.1.4 Cuzdey's quiet title action was not barred by any applicable statute of limitations.

Actions to quiet title are not subject to the statute of limitations. *Petersen v. Schafer*, 42 Wn. App. 281, 284, 709 P.2d 813 (1985). This is so even when there is an underlying legal theory or factual allegations, such as fraud, that might otherwise be subject to a statute of limitations, where the gravamen of the action is to quiet title. *Id.*

Here, the gravamen of Cuzdey's claim is to quiet title to the real property and to the NOVA mobile home. The amended complaint, on which the original and first amended summary judgment motions were based, was titled "Amended Complaint to Quiet Title to Real Property." CP 1. Despite mentioning breach of an oral contract, the amended complaint sought, as a remedy, not damages or specific performance, but "a decree quieting Plaintiff's title in and to the subject property." Similarly, the Second Amended Complaint is focused on quieting title. It alleged, "This action concerns title to and use of real property. ... The claims herein also involve interest in a NOVA mobile home." CP 161. While mentioning breach of an oral contract, the second amended complaint identifies this claim as "First Cause of Action—Quiet Title" and alleges, "Plaintiff is entitled to an order quieting title in the Property/NOVA." CP 167-68. The other causes of action in the second amended complaint are alternative grounds for relief.

See CP 168-69. The second amended complaint prays for “an order quieting Plaintiff’s title in and to the subject Property, including the NOVA,” and other remedies in the alternative. CP 170. The gravamen of Cuzdey’s action is to quiet title. The action is not barred by any statute of limitations.

Even if the three-year statute for breach of an oral contract could apply, it would not bar Cuzdey’s action. Cuzdey testified that after he had paid off the property, Landes asked permission to retain paper title a little longer, which Cuzdey granted. CP 197 (P. Cuzdey), 207 (J. Cuzdey). This arrangement modified the oral agreement to extend the time for Landes to transfer title. Landes did not breach the agreement until instituting eviction proceedings in 2014 after Cuzdey’s divorce, making it clear that Landes was claiming ownership for herself, in breach of her promise to deliver title at a future time. Cuzdey brought this action immediately thereafter, well within any applicable statute of limitations.

The trial court erred when it opined that the statute of limitations could be an alternative ground for dismissal of Cuzdey’s claims. This Court should reverse.

5.1.5 After clearing all of these bars, genuine issues of material fact remain.

As demonstrated above, Cuzdey’s evidence is not barred by the Deadman’s Statute. Cuzdey’s quiet title action is not barred by the statute of frauds or by any statute of limitations. The Court is left to consider whether Cuzdey presented sufficient evidence in support of his claims to create genuine issues of material fact to avoid summary judgment. Cuzdey has done

so by establishing the elements of part performance, above. When a party establishes those elements, the doctrine of part performance applies and the oral agreement is enforceable. *See Pardee v. Jolly*, 163 Wn.2d 558, 567-68, 182 P.3d 967 (2008).

Cuzdey has provided testimony to establish the terms of the agreement. Landes purchased the real property in 1983 for \$9,000 or \$10,000. CP 162; Att. 2, 3. In 1984, Cuzdey and Landes agreed that Landes would sell the real property to Cuzdey for \$10,000, which Cuzdey would repay through a combination of cash payments and labor performed on other property owned by Landes. CP 162-64, 190, 192, 205.

Cuzdey has provided testimony that Landes partly performed by delivering the property and Cuzdey fully performed by making payments of cash and labor. CP 192, 201. Cuzdey has provided testimony that Landes considered the debt paid in full. CP 190, 205-06. Cuzdey's evidence states specific facts in support of his claim of title. With Cuzdey's performance of the oral agreement complete, his claim of title to the property is superior to Landes' empty claim of paper title to property they have already sold to Cuzdey.

As to the NOVA mobile home, there can be no dispute that title should be quieted to Cuzdey. In answer to Cuzdey's amended complaint, Landes admitted "that the purchase of the 1982 Commodore mobile home [the NOVA] by their daughter and the plaintiff has been paid off." CP 7. In Landes' declaration submitted with the original motion for summary judgment, Landes testified,

“Plaintiff and our daughter, Karla, were to pay us back for the loan by making the monthly payments, as well as the property taxes on the mobile home. . . . Plaintiff and his wife paid the exact amount of each monthly loan payment. . . . [T]he mobile home was paid off several years ago.”

CP 73. In the second amended memorandum in support of the motion for summary judgment, Landes asserted, in the Statement of Facts,

Mrs. Wallen and Mr. Cuzdey repaid Mr. and Mrs. Landes for the cost of the Nova Commodore by making the monthly payments on the loan for Nova Commodore mobile home directly to the bank. . . . The last payment made was in 2005 and the loan closed.

2nd Am. Memo. at 2 (underline in original).

Through these statements, Landes has admitted that there was an agreement by which Cuzdey would purchase the NOVA, and that Cuzdey fully performed. As such, Cuzdey becomes the owner, subject to any claims by Wallen that were not resolved in the divorce. Landes holds only an empty paper title to property she already sold to Cuzdey. The trial court erred when it dismissed Cuzdey’s claim to quiet title to the NOVA.

Viewing the facts and reasonable inferences therefrom in a light most favorable to Cuzdey, the nonmoving party, there are genuine issues of material fact precluding summary judgment dismissal of Cuzdey’s claims. This Court should reverse the trial court’s order and judgment and remand for further proceedings.

5.2 The trial court abused its discretion in finding Cuzdey's quiet title action frivolous under RCW 4.84.185.

5.2.1 An award of attorney's fees under RCW 4.84.185 is reviewed for abuse of discretion.

The standard of review for an award of attorney fees under RCW 4.84.185 is for abuse of discretion. *Dave Johnson Ins., Inc. v. Wright*, 167 Wn. App. 758, 786, 275 P.3d 339 (2012). A trial court abuses its discretion when its decision is unreasonable, applies the wrong legal standard, or is based on untenable grounds or untenable reasons. *Id.*

5.2.2 Where at least one claim is supported by any rational argument on the facts, such as Cuzdey's claim of title to the NOVA, an award of fees cannot be sustained.

Before an award of attorneys' fees may be made under RCW 4.84.185, the lawsuit must be determined to be frivolous **in its entirety**, and to have been advanced without reasonable cause. *Biggs v. Tail*, 119 Wn.2d 129, 133, 830 P.2d 350 (1992) (emphasis added). The court must consider all evidence presented to determine whether the action cannot be supported by any rational argument on the law or the facts. *Ahmad v. Town of Springdale*, 178 Wn. App. 333, 343-44, 314 P.3d 729 (2013). In *Biggs*, the supreme court reversed an award of fees and costs where the trial court had found only three out of four claims frivolous. *Biggs*, 119 Wn.2d at 137. A trial court abuses its discretion when it awards fees under RCW 4.84.185 when there is even one claim with sufficient support to advance to trial. *Dave Johnson*, 167 Wn. App. at 787.

As demonstrated above, at 22-23, Cuzdey's claim of title to the NOVA mobile home has merit. In addition to Cuzdey's own evidence, Landes admitted Cuzdey had paid off the purchase of the mobile home. Cuzdey's action to quiet title to the mobile home is not barred by any statute of limitations and is supported by the undisputed facts. Based on this claim alone, Cuzdey's action was not frivolous as a whole. The trial court abused its discretion in awarding attorney's fees under RCW 4.84.185. This Court should reverse.

5.2.3 The trial court's decision was based on untenable grounds because the divorce papers were not a prior statement that Cuzdey owned no property.

The trial court's primary reason for finding Cuzdey's action frivolous was its mistaken belief that Cuzdey had made a prior, binding statement that he owned no real property:

I think that it is significant that Mr. Cuzdey, in a declaration only a few years before this – it may have been only a few months – indicated he owned no real property. I find that it was only after there was a move to have him leave the property by Ms. Landes that this action was filed.

RP, Aug. 7, 2015, at 23:1-4. This statement is an unreasonable misreading of the evidence presented to the court regarding the divorce proceedings between Wallen and Cuzdey. *See* 2nd Am. Memo. at 7. The evidence demonstrates that Cuzdey did not state—much less in a sworn declaration—that he owned no real property. To the contrary, Wallen and Cuzdey never placed the issue of property before the court in the divorce.

Wallen filed the initial divorce petition. CP 308-11. The petition states, “There is community or separate property owned by the parties.” CP 309. However, in the “Relief Requested” section, Wallen crossed out “Divide the property” and wrote “N/A” in its place. CP 310 (Wallen initialed this change; Cuzdey did not). Both Wallen and Cuzdey appeared pro se. CP 310-11. It was an uncontested divorce. CP 202. Wallen and Cuzdey reached an agreement between themselves as to how to divide the marital property:

Plaintiff and I had a signed, written agreement as well as a verbal agreement as to the division of all belongings. ... As stated in the divorce decree, both Plaintiff and I took care of the division of property ourselves.

CP 82 (Wallen Decl.). The court did not interfere with Wallen and Cuzdey’s division of property when it entered the Decree of Dissolution. *See* CP 312-14 (*e.g.*, at 312: “Real Property Judgment Summary: Does not apply”).

Both Wallen and Cuzdey understood the divorce proceedings as preserving their claims to at least the NOVA mobile home. Cuzdey testified, “I understood and was also told by my ex-wife, who read the instructions for filling out the divorce papers, that the property was not at issue, and the court would not consider any claims anyway as it was an uncontested divorce.” CP 202. Wallen also testified to her understanding that she did not give up any claims in the divorce: “I will claim interest [in the property at issue] due to community property laws. ... Plaintiff and I took care of the division of property ourselves.” CP 82.

The trial court's finding that Cuzdey had previously stated he had no property is an unreasonable interpretation of this evidence and is based on untenable grounds. The issues of ownership of the real property and the NOVA mobile home were never litigated in the divorce. Cuzdey did not represent to the court that he did not own the real property or the NOVA mobile home. Wallen and Cuzdey handled the division of property outside of court. The divorce proceedings cannot bar Cuzdey's quiet title action or otherwise render it frivolous. The trial court abused its discretion. This Court should reverse the trial court's fee award and vacate the judgment.

6. Conclusion

The trial court erred in dismissing Cuzdey's claims on summary judgment. Landes waived the protections of the Deadman's Statute. Cuzdey presented sufficient admissible evidence to remove the oral agreement from the Statute of Frauds and to establish his superior claim of title to the real property and the NOVA mobile home. There are genuine issues of material fact that preclude summary judgment dismissal. This Court should reverse the trial court's summary judgment order, vacate the judgment, and remand for further proceedings.

The trial court abused its discretion in awarding attorney fees under RCW 4.84.185. Cuzdey's action could not be frivolous as a whole because the undisputed evidence established that Cuzdey had paid in full for the NOVA. The trial court's decision rested on untenable grounds because Cuzdey never stated that he owned no property. This Court should reverse the trial court's

award of fees under RCW 4.84.185, vacate the judgment, and remand for further proceedings on any remaining claims.

Respectfully submitted this 16th day of February, 2016.

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on February 16, 2016, I caused the original of the foregoing document, and a copy thereof, to be filed and served by the method indicated below, and addressed to each of the following:

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DATED this 16th day of February, 2016.

/s/ Rhonda Davidson
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