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COURT OF APPEALS  
DIVISION II  
2018 FEB 20 PM 1:04  
STATE OF WASHINGTON  
BY   
DEPUTY

No. 50998-9-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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Stuart McColl (Plaintiff)

Appellant

v.

Geoffrey Anderson (Defendant)

Respondent,

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REPLY BRIEF OF THE APPELLANT

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## A. INTRODUCTION

All parties agree a Quiet Title action was never brought by either side, and all parties agree that there is a legal question of whether RCW 7.28.083(3) applies to cases of Declaratory relief.

The Respondent acknowledged the Appellant's argument on appeal here by writing "The Plaintiff's argument regarding the applicability of this statute appears to have two premises ... that the statute does not apply because this was not an action to quiet title." (Brief of the Respondent page 5 last line) The Respondent's Introduction admits this was an action brought only for Declaratory and Injunctive relief.

RCW 7.28.083(3) does not apply to an action for Declaratory relief because only a Quiet Title action can create a court order awarding title. To award fees under the Quiet Title chapter, a Quiet Title case must be brought.

Had this Appellant (Plaintiff) won this Declaratory case, it would be incredulous to suggest that this Plaintiff deserved fees, beyond standard statutory fees under RCW 4.84.080, for asserting title having never brought a Quiet Title action. The fees awarded here under the Quiet Title chapter, for a case where no Quiet Title action was brought, should be reversed.

## B. STANDARD OF REVIEW

Whether a specific statute, contractual provision, or recognized ground in equity authorizes an award of fees is a question of law and is reviewed de novo. *Kaintz v. PLG, INC.* 197 P. 3d 710 (2008), *Tradewell Group, Inc. v. Mavis*, 71 Wash.App. 120, 126, 857 P.2d 1053 (1993)

## C. REPLY ARGUMENT

Can RCW 7.28.083(3) apply to actions that are not Quiet Title actions ? **NO**.

While the Respondent acknowledged the issue in his Brief he was unable to provide any explanation or authority as to why fees under the Quiet Title chapter can be awarded for an action not brought for Quiet Title. The Respondent avoided the issue altogether.

Respondent did cite *Erbeck v. Springer* (unpublished); But *Erbeck* is a case where the Plaintiff had indeed filed a Quiet Title action, and therefore *Erbeck* has no similarity and no authority over this legal question over whether RCW 7.28.083(3) fees apply to Declaratory action.

RCW 7.28.083(3) is by definition a statutory ground for attorney's fees under the Quiet Title chapter. But, fees under RCW 7.28.083(3) can only be available if a party brings an action asserting title through RCW 7.28, because Quiet Title actions are only controlled by RCW 7.28.

A Superior Court cannot create an order awarding Quiet Title brought only for Declaratory and Injunctive relief. The Appellant again supplies authority that supports this position regarding Quiet Title:

*“In Washington, such actions are governed by RCW 7.28.010. An action to quiet title allows a person in peaceable possession or claiming the right to possession of real property to compel others who assert a hostile right or claim to come forward and assert their right or claim and submit it to judicial determination.” Kobza v. Tripp, 105 Wn. App. 90, 95, 18 P.3d. 624 (2001)*

RCW 7.28.010 is controlling and requires Quiet Title action must be brought to assert a claim to title, and thereby fees under RCW 7.28.083(3).

When the case was filed, both the Plaintiff and Defendant were protected from Quiet Title attorney’s fees because both were aware through the Complaint that no Quiet Title action had been brought under RCW 7.28.010. Respondent could have easily filed a counter-claim and brought a Quiet Title action if that is what the Respondent wanted. Respondent opted to be protected from fees should he lose. RCW 7.28.010 requires action be brought as the words “action” and “brought” used there so dictate.

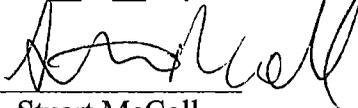
Respondent after the fact is arguing with no authority that RCW 7.28.010 is not a white bright line and Quiet Title “action” is not required for fees outlined in the Quiet Title chapter RCW 7.28 .

#### **D. Conclusion**

No court has ever awarded fees under RCW 7.28.083(3) where the Complaint did not bring a Quiet Title action under RCW 7.28.010. And no court ever should. RCW 7.28.010 is indeed a white bright line requiring Quiet Title action be brought and is indeed controlling.

In this action for Declaratory and Injunctive relief, the Honorable Judge Melly accidentally exceeded his legal authority and erroneously awarded attorney's fees under RCW 7.28.083(3). Judge Melly is not alone, and it has happened before, as was shown in the Arizona case Long v. Clark, 226 Ariz. 95, 244 P.3d 99 (2010). Long v. Clark is a case where a trial court judge made the same mistake. Fees were awarded where Quiet Title action was required for fees to be issued, but a Quiet Title action was never brought, and the Arizona appellate court reversed the fees. The same has occurred here where RCW 7.28.010 sets the requirement for action, but no Quiet Title action was ever brought here in this case. This Appellant requests the award of fees for \$35,610 to the Respondent (Defendant) be reversed by this Honorable Appellate Court.

Respectfully submitted this 14 day of Feb. , 2018.

  
\_\_\_\_\_  
Stuart McColl

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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

WASHINGTON STATE COURT OF APPEALS  
DIVISION II

STUART F. MCCOLL, a married man  
dealing with his separate property,

Plaintiff,

vs.

GEOFFREY A. ANDERSON, a married man  
dealing with his separate property,

Defendant.

**Court of Appeals Division II  
Case No.**

**50998-9-II**

**Clallam Superior Court  
Case No.**

**17-2-00222-7**

**Proof of Service**

TO: Clallam County Superior Court Clerk

On this day I deposited in the U.S. Mail a properly stamped and addressed envelope to:

George Mix, Mix Sanders Thompson, PLC  
1420 Fifth Avenue, Suite 2200  
Seattle, WA 98101

Containing 1 copies each of: Appellants Reply Brief.

I declare under penalty of perjury under the laws of the State of WA that the foregoing is true and correct, that I am at least 18 years old, and a resident of WA State, Executed at Sequim, WA this 15 day of Feb., 2018.

x  