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Division II
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NO. 52313-2-II

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

DIVISION II

JAMES BETOURNAY and JUDITH BETOURNAY,

Respondents

v.

AMMAR MANNA'A et ux, et al,

Appellants

BRIEF OF APPELLANT

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TABLE OF CONTENTS

I. ASSIGNMENT OF ERROR.....1

A. Assignment of Error.....1

B. Issues Relating to Assignment of Error 1

II. STATEMENT OF THE CASE.....2

A. Procedural History.....2

B. Underlying Facts.....3

III. ARGUMENT.....10

A. Standard of Review.....10

B. Substantive Legal Authority.....11

1. The Trial Court Erred In Reforming The Option Agreement To Allow For An Extension of Time After It Had Expired By Its Own Terms And Allowing It To Close In The Name Of Only One Of The Optionees 11

2. The Trial Court Erred In Determining That Appellant Tortiously Interfered With Respondent's Contract With 2nd Half 24

3. The Trial Court Erred In Awarding Attorney Fees As Damages 28

IV. CONCLUSION 32

TABLE OF AUTHORITIES

Table of Cases

Akers v. Sinclair, 37 Wash.2d 693, 702, 226 P.2d 225 (1950) 12

City of Seattle v. McCready, 131 Wash. 2d 266, 275, 931 P.2d 156, 161 (1997) 28

Columbia Cmty. Bank v. Newman Park, LLC, 177 Wash. 2d 566, 573, 304 P.3d 472, 475 (2013) 10

Déjà Vu-Everett-Fed. Way, Inc. v. City of Federal Way, 96 Wn.App. 255, 263, 979 P.2d 464 (1999) 11

Denaxas v. Sandstone Court of Bellevue, L.L.C.,148 Wash. 2d 654, 669, 63 P.3d 125, 132 (2003) 12

Harrison v. Puga, 4 Wash. App. 52, 64-65, 480 P.2d 247, 255 (1971).....16

J. L. Cooper & Co. v. Anchor Sec. Co., 9 Wash. 2d 45, 71–72, 113 P.2d 845, 857 (1941).....19,24

King v. W. Coast Grocery Co., 72 Wash. 132, 136, 129 P. 1081, 1083 (1913).....18

Leingang v. Pierce Cty. Med. Bureau, Inc., 131 Wash. 2d 133, 157, 930 P.2d 288, 300 (1997).....25

MacPherson v. Franco, 34 Wash. 2d 179, 182, 208 P.2d 641, 642 (1949).....17

Maytown Sand & Gravel LLC v. Thurston Cty., 198 Wash. App. 560, 591–92, 395 P.3d 149, 165, review granted, 404 P.3d 480 (Wash. 2017), and aff'd in part, rev'd in part, 191 Wash. 2d 392, 423 P.3d 223 (2018), as amended (Oct. 1, 2018).....28

Oium v. Fillion, 129 Wash. 37, 37–38, 223 P. 1060, 1060 (1924) 17

Osburn v. Dolan, 7 Wash. 62, 34 Pac. 433.....17

Piper v. Dep't of Labor & Industries, 120 Wn.App. 886, 891, 86 P.3d 1231 (2004).....30

Quadra Enterprises, Inc. v. R.A. Hanson Co., 35 Wash. App. 523, 526, 667 P.2d 1120, 1122 (1983) 25

Seattle Prof'l Eng'g Employees Ass'n v. Boeing Co., 139 Wash. 2d 824, 833, 991 P.2d 1126, 1131, opinion corrected on denial of reconsideration, 1 P.3d 578 (Wash. 2000).....12

State v. Armenta, 134 Wash. 2d 1, 9, 948 P.2d 1280, 1284 (1997) 10

State v. Gatewood, 163 Wn.2d 534, 539, 182 P.3d 426 (2008) 11

State v. Hill 123 Wn.2d 641, 647, 870 P. 2d 313 (1994) 10

State v. Stevenson, 128 Wn.App 179, 193 114 P.3d 699 (2005).....10

State v. Tobin, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007).....11

Teter v. Deck, 174 Wn.2d 207, 222, 274 P.3d 336 (2012) 11

Tribble v. Allstate Prop. & Cas. Ins. Co., 134 Wn.App. 163, 170, 139 P.3d 373 (2006) (quoting State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).....11

Wells v. Aetna Ins. Co., 60 Wash. 2d 880, 882, 376 P.2d 644, 645 (1962) 29

Court Rules

CR 16.....5

I. ASSIGNMENT OF ERROR

A. ASSIGNMENT OF ERROR. The trial court erred by:

1. Reforming a Option Agreement to permit option to be exercised in a manner contrary to the clear terms of the contract.
2. Reforming the Option Agreement permitting the option to be closed in the name of Priscilla Stevens alone.
3. Awarding attorney fees as damages to Priscilla Stevens, Intervenor.
4. Entering the Judgment on July 30, 2018 granting specific performance of the expired option contract and awarding attorney fees and costs, as well as reimbursement of a loan fee related to a fraudulent transaction.
5. Appellant specifically assigns error to the following Findings of Fact: Nos. 31, 32, 33.
6. Appellant specifically assigns error to the following Conclusions of Law: Nos. 2, 5, 6, 7, 8.

B. ISSUES RELATING TO ASSIGNMENT OF ERROR.

1. DID THE TRIAL COURT ERr IN REFORMING THE OPTION AGREEMENT TO ALLOW FOR AN EXTENSION OF TIME AFTER IT HAD EXIRED BY ITS OWN TERMS; AND BY ALLOWING IT TO CLOSE IN THE NAME OF ONLY ONE OF THE OPTIONEES?

a. Can the court relieve the Optionee from its obligation to exercise the option by placing cash in escrow during a specified period of time?

b. Did the intervenor, Pricilla Stevens, plead or prove that there was a novation or assignment from Sara Ristick, the co-optionee of the contract permitting her to be the sole optionee of the contract, or can Pricilla Stevens exercise the option in her own name without the consent of her joint-contracting party?

c. Did Intervenor Pricilla Stevens, have an equitable right to extension of the option period, after fraudulently attempting to sell the property in the name of the true owner, 2nd Half LLC, prior to exercising her option to purchase the property.

2. DID THE TRIAL COURT ERR IN DETERMINING THAT APPELLANT TORTIOUSLY INTERFERED WITH RESPONDENT'S CONTRACT WITH 2ND HALF LLC?

3. DID THE TRIAL COURT ERROR IN AWARDING ATTORNEY FEES AS DAMAGES?

a. Should the court award attorney fees as damages to Pricilla Stevens when she was not engaged in third-party litigation?

b. Should the court sitting in equity award attorney fees and costs to Stevens when she attempted to exercise her option to purchase the property employing a fraudulent scheme, and lied about funding the option in escrow prior to May 30, 2016, thus improperly asking for equity with "unclean hands".

II. STATEMENT OF THE CASE

A. Procedural History.

This appeal comes following a bench trial on the merits to the

Honorable Judge, whereupon the completion of the trial, the court entered judgment in favor of the Respondent, Pricilla Stevens ("Stevens") equitably extending the option period and reforming the option for purchase of the subject property to eliminate Ms. Ristick as optionor, and awarding attorney fees incurred, as damages, in the two-party litigation under this cause against the Appellant, Amarra Manna ("Manna").

B. Underlying Facts.

This case centers on an option agreement. *See* Findings and Conclusions of Law No. 8, CP 128.

At issue is whether the optionee timely tendered payment in connection with the option. Also at issue is whether the trial court, which extended the time for performance by six months, properly modified the terms of the option, essentially reforming the option to eliminate one of the joint option-holders. *See* Conclusion of Law No. 7, CP 134. Also at issue is the court's determination, at trial, that Stevens should be awarded attorney fees and costs as damages. *See Conclusion of Law No. 5*. CP 128

The option agreement is Exhibit 1 of the trial Exhibits; CP 91-93. It provides that the time for exercising the option ends May 30, 2016. *See Trial Exhibit 1 at page 2, paragraph (c)*; CP 93. The option was given on June 5, 2013, and the option period began June 1, 2013, and so there was

essentially ***three*** years in which to exercise the option.

The operative part of the option that's at issue is paragraph (e) on page 2 of trial Exhibit 1; CP 93:

> **e. Method of Exercising Option.** The only method for exercising the option is to tender into escrow, on or before the expiration date, the entire option price; provided, however, that the parties may make subsequent agreements ***in writing*** that alter or amend the expiration date or method of exercising the option. Costs of any escrow and excise tax will be born entirely by the Grantee/Buyer. Costs of title insurance, if any is desired, will be paid entirely by Grantee/Buyer.

It is undisputed that the purchase price was not tendered as required by the option agreement by May 30, 2016. *See Finding of Fact No. 13*, CP 129.

The court found that:

> *"Mr. Manna had no intention of closing on the option. Such lack of intention to cooperate in good faith and close on the option was further and starkly demonstrated after the court in this case ordered disclosure of Ms. Stevens' lender, which occurred by court filing on Friday, August 5, 2016. On Monday August 8, 2016, the disclosed lender, Mr. Unger, was subjected to a sustained barrage of harassment and intimidation by Mr. Graham and Mr. Mills on behalf of Mr. Manna. . . ."*
>
> *See Finding No. 33*, CP 132-33.

The purported conduct that the court outlines in Finding of Fact No. 33 took place, as indicated in the finding, took place in ***August*** of 2016, over two months after the option had expired. *See Finding of Fact No. 13*, CP 129.

It is important to note that all of this occurred ***after*** court-ordered disclosure of the alleged lender. It occurred in early August, which was three months after the time for performing on the option. Even accepting the findings of fact at face value, it's impossible that actions occurring in early August of 2016 could have adversely affected the ability to close on an option because by that time, the option had expired by its terms.

As of July 19, 2016, although Ms. Steven's then lawyer, Mr. Ley was asserting that "Funds have been provided to escrow," there was a refusal to actually identify where the escrow was set up. CP 56,64, 66, 67. That is, there was an assertion that there was a tender of funds sufficient to exercise the option, but no way to actually verify the truth of the assertion. So, a CR 16 conference was requested. CP 55-67. On July 29, 2016, the court issued an order directing Mr. Ley to actually identify where the tender was made. CP 81. It was not until August 5, 2016 that a lender was identified sufficient for anyone to determine where the tender had been made. CP 81.

It's that disclosure that seems to have triggered all the activity described by the court in its Finding of Fact No. 33 describing acts "demonstrating" that Mr. Manna had no intention of closing on the option, but again all this occurred long after the option expired. As it turns out, **no**

tender of funds into escrow was ever made as of the expiration date of the option. Any issue surrounding the option should have ended there.

Prior to expiration of the option, a single escrow was set up by Ms. Stevens. It was at Rainier Title and it was opened by a realtor named Jim McConville. *See Finding No. 19.*, CP 130.

Findings of Fact 17-26 essentially tell the story of Rainier Title's involvement. Mr. McConville was hired by Priscilla Stevens in connection with a Purchase and Sale Agreement she signed in which 2nd Half LLC was the seller. Ms. Stevens, however, had "no connection at all with 2nd Half LLC." (the owner and Optionor of the property). See Finding No. 18, CP 130. She actually signed a listing agreement with Mr. McConville, representing herself to be a manager of 2nd Half LLC. CP 130; CP 95-96.

Despite Stevens not having exercised the option by placing cash in escrow prior to May 30, 2016, and thus not having even a claim to *potential* ownership of the property, Mr. McConville, on behalf of "Stevens", secured a buyer named Garlington and obtained signatures on a Purchase and Sale Agreement between 2nd Half LLC and Garlington. Stevens signed the Purchase and Sale Agreement on behalf of 2nd Half LLC." *See Finding of Fact No. 20*, CP 130; CP 100.

Michelle Keck of Rainier Title was the escrow officer involved in the transaction and she began working on closing the sale of the Thompson

Street property from 2nd Half LLC to the Garlingtons. *See Finding of Fact No. 21*, CP 130.

Meanwhile, on April 19, 2016, 2nd Half LLC – the true owner of the property – deeded title to the property to Mr. Manna. *See Finding of Fact No. 22*, CP 130.

On May 13, 2016, Rainier Title resigned and refused to close the transaction. *See Finding of Fact No. 26*, CP 131. Ms. Keck testified at trial that she could not pinpoint one reason why she was not comfortable remaining on the transaction, but she did testify that Ms. Stevens was not a member of 2nd Half LLC and that 2nd Half had sold the property to Mr. Manna. Id. These were two of many reasons she was not comfortable with the transaction, although no other specific reasons were indicated in the Findings of Fact. See Id. However, it's not a real mystery why Ms. Keck withdrew from the transaction. She had suspected what was clearly a fraudulent Purchase and Sale Agreement signed by Ms. Stevens on behalf of 2nd Half LLC despite the fact that Ms. Stevens was not even a member of 2nd Half let alone have authority to sign for the company.

Notwithstanding all of this, 2nd Half, unaware of the Stevens-Garlington deal, had already lawfully sold the property on April 19, 2016 to Mr. Manna. Therefore, it became impossible to close a sale from 2nd Half

LLC to the Garlingtons after April 19, and any escrow for that transaction would have been futile.

Mr. Manna took title to the property that's disputed subject to the existing option agreement. *See Finding of Fact No. 22*, CP 130. In response to an inquiry by an attorney named Steven Davis, Mr. Manna wrote specifically advising that he was aware of the option and would close according to the terms of the option if a timely tender was made. *See* trial Exhibit 5. *See also, Finding No. 22*; CP 130.

At one point, prior to the May 30, 2016 expiration of the option, a lender named Adkins, together with Mr. Unger, who was also arranging a loan for Ms. Stevens, consulted with Jim McConville and there was drafted up a new purchase and sale agreement. The new agreement proposed to convey the property from Mr. Manna to Ms. Stevens only (Ms. Ristick would have been removed from the transaction). *See also, Finding No. 27*; CP 131. This agreement was never signed by either of the parties. Id. By this time, Ms. Ristick had passed away. *See Finding No. 28*, CP 131. If Mr. Manna was to issue a deed in compliance with the option agreement, it would necessarily go to "Sara Ristick and Pricilla Stevens." *See bottom of page 2 of Trial Exhibit 1*; CP 93.

In order for the option to be exercised in compliance with the option agreement, a transaction would either need to be signed by Stevens and the

estate of Sara Ristick, or Sara Ristick would have needed to assign her rights in the option to Stevens. Ms. Ristick never assigned her option rights during her lifetime, and no probate of her estate has ever been opened.

A practical and fundamental problem with opening a probate for Ms. Ristick is that Ms. Ristick has substantial judgments entered against her. See Pierce County Cause No. 12-2-15448-7, which contains a $60,000 judgment against Ms. Ristick entered April 30, 2013. Therefore, the effort to exercise the option in the name of Priscilla Stevens only, by-passing entirely the estate of Sara Ristick, was simply a fraud being perpetrated on the creditors of Sara Ristick by Ms. Stevens. If such a transfer was to be permitted, it would transfer the property without Ms. Ristick ever acquiring any interest in the real estate, and therefore her creditors would have no way to collect their judgment. Mr. Manna refused to sign the new purchase and sale agreement drafted by Jim McConville because he would have become exposed to lawsuits from the creditors of Ms. Ristick. *Finding of Fact 28*; CP 131. As mentioned above he also had a lawful judgment against Ms. Ristick for which he was entitled to collect. There is no legal or equitable principle that obligates Mr. Manna to work cooperatively to somehow remove Ms. Ristick from the chain of title under the option agreement.

As indicated in the letter to Mr. Steven Davis which is trial Exhibit 5, Mr. Manna was prepared to issue a deed in compliance with the option

as written CP 131; Exhibit 49. He did not, however, intend to modify the option agreement, and no principle of law required that he do so.

After Rainier Title resigned, no other escrow was set up to close on the transaction prior to trial and accordingly, the option expired by its terms. This lawsuit followed.

On July 30, 2016, a judgment and order awarding fees to Mr. Manna's lawyer (and others) resulted, along with an order extending the time for performance. Moreover, the court also modified or reformed the option contract directing that option agreement "may be closed solely in the name of Priscilla Stevens", which occurred on January 8, 2018, just five days before the court's extended closing date. *See Conclusion of Law No. 7*, CP 137. This timely appeal followed. CP 260-66.

III. ARGUMENT

A. Standard of Review

When reviewing a trial court's ruling on a question of law, the appellate court reviews the question de novo. Columbia Cmty. Bank v. Newman Park, LLC, 177 Wash. 2d 566, 573, 304 P.3d 472, 475 (2013).

After a bench trial or fact finding, review is limited to determining whether substantial evidence supports the challenged findings and if so, whether the findings support the conclusions of law. State v. Hill 123

Wn.2d 641, 647, 870 P. 2d 313 (1994). State v. Stevenson, 128 Wn.App 179, 193 114 P.3d 699 (2005). A trial court's conclusions of law are reviewed de novo. State v. Armenta, 134 Wash. 2d 1, 9, 948 P.2d 1280, 1284 (1997); State v. Gatewood, 163 Wn.2d 534, 539, 182 P.3d 426 (2008).

A trial court's decision to grant or deny attorney fees will not be disturbed in the absence of an abuse of discretion." Déjà Vu-Everett-Fed. Way, Inc. v. City of Federal Way, 96 Wn.App. 255, 263, 979 P.2d 464 (1999). A trial court abuses its discretion if its decision is " 'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" Tribble v. Allstate Prop. & Cas. Ins. Co., 134 Wn.App. 163, 170, 139 P.3d 373 (2006) (quoting State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). "A trial court's decision is manifestly unreasonable if it is outside the range of acceptable choices." Teter v. Deck, 174 Wn.2d 207, 222, 274 P.3d 336 (2012).. Discretion also is abused when it is exercised contrary to law. State v. Tobin, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007).

B. Substantive Legal Authority

1. THE TRIAL COURT ERRED IN REFORMING THE OPTION AGREEMENT TO ALLOW FOR AN EXTENSION OF TIME AFTER IT HAD EXIRED BY ITS OWN TERMS AND ALLOWING IT TO CLOSE IN THE NAME OF ONLY ONE OF THE OPTIONEES.

a. The court erred in relieving the Optionee from its obligation to exercise the option by placing cash in escrow during a specified period of time.

Reformation is an equitable remedy which a court may employ to bring a writing that is materially at variance with the parties' agreement into conformity with that agreement. Denaxas v. Sandstone Court of Bellevue, L.L.C.,148 Wash. 2d 654, 669, 63 P.3d 125, 132 (2003). A party may only seek reformation of a contract if (1) the parties made a mutual mistake or (2) one of them made a mistake and the other engaged in inequitable conduct. Id. A party seeking reformation must prove the facts supporting it by clear, cogent, and convincing evidence. Akers v. Sinclair, 37 Wash.2d 693, 702, 226 P.2d 225 (1950). Courts are not at liberty, under the guise of reformation, to rewrite the parties' agreement and 'foist upon the parties a contract they never made. Seattle Prof'l Eng'g Employees Ass'n v. Boeing Co., 139 Wash. 2d 824, 833, 991 P.2d 1126, 1131, opinion corrected on denial of reconsideration, 1 P.3d 578 (Wash. 2000)

The court's Judgment and Findings of Fact and Conclusions of Law entered in this case indicate that the court granted "specific performance" by extending the option by an additional six month period of time. CP 258, CP 134. However, the court did not actually order "specific performance" in this case, it reformed the contract.

The option agreement called for a cash deposit by May 30, 2016. CP 93. In fact, the option clearly stated that the ONLY method of exercising the option was to tender the option price (of $116,000) into escrow when it said, in pertinent part:

*"The **only** method of exercising the option is to tender into escrow, on or before the expiration date, the entire option price...." (**Emphasis added**).*

CP 93.

Had the court ordered specific performance in adherence with the existing contract, the option had already expired on May 30, 2016. Specific performance of the contract would have rendered the option expired. Accordingly, the use of the term of granting "specific performance", as referenced court's finding of facts and conclusions of law, as well as its judgment is a misnomer. The trial court did not order specific performance, it ordered an equitable reformation of the parties' agreement.

There was no evidence produced at trial, nor were there any findings of fact or conclusions of law to support the contention that the parties contemplated any other method of exercising the option or that the date should be extended (absent agreement of the parties – which there was no evidence or findings thereof). There is no evidence of any mistake whatsoever in any of the findings justifying a reformation of the parties'

agreement, and therefore the court erred in reforming the contract on that basis alone.

The trial court was offended by purported actions of the Defendants in this case that took place in August of 2016, almost three months ***after*** the option expired. CP 132-133, *Finding of Fact No. 33.*

The court also made note of actions which took place in May of 2016, prior to the option expiring, with respect to whether or not the court believed Mr. Manna intended to "perform" with respect to the option (he attempted to sell the property). CP 131, *Finding of Fact No. 33.* However, the option language is crystal clear. Only one thing would have had to occur for Stevens to exercise the option prior to May 30, 2016 (and all Manna could have done was "perform"). That one thing was to make a cash deposit into escrow of $116,000. Id. Stevens did not have a contractual right to sell the property prior to exercising the option, as she fraudulently attempted to do by forging her signature as an authorized representative of Defendant 2nd Half LLC (which Manna didn't even know about). CP 129-130, *Finding of Fact No. 33.* She did not have the right to seek or obtain cooperation in obtaining financing to fund the option from Manna (which Manna also didn't know about). She did not have the right to use 2nd Half LLC's property itself to collateralize a loan for funds

necessary to exercise the option. Rather, she simply had the right to deposit cash and failed to do so by May 30, 2016, period. In fact, except for rejecting proof by Stevens that she had deposited funds into escrow, or somehow blocking every escrow (in the world) from making a deposit, there is nothing that Manna could have done to "interfere" with her right to exercise the option. The distractions that infiltrated the trial regarding Stephens trying to borrow money in order to exercise the option or Manna's desire to sell the property (which he rightfully owned) to a third party are just a red herring.

As it turns out, Stevens again was dishonest when she represented through counsel on May 27, 2016 that "funds have been provided to escrow" and that they were "segregated and available) at that time. CP 64; Trial Exhibit 49. No funds were actually tendered, and the option was not exercised as agreed by the parties. This was another fraudulent representation.

There were no mistakes requiring reformation of the parties' agreement because the agreement was clear. Stevens didn't obtain the necessary funds to exercise the option for the purchase of the property and the option expired. The court erred in reforming the parties agreement.

b. The intervenor, Pricilla Stevens, failed to plead or prove that there was a novation or assignment from Sara Ristick, the co-optionee of the contract, permitting her to be the sole optionee of the contract, therefore she cannot exercise the option in her own name without the consent of her joint-contracting party.

Where parties to a contract are described as both agreeing to do a single contractual act, they are "joint" obligors as to a single obligation rather than "several" obligors with individual rights and liabilities to the obligation. Harrison v. Puga, 4 Wash. App. 52, 64-65, 480 P.2d 247, 255 (1971).

The Option at issue in this case defined the Grantor and Grantee of the option as follows:

".... Jeff A. Graham (called "Grantor" in the agreement), and Pricilla Stevens and Sara Ristick wife [sic] (called "Grantee in the agreement)...."

Sarah Ristick, and now her estate, were joint-parties to the option contract. For the reasons stated earlier, the trial court should not reform the option contract unless there was a mistake. Absent a novation or assignment of Ristick's option to Stevens, the court lacked authority to remove and separate her as a party to the option contract.

(1) There was no novation removing Sara Restick as a party to the option agreement.

A novation is a well-established and understood principal whereby there may be either the substitution of a new obligation for an old one between the same parties to a contract with intent to displace the old obligation with the new, or the substitution of a new debtor for the old one with intent to discharge the old debtor, or the substitution of a new creditor with intent to transfer the rights of the old creditor to the new. MacPherson v. Franco, 34 Wash. 2d 179, 182, 208 P.2d 641, 642 (1949). A novation is a new contractual relation, and because it is based upon a new contract by all the parties interested, it must have the consent of all of the necessary parties to the contract; proper consideration; and a mutual agreement. Id. at 182. The burden of proving a novation of a party to a contract, whereby an opposite contracting party is bound to a substituted or omitted party, is on the party asserting the novation. Osburn v. Dolan, 7 Wash. 62, 34 Pac. 433. Oium v. Fillion, 129 Wash. 37, 37–38, 223 P. 1060, 1060 (1924).

It was not pled nor proven that the parties to the contract agreed to a novation whereby Sara Ristick was removed as a party to the option agreement with the consent of all of the parties. In fact, there was no evidence presented because the parties never agreed to a novation.

On this basis alone, Sara Ristick, or her estate, was still a party to the option contract and the trial court had no basis to reform the option

contract to remove her as a necessary party thereto.

(2) There was no assignment of Sara Ristick's interest in the option contract to Stevens.

As a general rule, in the absence of prohibition by statute or stipulation by contract, rights arising out of executory contracts are assignable whenever they would survive to the personal representative of the assignor. King v. W. Coast Grocery Co., 72 Wash. 132, 136, 129 P. 1081, 1083 (1913).

Again, it is undisputed that Ristick never assigned her interest in the option contract. Whether it was assignable or not, the assignment never occurred prior to Ristick's death, and therefore there was certainly no assignment prior to expiration of the option on May 30, 2016. Accordingly, the option was impossible to exercise because one of the "Grantees" to the option, as described in the contract, could not act.

Stevens acknowledges in her trial brief that the option agreement was never assigned. See *Plaintiff's trial brief filed on 4/17/2016, page 5, lines 6-9* CP (to be supplemented). Stevens argued that Ristick's only heir would have cooperated with the assignment. Id. But the fact remains that no estate was opened, no personal representative was appointed, and no assignment occurred.

There is no legal support offered as to how Ristick could assign her

interest in the option after her death without the appointment of a personal representative, particularly long after the option had expired by its plain terms.

Because an assignment never occurred, the court erred in removing Sara Ristick as a necessary party to the option agreement.

c. The reformation and extension of the expired option clause in this case was based on "equity", which should not be granted where the party seeking equity has "unclean hands" and has acted fraudulently.

It is a long established principle in Washington that one may not seek equity, when he himself has unclean hands, as so eloquently stated in J. L. Cooper & Co. v. Anchor Sec. Co., 9 Wash. 2d 45, 71–72, 113 P.2d 845, 857 (1941) as follows:

> *"It is one of the fundamental principles upon which equity jurisprudence is founded, that before a complainant can have a standing in court he must first show that* ***not only*** *has he a good and meritorious cause of action,* ***but he must come into the court with clean hands****. He must be frank and fair with the court, nothing about the case under consideration should be guarded, but everything that tends to a full and fair determination of the matter in controversy should be placed before the court.* ***The complainant ought not to be the transgressor himself****, and then complain that by chance he has been injured on account of his own wrongful misconduct. When, as is sometimes the fact, the original wrong-doer is the party who sustains the greater injury by reason of his inequitable scheme or plan, he ought to bear the burden and the consequences of his own folly, and the equity court will not lend him its jurisdiction to right a wrong of which he himself is the author. Equity leaves the parties in pari delicto to fight out their own salvation and remedy their own wrongs in the law court. Equity will not assume jurisdiction where both parties are in the wrong. The purpose of equity is to afford to the complainant a full, complete, and adequate remedy, and it will*

not undertake to balance the equities between the parties when they are both in the wrong, nor give the complainant relief against his own vice and folly. When the plaintiff has been guilty of a fraud which tends to producing the injury of which he seeks redress, his conscience, inequity, is void of offence, and hence it cannot, with any propriety be said that his hands are unclean, for 'unclean hands', within the meaning of the maxim of equity, is a figurative description of a class of suitors to whom a Court of Equity as a court of conscience will not even listen, because the conduct of such suitors is unconscionable, i. e. morally reprehensible as to known facts."

The fact is, without Stevens's preceding fraudulent actions in attempting to sell property that didn't belong to her, none of the dispute that ensued would have occurred.

It is an undisputed simple fact, Stevens and Sara Ristick had an option to purchase the subject property for $116,000 that expired on May 30, 2016. CP 93. Furthermore, it is undisputed that the only way the option could be exercised is by a deposit of cash into an escrow account on or prior to that date. Id. Stevens did not have the cash to exercise the option. and Therefore, rather than attempting to borrow the cash, or enter into a contract with a third party whereby she could be advanced funds to use for exercising the option and sell the property at an agreed price later, she attempted to commit fraud by selling the subject property itself, *forging* her name in a listing agreement as the true owner, 2nd Half LLC. CP 129-130. In *Finding of Fact No. 17*, the court found that Pricilla Stevens boldly and fraudulently

signed a listing as seller, and Manager of 2nd Half LLC, one of the Defendants in this case, after having represented (through her grandfather) to the realtor that she and her grandmother, Sara Ristick, were "the authorized owners or managers of 2nd Half LLC. CP 129-130; CP 95-96. In *Finding of Fact No. 18*, the court further found that:

> *"At the time, because the option had not been exercised, Ms. Stevens was not the owner of the residence and had no connection at all with 2nd Half LLC, except that Second half LLC had granted to her and Sara Ristick the option agreement referenced above."*
>
> CP 130.

As explained in *Finding of Fact No. 20*, Stevens actually signed a purchase and sale agreement on behalf of 2nd Half LLC. CP 130; CP 100.

When the escrow agent learned that Stevens was not actually a manager or owner of 2nd Half LLC, and therefore could not be the "seller, she withdrew from the transaction[1]. CP 131.

Thereafter, in a second desperate attempt to obtain funds to exercise the option, the court outlined, in *Finding of Fact No. 25*, how Stevens, shockingly, even signed a Deed of Trust against the subject property, which

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[1] While the court found that the testimony was that there were "too many reasons the agent was not comfortable with the transaction, the only one identified, an logically the primary problem was that Stevens was NOT authorized to sell the property because she didn't own it.

she did not own, in connection with a purported loan to be used to pay to 2nd Half LLC (later to be Manna). CP 131; CP 366-385.

The court acknowledged that it did not condone her actions in "holding herself out as 2nd Half LLC", but completely minimized the totality of her actions in *Finding of Fact 32*, by stating that it did not "kill the ability to make the option agreement work". CP 132.

The trial court determined that despite Stevens not only having "held herself out as 2nd Half LLC", but actually signing multiple enforceable contracts on its behalf and attempting to sell property belonging to 2nd Half LLC, only Manna's conduct caused Stevens her damages. Therefore, it must be concluded that the court found that Stevens' fraudulent acts did not prohibit the court from granting her equitable relief, despite her unclean hands.

As has been stated several times, there was only one way to exercise that option and that was to place cash money into an escrow account. Stevens and Ristick had approximately three years to do that. Even up until May 31, 2016, had they simply placed cash into an escrow account, anywhere in the world, nothing else that had been done mattered. There was no duty in the option for the Grantor to cooperate with financing of the option. But apparently, the only way Stevens was going to secure financing

to exercise the option was to use 2nd Half LLC's property to secure the loan to exercise the option.

The option did not grant any authority to use the property as security for loan purposes. Furthermore, there was also no authority granted in the option for Stevens and Ristick to attempt to sell the property without first exercising the option and buying the property. What is to say that Stevens, after closing the sale of the property to Gallingtons, couldn't have just left the country with the proceeds and never paid the option? Why didn't Stevens contact 2nd Half LLC, who she knew to be the true owners of the property, and ask its manager to cooperate with the Gallington transaction and agree to do a simultaneous closing of the option and the sale, whereby at closing, the $116,000 option price would go to 2nd Half LLC and the balance to Stevens? By ***not attempting*** to contact 2nd Half LLC, but rather fraudulently signing on its behalf without its knowledge to sell the property, Stevens was clearly attempting to "pull a fast one" and at best use the subject property as collateral to fund the option payment. At worst she could have sold the property out from under 2nd Half LLC.

Stevens and Ron Steve lied. They lied multiple times related specifically to the subject of her lawsuit and related specifically to her attempt to illegally sell 2nd Half LLC's property, purportedly to exercise the option to purchase the property and there is absolutely no dispute about any

of that. She also lied that she had put cash in an account on May 27, 2016. It is impossible to understand how her conduct does not give her unclean hands such that the court should not grant equitable relief.

As is discussed in Section (b) above, reformation of a contract, in this instance, to extend the option closing deadline is equitable relief. Furthermore, awarding attorney fees and costs as damages, is equitable relief. Stevens did not come before the court with clean hands because she fraudulently attempted to sell the property that belonged to 2nd Half LLC/Manna, purportedly to use the funds to exercise the option. She also lied about having deposited sufficient funds into escrow on May 27, 2016, three days prior to closing. It is backward thinking for someone to believe that he may commit fraud in order to create a framework whereby he can obtain funds to pay for the right to own property -- which he sold before he even owned it.

Stevens did not deserve equitable relief and based on the principles outlined in J. L. Cooper & Co. above, the court should not grant equitable relief to her.

2. THE TRIAL COURT ERRED IN DETERMINING THAT APPELLANT TORTIOUSLY INTERFERED WITH RESPONDENT'S CONTRACT WITH 2ND HALF.

The five elements for a claim of tortious interference with a contractual relationship or business expectancy are: (1) the existence of a

valid contractual relationship or business expectancy; (2) that defendants had knowledge of that relationship; (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy; (4) that defendants interfered for an improper purpose or used improper means; and (5) resultant damage. Leingang v. Pierce Cty. Med. Bureau, Inc., 131 Wash. 2d 133, 157, 930 P.2d 288, 300 (1997). Where a trial court hears all of the evidence and enters findings of fact and conclusions of law, the scope of appellate review is limited to determining whether the findings are supported by substantial evidence, and if so, whether the findings support the trial court's conclusions of law and judgment. Quadra Enterprises, Inc. v. R.A. Hanson Co., 35 Wash. App. 523, 526, 667 P.2d 1120, 1122 (1983). One who asserts a good faith a legally protected interest of his own and intentionally causes a third person not to perform an existing contract with another does not interfere improperly with the other's relation if the actor believes that his interest may otherwise be impaired or destroyed by the performance of the contract or transaction. Id. at 527

The trial court's findings do not explain or support its conclusion of law that Manna somehow tortuously interfered with Stevens' contract with 2nd Half LLC. CP 132-134 (*Findings of Fact Nos. 31-33, Conclusion of Law No. 5*). The contract at issue between 2nd Half LLC and Stevens

was the option contract. Performance of that contract by Stevens only required one thing: The Grantees tendering cash into an escrow account. CP 93. Manna lawfully purchased the property subject to the option agreement on April 19, 2016, and at that point in time acquired a legally protected interest in the subject real property. CP 130. Furthermore, there were no findings at all indicating that at the time Manna purchased the subject property he knew anything about Stevens attempting to sell (albeit fraudulently) the property to a third-party in order to purportedly exercise the option. CP 129. So as of April 19, 2016, 2nd Half LLC no longer owned the subject property, and therefore there was no longer a contractual relationship between 2nd Half LLC and Stevens. There are absolutely no allegations, let alone findings, that Mr. Manna, in any way, interfered with 2nd Half's contract with Stevens prior to or at the point in time which Mr. Manna purchased the property on April 19, 2016. Manna had the legal right to purchase the real property and thereafter had every right to protect that interest as between himself and Stevens and Ristick[2]. As of April 19, 2019, and the days between then and May 31, 2016, the

[2] Ironically the court ignores Manna's duty to Sara Ristick, her estate and her estate's creditors by finding that Manna should have ignored Ristick's interest and permitted only one of the contracting parties (Stevens), execute on the option.

expiration of the option, Stevens' and Ristick's contract was not with 2nd Half LLC, but with Manna.

So, with these facts in mind, how could Manna interfere with Stevens' contractual rights with 2nd Half LLC by way of the events that took place after April 19, 2016, when 2nd Half LLC and Stevens no longer had a contractual relationship during the time of those alleged events? CP 130-133 (*Findings of Fact Nos. 23-33*). The answer is simple, he could not have. As of the time of Manna's conduct that allegedly interfered with Stevens' exercise of the option, there was no existence of a valid contractual relationship or business expectancy between 2nd Half LLC and Stevens, and therefore the first element of Stevens' claim fails. Without a contractual relationship, none of the other elements can be met either.

What's more, even if Manna could somehow interfere with Stevens' contract with 2nd Half, Manna would simply be protecting an opposite business interest in property that he lawfully purchased subject to the option. Manna had no specific duty toward Stevens that would require him to "want" Stevens to exercise the option. But if Stevens had put cash in an escrow account by May 30, 2016, as was the only way to exercise the option, he would have had no choice accept to close the option. That did not happen.

The Court erred in concluding that Manna tortuously interfered with Stevens' contract with 2nd Half LLC because at the time of the alleged events supporting Stevens' tortious interference claim, her contract with 2nd Half LLC no longer existed, and even if the contract with 2nd Half somehow still existed after April 19, 2016, Manna didn't interfere with performance of the option agreement.

3. THE TRIAL COURT ERRED IN AWARDING ATTORNEY FEES AS DAMAGES.

a. Attorney fees are not awardable as damages when fees are incurred in the same proceeding as being requested.

Washington's version of the American rule is that attorney fees are not available as costs or damages absent a contract, statute, or recognized ground in equity. City of Seattle v. McCready, 131 Wash. 2d 266, 275, 931 P.2d 156, 161 (1997). One recognized exception to this rule, as was cited by Stevens and accepted by the trial court is that attorney fees can be awarded as damages attorney fees as damages in wrongful action by a third person subjecting a party to litigation. Id. Attorney fees however are not awardable as damages when accumulated in the (current) proceeding. Maytown Sand & Gravel LLC v. Thurston Cty., 198 Wash. App. 560, 591–92, 395 P.3d 149, 165, review granted, 404 P.3d 480 (Wash. 2017), and aff'd in part, rev'd in part, 191 Wash. 2d 392, 423 P.3d 223 (2018), as amended (Oct. 1, 2018).

Stevens, in her complaint for intervention, only requested "statutory attorney fees and costs", and did not pray for attorney fees or costs as damages. CP 73. Stevens first raised her request for attorney fees as damages at oral argument at trial. Other than in her motion for attorney fees after the court made an award of attorney fees as damages, Stevens had cited no authority for an award of attorney fees.

Stevens's post trial motion for attorney fees as damages was supported by a number of cases, all of which involved a party being awarded attorney fees as damages **with other parties**. *See Intervenors Motion for Attorney fees and costs filed July 5, 2018*; CP __ (to be supplemented); *Intervenor's Reply brief filed July 12, 2018*; CP 510-523. Plaintiff's closest effort to substantiate an award of attorney fees incurred in the same case (not involving litigation with third parties), in contravention of the American Rule, was its citation of Wells v. Aetna Ins. Co., 60 Wash. 2d 880, 882, 376 P.2d 644, 645 (1962). However, even in Wells, Plaintiffs were required to **defend** their right to the automobile against the claim asserted in a **cross-complaint** by a **third party**, not fees incurred between the original parties.

In the instant case, Stevens did not defend an action by a third party in another case or in the instant case. Stevens was a voluntary intervenor,

seeking to enforce her purported two-party rights under a contract. CP 70-73. She did not sue, nor was she sued by, a third party. This was entirely two party voluntary litigation. This situation is clearly distinguishable from any and all of the authority cited by Stevens in support for her request for fees.

Stevens made an in-passing argument that pursuant to Piper v. Dep't of Labor & Industries, 120 Wn.App. 886, 891, 86 P.3d 1231 (2004), the court could award attorneys and costs based on a finding of "bad faith" and wantonness. In Piper, the court stated that in "***egregious cases***, a trial court may award a prevailing party attorney fees on a finding that the losing party acted in bad faith or wantonness. Many of these cases involve "private attorney general theories and none describe a particular standard of conduct necessary for the court to justify and award of fees as damages.

In the instant case, while the trial court made mention of its disapproval of certain actions of multiple defendants in this case, it made *did not* make an award based on bad faith or wantonness. CP 133-134; CP 256. Rather, in the judgment entered by the court on July 30, 2018, as prepared by Stevens' counsel, the court, citing Conclusion of Law 5 found that:

> *"Pricilla Stevens was forced to protect her option rights in (1) and unlawful detainer action; (2) an effort to attach the option; and (3) this present action."*

CP256.

In Conclusion of Law No. 5 reference in the judgment, the court again discussed Stevens' need to come to court in the instant case, and in the associated unlawful detainer action[3], as the basis for an award of attorney fees as damages. CP 133-134. There is no finding or conclusion of wantonness or bad faith supporting an award of fees.

Simply put, the court's award of attorney fees as damages violates the American Rule with respect to attorney fees and is not supported under Washington law, and therefore the judgment should be reversed as to that award.

b. The award of attorney fees in this case was based on "equity", which should not be granted where the party seeking equity has "unclean hands" and has acted fraudulently.

The court exercised its equitable powers when it disregarded the American Rule and awarded Attorney Fees as damages to Stevens. As was outlined in Section 1(c) above, Stevens' fraudulent conduct in attempting to sell 2nd Half LLC's property when she did not own the property gives her unclean hands. She also lied about having funding the option on May 27, 2016, she helped to create the very problem for which she sought relief. Had

[3] Pierce County Cause No 16-2-09936-5 was an action involving Manna and Stevens which was consolidated with this case and dismissed without prejudice, so in essence, it is the same case.

she just placed $116,000 an account, this case would not exist. Instead, she attempted to use property that didn't belong to her to fund the option and was awarded attorney fees and costs as damages when the genesis of her claims was her attempted fraudulent transaction itself.

Based on the doctrine of unclean hands alone, the court should reverse the trial court's award of reimbursement of the loan fee as well as the award of attorney fees and costs as damages.

IV. CONCLUSION

For the foregoing reasons, the court erred by:

1. Reforming the Option Agreement to permit option to be exercised in a manner contrary to the clear terms of the contract
2. Reforming the Option Agreement permitting the option to be closed in the name of Priscilla Stevens alone.
3. Awarding attorney fees as damages to Priscilla Stevens, intervenor.
4. Entering the Judgment on July 30, 2018 granting specific performance of the expired option contract and awarding
5. Making Findings of Fact: Nos. 31, 32, 33.
6. Making Conclusions of Law: Nos. 2, 5, 6, 7, 8.

7. attorney fees and costs, as well as reimbursement of a loan fee related to a fraudulent transaction.

For the above reasons, this court should reverse the trial court's judgment and the option should be determined to be expired; title reverted back to Appellant Manna; and the award of attorney fees and costs as well as reimbursement of the loan fee to Stevens should be reversed.

Respectfully submitted this 18th day of March, 2019.

/S/

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Certificate of Service

On March 18, 2019, the undersigned caused to be sent by electronic service, a copy of the Brief of Appellants to the following:

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I certify under penalty of perjury under the laws of the State of Washington that the forgoing is true and correct.

Signed at Tacoma, Washington, this 18th day of March 2019.

_____/S/_____
J MILLS,
WSBA#15842

J. MILLS, LAWYER

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