

Court of Appeals No. 62892-5

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

RICHARD W. PIERSON,

Appellant,

v.

WESLEY F. RIEDEL and LANA L. RIEDEL, husband and wife;
and SKAGIT COUNTY,

Respondents.

FILED
COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON
2009 OCT -5 PM 2:55

BRIEF OF APPELLANT

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ORIGINAL

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A. INTRODUCTION

This matter arises from a condemnation action by the State of Washington, under Skagit County Superior Court Cause No. 07-2-00173-8. Property owners Wesley F. Riedel and Lana L. Riedel hired Appellant Richard Pierson and entered into a written attorney's fee agreement providing for hourly payment of fees. The condemnation involved expansion of Highway 20 into four lanes and the taking of an ongoing business in the personal residence of the Riedels, approximately one mile west of the intersection of I-5 and Highway 20. From the outset, the property owners wished to stop construction and discontinue condemnation proceedings and continuously resisted the idea they were destined to lose both their business and their residence.

The condemnation ultimately settled, but the Riedels fired Pierson the next day and sought to revoke the settlement. However, the Riedels still owed Pierson \$11, 881.52 in attorneys fees. Pierson filed a lien in that amount against the funds on deposit with the superior court. After argument, the court granted the Riedel's motion to remove the lien.

B. ASSIGNMENTS OF ERROR & ISSUES PERTAINING THERETO

1. Assignments of Error

a. The trial court erred by applying a reliance analysis to a summary lien proceeding.

b. The trial court erred by failing to enter sufficient findings regarding the reasonableness of attorney fees.

2. Issues Pertaining to Assignments of Error

a. Did the trial court err by applying a reliance analysis to a summary lien proceeding? (Assignment of Error a)

b. Did the trial court err by failing to enter sufficient findings regarding the reasonableness of attorneys fees? (Assignment of Error b)

C. STATEMENT OF THE CASE

A mediation was undertaken in Skagit County Superior Court Cause No. 07-2-00173-8 between the State of Washington and the property owners/the Reidels before Ret. King County Superior Court Judge Terrance Carroll on October 24, 2007 at the offices of JDR in Seattle. A written settlement agreement was signed by all parties at that time. CP 43-44. Attending the mediation were the Reidels and their counsel, Richard Pierson, counsel for the State of Washington, Assistant Attorney General Amanda Phily, and Robert Bonjorni, the Reidels' appraiser. The mediation lasted approximately 9 hours and resulted in settlement on the issue of just compensation for the property owners. The

issue of relocation assistance payment and settlement, however, was not resolved at that time. The settlement included \$45,000.00 as reimbursement to the Reidels for attorneys' and expert fees and costs. CP 43.

The following day the Riedels had second thoughts concerning the settlement and relieved Richard Pierson of his duties as counsel, requesting he take no further action on their behalf. CP 17. The State's attorney Amanda Phily brought a Motion to Enforce the Written Settlement Agreement signed by the parties on October 24, 2007. After several hearings and several continuances to allow the Riedels to obtain new counsel, Skagit County Superior Court Judge John M. Meyer entered an order on January 16, 2008, enforcing the previously negotiated settlement agreement. CP 5-6.

On November 13, 2007, Pierson filed a Notice of Attorney's Lien for \$17,276.30, the total amount of attorneys' fees and costs combined. CP 1-4. The Riedels, through new counsel on November 18, 2008, filed a Motion to Remove Attorney Lien. CP 11-31. In response, Pierson filed an Opposition to Motion to Remove Attorney Lien and Countermotion to Enforce Attorney's Lien on November 21, 2008. CP 32-82.

At the hearing on the parties' respective lien motions, the trial court inquired as to whether detrimental reliance was involved. VRP

dated 12/19/08, p. 13, ll. 4-23. On December 23, 2008, the trial court granted the Riedels' Motion to Remove Attorney Lien. CP 8-9. The order contained no findings as to reasonableness of the attorney fees.

D. ARGUMENT

1. The Trial Court Abused its Discretion by Applying a Reliance Analysis to a Summary Lien Proceeding Rather than Entering Findings as to Reasonable Attorney Fees

The attorney lien statute, RCW 60.40.010, provides in relevant part:

(1) An attorney has a lien for his or her compensation, whether specially agreed upon or implied, as hereinafter provided:

...

(d) Upon an action, including one pursued by arbitration or mediation, and its proceeds after the commencement thereof to the extent of the value of any services performed by the attorney in the action, or if the services were rendered under a special agreement, for the sum due under such agreement...

...

(4) The lien created by subsection (1)(d) of this section is not affected by settlement between the parties to the action until the lien of the attorney for fees based thereon is satisfied in full.

A proceeding to enforce a lien is an equitable proceeding. *Price v. Chambers*, 148 Wn. 170, 172, 154 P.603 (1916). Courts have broad discretion when fashioning equitable remedies; those remedies are reviewed for an abuse of discretion. *Sorenson v. Pyeatt*, 158 Wn.2d 523,

531, 146 P.3d 1172 (2006). A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds. *Havens v. C&D Plastics, Inc.*, 124 Wn.2d 158, 168, 876 P.2d 435 (1994).

Here, the court summarily removed Pierson's attorney lien based on a written fee agreement. This was undertaken without the entry of substantial findings of fact or conclusions of law, and based on an inapplicable reliance analysis in contravention of the attorney lien statute. The court's conclusion is untenable and an abuse of discretion.

The Court found that "at mediation the Riedels relied on Mr. Pierson's representation as to the value of the services provided and settled the case based on that representation, at least in part." CP 8-9. Yet RCW 60.40.010(4) explicitly protects attorney's liens based upon an action or its proceeds from settlement, providing that the lien is "not affected by settlement between the parties" until it is satisfied in full. No exceptions are provided for. Nothing about settlement is to affect the lien. The trial court thus erred when it removed the lien based on "reliance" that allegedly occurred as a part of settlement. The court's equitable powers cannot exceed the limitations of the statute, which permits no analysis of attorney fees based on the settlement.

The only discretion the court had was to determine the reasonableness of attorney fees. The court erred again by making no such

findings. In the case of *HTK Management, LLC. et al. v. Rokan Partners, et al.*, 139 Wn.App. 772, 162 P.3d 1147 (2007), the appellate court affirmed the trial court's judgment dismissing condemnation proceedings in the monorail project in King County. The Court vacated the stipulated judgment and awarded attorney's fees, however, the appellate court remanded the fee issue to the trial court for entry of additional findings of fact and conclusions of law so that the appellate court could meaningfully review the fee award.

In this case, the provisions of RCW 8.25.070, which intends to award fees incurred by a condemnee to establish just compensation, was part of the basis upon which the State's attorney, Amanda Phily, agreed to pay \$45,000.00 toward the Riedel's attorney's fees and expert witness fees. That is the subject upon which the attorney's fees lien in the amount of \$11,881.52 was filed. As in *HTK*, the trial court made no findings of fact as to reasonableness of the fees. There is no meaningful way the Court can review the decision, and this constitutes reversible error. It is not possible to determine what portion of the fees in excess of \$11,000.00 should be specifically allocated from the \$45,000.00 specifically set aside by the State of Washington to cover attorney's fees and expert witness fees. This case should be remanded immediately to the trial court for further findings, or reversed on the basis of the attorney's lien statute,

which commands that it be enforced as a judgment in the amount of the filed lien.

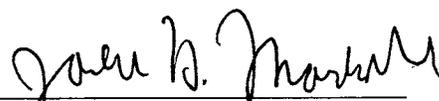
E. CONCLUSION

Richard Pierson seeks to collect attorneys' fees and costs owed him in this case, despite his clients' unhappiness with their settlement and his representation. Yet, that settlement and any equitable considerations therefrom should have played no part in the trial court's decision on the attorneys' fee lien. The only discretion the court had was to determine reasonableness of fees, which it failed to adequately do. This amounts to abuse of discretion under the above authorities and should be reversed.

DATED this 5th day of October, 2009.

Respectfully submitted,

WILLIAMS & WILLIAMS, PSC

By: 
Joseph H. Marshall, WSBA 29671
Attorneys for Appellant Pierson

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124 Wn.2d 158, *; 876 P.2d 435, **;
1994 Wash. LEXIS 393, ***; 9 I.E.R. Cas. (BNA) 1045

LaMAR D. HAVENS, Petitioner, v. C&D PLASTICS, INC., ET AL, Respondents.

No. 60597-1

SUPREME COURT OF WASHINGTON

124 Wn.2d 158; 876 P.2d 435; 1994 Wash. LEXIS 393; 9 I.E.R. Cas. (BNA) 1045; 130 Lab.
Cas. (CCH) P57,892

June 23, 1994, Filed

SUBSEQUENT HISTORY: [***1] Order Changing Opinion August 22, 1994, Reported at:
1994 Wash. LEXIS 496.

PRIOR HISTORY: Superior Court: After four of the claims were dismissed, the Superior Court for Snohomish County, No. 87-2-03034-1, Paul D. Hansen, J., on September 28, 1990, entered a judgment on a verdict in favor of the employee on the breach of contract and promissory estoppel claims.

Court of Appeals: The court at 68 Wn. App. 159, 842 P.2d 975 affirmed the dismissal of the wrongful discharge and negligent misrepresentation claims, reversed the judgment on the promissory estoppel claim, and remanded the case for retrial of the breach of contract claim.

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff employee filed a wrongful discharge case against defendants, employer and owner. The trial court dismissed four claims and ruled for the employee on the breach of contract and promissory estoppel claims. The Court of Appeals (Washington) affirmed the dismissal of the wrongful discharge and negligent misrepresentation claims, reversed the promissory estoppel claim, and remanded the case for retrial of the breach of contract claim.

OVERVIEW: The employee kept a diary of events concerning his employment and alleged that the employer promised him severance pay. The trial court refused to give a defense instruction concerning the just cause defense where a high-ranking employee was involved. The court held that (1) the trial court did not err in refusing to give the jury instructions about what constituted just cause for firing a high-ranking employee and that the proposed instruction contained an erroneous statement of the law; (2) there was no reversible error resulting from the trial court's exclusion of the diary entries because they qualified as admissions under Fed. R. Evid. 802 (d)(2); (3) any admission of the diary entries was harmless error; (4) there was insufficient evidence of any reliance on a legally enforceable promise of permanent employment to support the promissory estoppel claim

and the employee's own expectations did not constitute a promise by the employer; (5) the dismissal of the public policy wrongful discharge claim was proper because the employee did not establish a nexus between his termination and the certification requirements; and (6) the negligent misrepresentation claim was proper.

OUTCOME: The court affirmed the decision except that it reversed and remanded for retrial the issue of the breach of contract claim. The court reinstated the part of the judgment awarding damages for breach of contract and remanded the case for recalculation of the employee's attorney fee award.

CORE TERMS: promissory estoppel, diary, public policy, quality control, termination, plant, proposed instruction, wrongful discharge, misrepresentation claim, negligent misrepresentation, misrepresentation, jury instructions, nonmoving party's, discharged, hired, reversible error, certification requirements, reasonable minds, summary judgment, terminable-at-will, nexus, employment termination, severance, manager, hiring, sufficient evidence, reasonable inferences, directed verdict, breach of contract, justifiable

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HN1  The number and specific language of jury instructions is a matter within the trial court's discretion. Instructions are sufficient which permit a party to argue that party's theory of the case, are not misleading, and when read as a whole properly inform the trier of fact on the applicable law. If the instructions meet these requirements, it is not error to refuse to give a detailed augmenting instruction. Similarly, it is not error to refuse to give a cumulative instruction or one collateral to or repetitious of instructions already given. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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HN2  It is not error to refuse to give a jury instruction containing a misstatement of the law. [More Like This Headnote](#)

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[Evidence](#) > [Relevance](#) > [Relevant Evidence](#) 

HN3  Under [Fed. R. Evid. 402](#), all relevant evidence is admissible, unless otherwise excluded by the evidence rules. Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. [Fed. R. Evid. 401](#). The appellate court generally reviews trial court rulings on admissibility of evidence under an abuse of discretion standard. A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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HN4  Inadmissible hearsay qualifies under the hearsay exception as an admission, under [Fed. R. Evid. 801\(d\)\(2\)](#), when the statements are inconsistent with plaintiff's position at trial. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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HN5  The appellate court will not address constitutional arguments which the parties did not support by adequate briefing. [More Like This Headnote](#) |

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HN6  The exclusion of evidence, which is cumulative or has speculative probative value, is not reversible error. The evidence need not be identical to that which is admitted; instead, harmless error if error at all, results where evidence is excluded which is, in substance, the same as other evidence, which is admitted. [More Like This Headnote](#) | *Shepardize: Restrict By Headnote*

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HN7  In ruling on a motion for judgment notwithstanding the verdict, a trial court exercises no discretion. The court must accept the truth of the nonmoving party's evidence and draw all favorable inferences that it may reasonably evince. The court must view the evidence in the light most favorable to the nonmoving party; the court may grant the motion only where there is no competent evidence or reasonable inference that would sustain a verdict for the nonmoving party. If there is any justifiable evidence upon which reasonable minds might reach conclusions that sustain the verdict, the question is for the jury. [More Like This Headnote](#) | *Shepardize: Restrict By Headnote*

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[Contracts Law](#) > [Consideration](#) > [Promissory Estoppel](#) 

HN8  To obtain recovery in promissory estoppel, plaintiff must establish: (1) a promise which (2) the promisor should reasonably expect to cause the promisee to change his position and (3) which does cause the promisee to change his position (4) justifiably relying upon the promise, in such a manner that (5) injustice can be avoided only by enforcement of the promise. Promissory estoppel requires the existence of a promise. A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment is made. [More Like This Headnote](#) | *Shepardize: Restrict By Headnote*

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HN9  The weight of authority holds that where the terminable at will doctrine is concerned, the promise for promissory estoppel must be a "clear and definite promise." The requirement of a clear and definite promise is consistent with the state's terminable at will doctrine; where the court recognizes exceptions to the terminable at will rule, they carefully draw the exceptions. The promise must also be one that the promisor would reasonably expect to cause the promisee to change his position in reliance on the promise. [More Like This Headnote](#) | *Shepardize: Restrict By Headnote*

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[Labor & Employment Law](#) > [Wrongful Termination](#) > [General Overview](#) 

HN10  The trial court's ruling on the motion in limine has the effect of dismissing the wrongful discharge claim in entirety, and the trial court entered an order stating it treated the motion in limine as a motion for dismissal and/or summary judgment. Therefore, the summary judgment standard for appellate review is appropriate. The court engages in the same inquiry as the trial court. Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and

admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). The court considers facts and the reasonable inferences therefrom in favor of the nonmoving party, and the court should grant summary judgment in favor of the moving party only if reasonable minds could reach but one conclusion from all the evidence. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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[Labor & Employment Law](#) > [Wrongful Termination](#) > [Public Policy](#) 

[Torts](#) > [Intentional Torts](#) > [Defenses](#) > [Intent](#) 

HN11  A cause of action in tort exists for wrongful discharge if the employee's discharge contravenes a clear mandate of public policy. This exception to the terminable-at-will doctrine is a narrow one. Wrongful termination of employment in violation of public policy is an intentional tort. The plaintiff must establish the wrongful intent to discharge in contravention of public policy. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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HN12  The elements for a negligent misrepresentation cause of action are: One who, in the course of his business, profession or employment supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information. The proof must be clear, cogent, and convincing. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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HN13  The plaintiff must show justifiable reliance upon the negligent misrepresentation to satisfy the elements of the negligent misrepresentation action. Ordinarily this is a question of fact. However, when reasonable minds could reach but one conclusion, the trier of fact may determine questions of fact as a matter of law. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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SUMMARY:

Nature of Action: In a wrongful termination case, the discharged employee raised theories of breach of contract, promissory estoppel, discharge in violation of public policy, negligent misrepresentation, age discrimination, defamation, and violation of the Consumer Protection Act. The employee was hired to set up and operate a division of an out-of-state manufacturing corporation. The plaintiff was fired within 4 months of his hiring. The termination letter referred to "irreconcilable differences" and "chemistry" that did not "mix well".

Superior Court: After four of the claims were dismissed, the Superior Court for Snohomish County, No. 87-2-03034-1, Paul D. Hansen, J., on September 28, 1990,

entered a judgment on a verdict in favor of the employee on the breach of contract and promissory estoppel claims.

Court of Appeals: The court at 68 Wn. App. 159, 842 P.2d 975 *affirmed* the dismissal of the wrongful discharge and negligent misrepresentation claims, *reversed* the judgment on the promissory estoppel claim, and *remanded* the case for retrial of the breach of contract claim.

Supreme Court: Holding that the trial court's "just cause" instruction was proper, that the exclusion of entries in a diary maintained by the plaintiff was harmless error, and that there was insufficient evidence to support the claims of promissory estoppel, wrongful discharge in violation of public policy, and negligent misrepresentation, the court *affirms* the decision of the Court of Appeals except for its remand for retrial of the breach of contract claim, which is *reversed*, *reinstates* that portion of the judgment awarding damages for breach of contract, and *remands* the case for recalculation of the plaintiff's attorney fee award.

HEADNOTES

WASHINGTON OFFICIAL REPORTS HEADNOTES

WA[1] [1] Trial -- Instructions -- Sufficiency -- Number -- Language. The number of jury instructions and the specific language of the instructions are matters within the trial court's discretion.

WA[2] [2] Trial -- Instructions -- Sufficiency -- Test. Instructions are sufficient if they (1) permit each party to argue its theory of the case; (2) are not misleading; and (3) when read as a whole, properly inform the jury of the applicable law.

WA[3] [3] Trial -- Instructions -- Proposed Instructions -- Repetitive Instructions -- In General. It is not error for a trial court to refuse to give an instruction that is cumulative or is collateral to or repetitious of instructions already given.

WA[4] [4] Employment -- Termination -- Necessity for Cause -- "Just Cause" -- Determination -- Substantial Weight to Employer's Decision. In determining whether the discharge of an employee was supported by "just cause", the trier of fact does not give substantial weight to the employer's decision.

WA[5] [5] Trial -- Instructions -- Proposed Instructions -- Error. It is not error for a trial court to refuse to give an instruction that contains a misstatement of the law.

WA[6] [6] Evidence -- Review -- Standard of Review. Trial court rulings on the admissibility of evidence generally are reviewed under the abuse of discretion standard.

WA[7] [7] Courts -- Judicial Discretion -- Abuse -- What Constitutes. -- In General. A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds.

WA[8] [8] Employment -- Termination -- Justification -- Proof -- Diary. A discharged employee's diary entries which pertain to the employer's stated reason for the discharge and the factual circumstances at the time of the discharge are not inadmissible as constituting an

attempt by the employer to create or rely upon an after-the-fact reason for the discharge.

WA[9] [9] Appeal -- Assignments of Error -- Argument -- Necessity -- In Brief. An appellate court will not address constitutional arguments that are not supported by adequate briefing.

WA[10] [10] Evidence -- Cumulative Evidence -- Exclusion -- Harmless Error. The exclusion of evidence that is cumulative, *i.e.*, that is in substance the same as other admitted evidence, does not constitute prejudicial error.

WA[11] [11] Evidence -- Review -- Harmless Error -- Outcome of Trial. Any error in excluding evidence is harmless if it is extremely unlikely that its admission would have affected the outcome of the trial.

WA[12] [12] Trial -- Taking Case From Jury -- Sufficiency of Evidence -- Judgment n.o.v. -- Test. In ruling on a motion for a judgment notwithstanding the verdict, a trial court must accept the truth of the nonmoving party's evidence, draw all reasonable inferences in favor of the nonmoving party, and grant the motion if there is no justifiable evidence upon which reasonable minds might reach conclusions that sustain the verdict.

WA[13] [13] Contracts -- Promissory Estoppel -- Elements -- Promise -- What Constitutes. For purposes of the doctrine of promissory estoppel, a "promise" is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.

WA[14] [14] Contracts -- Promissory Estoppel -- Elements -- Mutual Assent. Mutual assent is not an element of the doctrine of promissory estoppel.

WA[15] [15] Contracts -- Promissory Estoppel -- Elements -- Promise -- Absence -- Degree of Reliance. A promise is a necessary element of the doctrine of promissory estoppel. A strong degree of reliance cannot make up for a missing promise.

WA[16] [16] Employment -- Termination -- Necessity for Cause -- "Just Cause" -- Promissory Estoppel -- Nature of Promise -- In General. An employer's legally enforceable promise of permanent employment subject to termination only for just cause must be clear and definite and must be the type of promise that the employer would reasonably expect the employee to change position in reliance on.

WA[17] [17] Employment -- Termination -- Necessity for Cause -- "Just Cause" -- Promissory Estoppel -- Nature of Promise -- Hopes and Expectations. An employer's expression of a hope and expectation of a long-term and mutually satisfactory relationship with a new employee does not constitute a promise of permanent employment subject to termination only for just cause.

WA[18] [18] Employment -- Termination -- Violation of Public Policy -- Causation. The exception to the terminable-at-will doctrine for the employer's contravention of a clear mandate of public policy does not apply absent a nexus between the discharge and the claimed violation of public policy.

WA[19] [19] Judgment -- Summary Judgment -- Review -- In General. When reviewing a summary judgment, an appellate court engages in the same inquiry as the trial court. It applies the standard of CR 56(c) after viewing the facts and the reasonable inferences therefrom most favorably toward the nonmoving party. Summary judgment is appropriate if reasonable minds could reach but one conclusion from all the evidence.

WA[20] [20] Employment -- Termination -- Violation of Public Policy -- Intent To Discharge. The exception to the terminable-at-will doctrine for the employer's contravention of a clear mandate of public policy is a narrow one. The discharged employee must establish the employer's wrongful intent to discharge in contravention of public policy.

WA[21] [21] Trial -- Taking Case From Jury -- Sufficiency of Evidence -- Directed Verdict -- In General. A directed verdict is proper if there is no evidence or reasonable inferences from the evidence that would sustain a verdict in favor of the nonmoving party.

WA[22] [22] Negligence -- Misrepresentation -- Elements of Tort -- In General. When a party in the course of his or her business, profession, or employment supplies false information for the guidance of others in their business transactions and fails to exercise reasonable care in obtaining or communicating the information, the party is liable for the pecuniary loss caused by justifiable reliance on the information.

WA[23] [23] Negligence -- Misrepresentation -- Proof -- Degree of Proof. Negligent misrepresentation must be proved by clear, cogent, and convincing evidence.

WA[24] [24] Negligence -- Misrepresentation -- Elements of Tort -- Reliance -- Question of Law or Fact. The negligent misrepresentation element of justifiable reliance is an issue of fact.

WA[25] [25] Trial -- Issues of Fact -- Determination as a Matter of Law. Questions of fact may be decided as a matter of law when reasonable minds could reach only one conclusion from the evidence.

WA[26] [26] Negligence -- Misrepresentation -- Elements of Tort -- Breach of Duty -- Promise of Future Conduct -- Failure To Perform. For purposes of a claim for negligent misrepresentation, a party's failure to perform a promise of future conduct is not sufficient to establish a breach of the party's duty of care.

COUNSEL: *Christensen, O'Connor, Johnson & Kindness*, by *F. Ross Boundy* and *McDonald & Quackenbush, P.S.*, by *Frances E. Pennell*, for petitioner.

Edwards, Sieh, Wiggins & Hathaway, P.S., by *Malcolm L. Edwards*; *Culp, Guterson & Grader* and *Bruce W. Hilyer*; *David N. Mark*, for respondents.

JUDGES: Brachtenbach, J., Andersen, C.J., Utter, Dolliver, Durham, Smith, Guy, Johnson, Madsen, J.J., concur.

OPINION BY: BRACHTENBACH

OPINION

En Banc. [*162] [**437] Brachtenbach, [***2] J. -- Issues in this employment termination case include whether the jury should have been instructed about what constitutes just cause for firing a "high ranking" employee; whether the employee's diary entries are admissible as evidence of just cause for dismissal; whether there was sufficient evidence to support a claim based on promissory estoppel; and, whether the trial court improperly dismissed the employee's claims of wrongful discharge in violation of public policy and negligent misrepresentation. We conclude that the trial court did not err in refusing to give the jury instruction, that there is no reversible error resulting from the trial court's exclusion of the diary entries, and that there was insufficient evidence to support the

promissory estoppel claim. We uphold the dismissal of the public policy wrongful discharge claim and the negligent misrepresentation **[**438]** claim. The Court of Appeals decision in this case is affirmed in part and reversed in part, and this matter is remanded for recalculation of Plaintiff's attorney fee award.

In October 1986, Plaintiff LaMar D. Havens was hired by Defendant C&D Plastics, Inc. (C&D) to set up and operate a Washington division **[***3]** of C&D Plastics, Northwest Composites, to manufacture parts for The Boeing Company **[Boeing]**. Plaintiff's employment resulted from conversations and negotiations between Plaintiff and the owner and chief executive officer of C&D, James Downey, and the president of C&D, Joseph Moran. The meetings were informal. After he was hired under an oral employment agreement, Plaintiff sent a letter to C&D confirming his understanding that he was to receive \$ 70,000 in salary plus a fixed first year bonus of \$ 15,000, with future years' bonuses based upon company profits. Nothing in this letter referred to length of the employment relationship, nor was any mention made of any just cause requirement for discharge.

Plaintiff's responsibilities included selecting a site, purchasing equipment, and hiring and firing personnel. However, practically from the outset, the parties' relationship was marred by disagreement, with early disagreement **[*163]** about what kind of plant quality control manager was needed and how many quality control personnel were needed at the plant. Other disagreements arose. Plaintiff arranged to hire a friend as a maintenance man, at \$ 32,000 a year. He believed he had authority **[***4]** to do so and thought the individual was experienced and qualified for the job. When owner-CEO Downey learned of the hiring, he informed Plaintiff that they paid such employees half that much in California. Downey was quite upset by the hiring, and in response Plaintiff reversed the hiring decision.

The question of the quality control manager position arose several times. The parties disagreed about what kind of person should be hired. Shortly before Plaintiff was fired, he declined to hire a C&D employee from California who traveled to Washington to interview for the position. Plaintiff said the California employee was not qualified for the position. President Moran had sent the employee to Washington, and he and Downey believed the man should have been hired.

Plaintiff wanted to hire an electrical contractor to install equipment at the plant. When he told Downey this, Downey told him that they never obtained electrical permits and that a C&D employee would install the equipment. In a similar vein, Plaintiff told Downey that Boeing **[Boeing]** should be notified of the new plant so it could inspect and certify the plant system before production began. Downey disagreed and told Plaintiff not **[***5]** to worry about it. Plaintiff did not pursue either of these matters further.

There was evidence that discussions between Plaintiff and Downey and Moran were far from cordial. For example, Moran testified that he and Plaintiff screamed at each other on one occasion. Plaintiff testified that Downey was loud and abusive.

During the course of his employment, Plaintiff kept a diary where he recorded events and expressions of his feelings about his employment with C&D and his relationships with Downey and Moran.

[*164] On February 2, 1987, within 4 months of being hired, Plaintiff was fired. In the letter of termination, Moran said that "things have not been what we hoped for", that "the chemistry with us does not mix well at all", and that "the differences we feel are irreconcilable". Clerk's Papers, at 1049.

After giving notice of termination, C&D promised severance pay. Plaintiff sent a letter stating his understanding that C&D would pay severance pay for 6 months or until Plaintiff found alternative employment, whichever occurred first, and that C&D would continue to provide

health insurance. In this letter, Plaintiff made no claim for any additional money or benefits. Downey [***6] responded that severance pay would be paid for 3 months, with a possibility for additional severance pay if Plaintiff did not find a new job. When C&D was contacted by a lawyer whom Plaintiff had consulted, 6 weeks after he was discharged, C&D terminated the severance pay.

[**439] Plaintiff filed suit, alleging breach of contract, promissory estoppel, wrongful discharge in violation of public policy, negligent misrepresentation, age discrimination, defamation, and violation of the Consumer Protection Act (CPA). Before trial, Plaintiff voluntarily dismissed the defamation and CPA claims, and the trial court dismissed the wrongful discharge claim. At the end of Plaintiff's case, the court dismissed the negligent misrepresentation claim.

At the close of trial, the trial court instructed the jury on just cause for dismissal, but refused to give an instruction proposed by the defense on just cause where a "high-ranking" employee is involved.

The jury returned a special verdict awarding Plaintiff \$ 65,901 for breach of a yearly employment contract (thus indicating a determination of a 1-year implied contract), \$ 26,900 for breach of the severance pay agreement, and \$ 363,958 on the [***7] promissory estoppel claim (this amount represents lost wages to the time of trial, ex. 25). The trial court "merged" the contract damage award into the promissory estoppel award, on the basis that Plaintiff would otherwise obtain a double recovery. The court awarded prejudgment [*165] interest and attorney fees and costs to Plaintiff. The court denied a defense motion for a judgment n.o.v. on the promissory estoppel claim.

C&D and Downey (hereafter collectively Defendants) ¹ appealed. The Court of Appeals reversed as to promissory estoppel, held that retrial was required on the implied contract claim, and affirmed dismissal of the wrongful discharge and negligent misrepresentation claims.

FOOTNOTES

¹ The trial court granted Defendants' posttrial motion to dismiss Moran as an individual defendant. Although Plaintiff challenged this dismissal, the Court of Appeals affirmed the judgment in Moran's favor. Plaintiff abandoned this challenge in his Amended Petition for Review.

Plaintiff's petition for review was granted.

[***8] JURY INSTRUCTION

The trial court refused to give Defendants' proposed jury instruction 16, which concerned what constitutes "good cause" or "just cause" for terminating a "high-ranking" employee. Defendants appealed, arguing the failure to give the instruction was reversible error because the jury was without guidance as to what constitutes just cause for discharging such an employee. The Court of Appeals agreed, holding that the instruction is necessary to permit Defendants to adequately argue that just cause existed for Plaintiff's termination. The court said that Defendants are entitled to an instruction in substantially the language they requested. We disagree.

WA[1] [1] WA[2] [2] WA[3] [3] HN1 The number and specific language of jury instructions is a matter within the trial court's discretion. *Douglas v. Freeman*, 117 Wash. 2d 242, 256, 814 P.2d 1160 (1991). Instructions are sufficient which permit a party to argue that party's

theory of the case, are not misleading, and when read as a whole properly inform the trier of fact on the applicable law. *Douglas*, at 256-57. If these requirements are met, it is not error to refuse to give a detailed augmenting instruction. *****9** *Crossen v. Skagit Cy.*, 100 Wn.2d 355, 360, 669 P.2d 1244 (1983). Similarly, "it is not error to refuse to give a cumulative instruction or one collateral to or repetitious of ***166** instructions already given." *State v. Benn*, 120 Wn.2d 631, 655, 845 P.2d 289, cert. denied, 510 U.S. 944, 126 L. Ed. 2d 331, 114 S. Ct. 382 (1993).

Jury instruction 18 defined just cause as follows:

Just cause, or good cause, for the purposes of these instructions, is defined as a fair and honest reason for dismissal, exercised in good faith on the part of the party exercising the power. A discharge for just or good cause is one that is based on facts that (1) are supported by substantial evidence; (2) are reasonably believed by the employer to be true; and (3) are not for any arbitrary or capricious or illegal reason.

Clerk's Papers, at 570.

This unchallenged instruction accords with the definition approved in *Baldwin v. Sisters* ****440** of *Providence in Wash., Inc.*, 112 Wn.2d 127, 769 P.2d 298 (1989).

Defendants' proposed instruction 16 states:

In deciding whether C & D had "good cause" or "just cause" *****10** to terminate the plaintiff, substantial weight must be given to managerial discretion. In determining what is "good cause" or "just cause" to support termination of a high-ranking employee, an employer is entitled to consider such intangible attributes as personality, initiative, ability to function as part of a management team and ability to motivate subordinates.

Clerk's Papers, at 631.

The trial court refused to give the proposed instruction on the grounds that the instruction was encompassed by instruction 18. The Court of Appeals reasoned, however, that the language of jury instruction 18, "arbitrary or capricious or illegal", does not include ability to function as part of a management team, and thus the instruction did not enable Defendants to argue their theory of the case. *Havens v. C&D Plastics, Inc.*, 68 Wn. App. 159, 170, 842 P.2d 975 (1992), review granted, 122 Wn.2d 1023, 866 P.2d 39 (1993).

The Court of Appeals' reasoning fails to account for the definition in jury instruction 18 that just cause is "a fair and honest reason for dismissal, exercised in good faith" and, further, is not arbitrary, capricious, or illegal. *****11** See *Baldwin*, at 139. Thus, the fact that ability to function as part of a management team may not be encompassed within the "arbitrary or capricious or illegal" language is not determinative. Instruction 18 permitted Defendants to argue that just cause ***167** for dismissal, as "a fair and honest reason for dismissal, exercised in good faith", includes the inability to function as part of a management team. In addition, instruction 18 permitted Defendants to argue that an employer should be able to exercise managerial discretion in deciding what constitutes just cause for dismissal of someone in Plaintiff's position. The trial court therefore did not abuse its discretion by refusing to give the proposed instruction.

WA[4]¶[4] **WA[5]¶[5]** Moreover, the proposed instruction contains an erroneous statement of the law. In *Baldwin*, this court struck a balance between the employer's interest in making personnel decisions and the employee's interest in continued employment by approving a

just cause standard which checks the employer's subjective good faith standard with an objective reasonable belief standard. **[**12]** *Baldwin*, at 139. By directing the jury to give substantial weight to the employer's decision, the proposed instruction alters the balance carefully delineated in *Baldwin*, and shifts it impermissibly in favor of the employer. ^{HN2}It is not error to refuse to give an instruction containing a misstatement of the law. *Kastanis v. Educational Employees Credit Union*, 122 Wn.2d 483, 499, 859 P.2d 26, . 865 P.2d 507 (1993).

In summary, refusing to give the "just cause" definition in the proposed instruction was not an abuse of discretion in light of jury instruction 18, and, in any event, by directing that substantial weight be given the employer's decision, the proposed instruction contains an erroneous statement of the law. However, we also note that the term "high-ranking employee" is fraught with uncertainty. We further note that Plaintiff has not complained about whether the specific definition of "just cause" in the proposed instruction is proper, ² nor has any challenge been made as to whether "bad chemistry" may constitute just cause for firing an employee. We do not reach these issues. Our holding that Defendants could argue their **[**13]** theory of the case under jury instruction **[*168]** 18 should not be read as implicit approval of the definition in proposed instruction 16.

FOOTNOTES

² At least one of the "intangibles" in proposed instruction 16 is of doubtful validity as a basis for discharge. "Personality" is an extremely broad term, and it may be questioned whether it constitutes a "just cause" standard at all.

DIARY ENTRIES

Plaintiff kept a diary in which he recorded various business notes and comments, including some personal comments about business situations, meetings, conversations, and the like. The trial court ruled that entries from this diary were inadmissible **[**441]** as substantive evidence because the employer did not know of them at the time Plaintiff was discharged. The court also seemed to reason the entries were inadmissible hearsay. The trial court said that the diary entries could be used to refresh Plaintiff's memory and for impeachment purposes. The diary itself was never offered in evidence. Defendants rely on an offer of **[**14]** proof of five brief excerpts.

Defendants appealed, arguing that the trial court abused its discretion in excluding the diary entries, and arguing that they were the strongest documentary evidence that Plaintiff was fired for just cause. The Court of Appeals agreed that the trial court committed reversible error in excluding the diary entries. We disagree.

^{WA[6]}**[6]** ^{WA[7]}**[7]** ^{HN3}Under ER 402, all relevant evidence is admissible, unless otherwise excluded by the evidence rules. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Trial court rulings on admissibility of evidence are generally reviewed under an abuse of discretion standard. *Brouillet v. Cowles Pub'g Co.*, 114 Wn.2d 788, 801, 791 P.2d 526 (1990). A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds. *In re Marriage of Kovacs*, 121 Wn.2d 795, 801, 854 P.2d 629 (1993).

^{WA[8]}**[8]** Plaintiff does not argue that the five diary entries at issue are inadmissible hearsay, and **[**15]** we conclude they are not. ^{HN4}They qualify as admissions under ER 801(d)(2), in that they are inconsistent with Plaintiff's position at trial. See **[*169]**

generally 5B Karl B. Tegland, Wash. Prac., *Evidence* § 344(2) (3d ed. 1989). Nor do we agree that the entries are inadmissible on the basis that an employer cannot justify a prior discharge on the basis of facts acquired during litigation. See Hollingsworth v. Washington Mut. Sav. Bank, 37 Wn. App. 386, 394, 681 P.2d 845 (relied upon by Plaintiff), review denied, 103 Wn.2d 1007 (1984); see also Gaglidari v. Denny's Restaurants, Inc., 117 Wn.2d 426, 815 P.2d 1362 (1991) (whether there was just cause for discharge depends upon what the employer reasonably believed to be true at the time of the discharge).

The diary entries are evidence of what was going on at the time of the employment relationship and constitute, at the least, circumstantial evidence of the parties' "chemistry", in that a jury could infer that Plaintiff's conduct, demeanor, and the like in his relationship with Downey and Moran accorded with what he said in the diary. Moreover, some of the entries [***16] involve recorded events and conversations, and thus are evidence of what was known to the employer at the time. In accord with the court's analysis in Hollingsworth, at 394, the employer did not attempt to use the diary entries as an after-the-fact reason for the discharge, *i.e.*, a different reason than that advanced at the time of the discharge.

WA[9] ¶ [9] The trial court's reasons for excluding the diary entries are untenable. Plaintiff maintains, though, that admitting the entries would threaten societal values of privacy and free expression, protected by the First and Ninth Amendment. He has presented inadequate argument and authority for this proposition, and ^{HNS} we will not address constitutional arguments which are not supported by adequate briefing. State v. Hill, 123 Wn.2d 641, 648, 870 P.2d 313 (1994). ³

FOOTNOTES

³ Plaintiff advanced other arguments in the Court of Appeals for inadmissibility of the diary entries. He has abandoned those arguments in this court.

WA[10] ¶ [10] Despite [***17] our conclusion that the trial court's reasons for excluding the evidence are untenable, there was no reversible error. ^{HNG} The exclusion of evidence which is cumulative or has speculative probative value is not reversible [*170] error. Henry v. Leonardo Truck Lines, Inc., 24 Wn. App. 643, 602 P.2d 1203 (1979); see also, *e.g.*, Tumelson v. Todhunter, 105 Wn.2d 596, 603, 716 P.2d 890 (1986); Moore v. Smith, 89 Wn.2d 932, 941-42, 578 P.2d 26 (1978). The evidence need not be identical to that which is admitted; instead, harmless error, if error at all, results where evidence is excluded which is, in substance, the same as other evidence [**442] which is admitted. See, *e.g.*, Moore, at 941-42 (no reversible error where "the substance" of the excluded evidence, an exhibit, came out at trial in testimony); Mason v. Bon Marche Corp., 64 Wn.2d 177, 179, 390 P.2d 997 (1964) (no reversible error where no offer of proof and no showing that excluded evidence differed "in any material respect" from that which was admitted); [***18] Gaffney v. Scott Pub'g Co., 41 Wn.2d 191, 194, 248 P.2d 390 (1952) (no reversible error where other testimony was "in substance, the same as" the excluded evidence), *cert. denied*, 345 U.S. 992, 97 L. Ed. 1400, 73 S. Ct. 1131 (1953).

The diary entries at issue include statements showing Plaintiff's negative feelings about Downey and Moran following disagreeable conversations with Downey, Plaintiff's emphatic disbelief when Downey told him after one unpleasant encounter that he would be Downey's best manager, and an entry where Plaintiff told Downey Plaintiff did not need him, to which Downey responded by saying if Plaintiff missed anything he would no longer work for Downey.

WA[11] ¶ [11] The substance of these entries, however, was otherwise admitted through the

testimony of many of the witnesses, including Plaintiff, Downey and Moran. Moreover, there was abundant testimony of the contentious and disharmonious relationship of the parties, *i.e.*, of "bad chemistry". The only one of the statements about which there might be a question is the fifth diary entry at issue, wherein Plaintiff wrote that he told Moran he could not fault them for firing [***19] him, as they had obvious differences. At trial, Plaintiff testified that he "may" have told Moran this. Although the use of the word "may" is somewhat equivocal, the statement itself is the same. In addition, after full review, we conclude that in the context of the entire extensive [*171] trial record, the value of the diary entry, in addition to that to which Plaintiff testified, was speculative. It is extremely unlikely that admission of this entry would have affected the outcome of the trial.

We hold that any error in excluding the diary entries was harmless error.

PROMISSORY ESTOPPEL

WA[12]¶[12] The jury awarded \$ 65,901 for breach of contract, and \$ 363,958 based on promissory estoppel. The contract award was merged into the promissory estoppel award. Defendants argued on appeal that their motion for judgment n.o.v. should have been granted because there was insufficient evidence of a legally enforceable promise of permanent employment subject to termination only for just cause, and insufficient evidence of reliance on any such promise. The Court of Appeals agreed, as do we. Because we affirm the Court of Appeals on this ground, we do not reach the alternative basis [***20] for that court's decision, involving the question whether promissory estoppel is applicable where consideration for the promise has been given. Nor is it necessary, in light of our disposition of this issue, to consider the parties' other arguments pertaining to the promissory estoppel claim.

HN7¶ In ruling on a motion for judgment notwithstanding the verdict, a trial court exercises no discretion. The court must accept the truth of the nonmoving party's evidence and draw all favorable inferences that may reasonably be evinced. The evidence must be viewed in the light most favorable to the nonmoving party; the court may grant the motion only where there is no competent evidence or reasonable inference that would sustain a verdict for the nonmoving party. "If there is any justifiable evidence upon which reasonable minds might reach conclusions that sustain the verdict, the question is for the jury."

(Footnotes omitted.) Douglas v. Freeman, 117 Wash. 2d 242, 247, 814 P.2d 1160 (1991).

WA[13]¶[13] HN8¶ To obtain recovery in promissory estoppel, plaintiff must establish

"(1) [a] promise which (2) the promisor should reasonably expect to cause [***21] the promisee to change his position and (3) [*172] which does cause the promisee to change his position (4) justifiably relying upon the promise, in such a manner that (5) injustice can be avoided only by enforcement of the promise."

Klinke v. Famous Recipe Fried Chicken, Inc., 94 Wn.2d 255, 259 n.2, 616 P.2d 644 (1980) (quoting Corbit v. J.I. Case Co., 70 Wn.2d 522, 539, [**443] 424 P.2d 290 (1967)); see Restatement (Second) of Contracts § 90 (1981). ⁴ Promissory estoppel requires the existence of a promise. Klinke, at 259; Restatement (Second) of Contracts § 90. A promise is "a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made." Restatement (Second) of Contracts § 2(1); see § 90 cmt. a (referring to promise definition in § 2).

FOOTNOTES

4 Jury instruction 14 provided:

"In order for you to find that plaintiff is entitled to recover on his claim for promissory estoppel, or reliance, against the defendant, you must find by a preponderance of the evidence that:

"(1) The defendant made statements to the plaintiff which the plaintiff reasonably understood to mean that his employment would not be terminated without just cause; and

"(2) Such statements were either intended to induce the plaintiff to believe, or that the defendant should have known that the plaintiff would so understand, that the offered employment would be terminable only for just cause; and

"(3) That plaintiff took substantial action in reliance on such statements; and

"(4) The termination of plaintiff's employment was not for good cause."
Clerk's Papers, at 566.

Jury instruction 15 provided:

"The term 'promissory estoppel' is a legal term and means that a person will be prevented (estopped) from denying the consequences of his statements, or promises, that another has reasonably relied upon and has changed positions because of that reliance." Clerk's Papers, at 567.

*****22** Plaintiff argues that the Court of Appeals mistakenly ruled that Plaintiff was required to establish an unequivocal promise that he could be discharged only for just cause. He complains that the Court of Appeals erroneously relied upon language in Siekawitch v. Washington Beef Producers, Inc., 58 Wn. App. 454, 793 P.2d 994 (1990): "Only when the parties specifically bargain for security will the law require just cause for termination." Havens v. C&D Plastics, Inc., 68 Wn. App. 159, 166, 842 P.2d 975 (1992) (quoting Siekawitch, at 462), review granted, 122 Wn.2d 1023, 866 P.2d 40 (1993). ***173** Plaintiff also urges that definiteness is a contractual requirement which is not necessary for promissory estoppel, and that promissory estoppel may be used to enforce promises that are indefinite or silent as to key terms.

WA[14]*[14] **WA[15]*[15]** To the extent the Court of Appeals' reliance on the language from Siekawitch was intended to mean that mutual assent is required, it is incorrect, as promissory estoppel does not require mutual assent. See Joseph D. Weinstein, *Promissory Estoppel in Washington*, *****23** 55 Wash. L. Rev. 795, 797 (1980). However, although promissory estoppel may apply in the absence of mutual assent or consideration, the doctrine may not be used as a way of supplying a promise. 1 Henry H. Perritt, Jr., *Employee Dismissal Law and Practice* § 4.39, at 344, 348 (3d ed. 1992). "A promise is the sine qua non of promissory estoppel." Hunt v. Great W. Sav. Bank, 54 Wash. App. 571, 576 n.4, 774 P.2d 554 (1989) (citing Klinke), review denied, 113 Wn.2d 1037, 785 P.2d 825 (1990). Thus, to the extent Plaintiff appears to suggest that the degree of his reliance may counterbalance the absence of the required promise, the implication must be rejected.

WA[16]¶[16] We agree with HN9¶ the weight of authority that where the terminable-at-will doctrine is concerned, the promise for promissory estoppel must be a "clear and definite promise". 1 Paul H. Tobias, *Litigating Wrongful Discharge Claims* § 4.52, at 4-89 (1993). E.g., *Taylor v. Canteen Corp.*, 789 F. Supp. 279 (C.D. Ill. 1992); [***24] *Gries v. Zimmer, Inc.*, 709 F. Supp. 1374, 1384-85 (W.D.N.C. 1989) (applying Indiana law); *D'Ulisse-Cupo v. Board of Directors of Notre Dame High Sch.*, 202 Conn. 206, 213, 520 A.2d 217 (1987); *Spanier v. TCF Bank Sav.*, 495 N.W.2d 18, 20 (Minn. Ct. App. 1993). The requirement of a clear and definite promise is consistent with this state's terminable-at-will doctrine; where exceptions to the terminable-at-will rule have been recognized, they have been carefully drawn. See generally *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 685 P.2d 1081 (1984). The promise must also be one which the promisor would reasonably expect to cause the promisee to change his [**444] position [*174] in reliance on the promise. Restatement (Second) of Contracts § 90 (1981).

Here, there is no clear and definite promise of permanent employment subject only to dismissal for just cause.

Plaintiff relies upon a number of statements and circumstances as constituting a promise of permanent employment subject only to a just cause dismissal. Many of these statements are typical of those often [***25] made in the interviewing process (such as what it would take to get Plaintiff to leave his present job and come to work for C&D), and statements relating to the nature of the job for which he was hired (such as the setup and operation would be "his show"). Other statements are consistent with the 1-year contract which the jury found, but do not constitute a clear and definite promise of permanent employment subject to just cause dismissal only (such as discussion of a first year's salary and bonus plus discussion about projected rates of compensation for later years of employment, without any indication of the duration of that employment).

Plaintiff says Defendants never told Plaintiff his employment would be terminable at will. However, terminable at will is the general rule, not the exception. Further, there is no dispute that Defendants never told him he would only be fired for just cause, either.

In fact, as the Court of Appeals observed, Plaintiff's own testimony shows there was never any mention of termination of employment. Plaintiff testified: "There was no downside risk discussed. There was no discussion of anything but what was on the up-side. Nothing was discussed about [***26] what if something went bad or there were problems." Verbatim Report of Proceedings, at 255. Plaintiff's own letter confirming the oral agreement of his employment does not indicate that any promise for permanent employment subject only to discharge for just cause was made. Pl's ex. 5.

WA[17]¶[17] Defendants stated that they were looking forward to a long and prosperous future together, and Plaintiff testified that he told Defendants that he expected to remain at Northwest Composites until he retired. The Court of Appeals correctly [*175] observed that such statements by Defendants are consistent with the general expectation present in any such negotiation: the employer was hoping for and expecting a long-term, mutually satisfactory relationship. Plaintiff's own expectations do not constitute a promise by the employer, and in any case are also consistent with the general hope and expectation of a long relationship.

Plaintiff also relies upon Moran's testimony that he told Plaintiff that Defendants were good to their employees and firing was a last resort. To establish a promissory estoppel claim, a party must show reliance upon the alleged promise. There is no evidence of any [***27] reliance by Plaintiff upon the "last resort" statement which Moran testified he made (nor is it clear that the statement was intended to apply to Plaintiff).

Finally, Plaintiff relies on *Malarkey Asphalt Co. v. Wyborney*, 62 Wn. App. 495, 503-04, 814

P.2d 1219, 821 P.2d 1235 (1991). The reliance is misplaced. *Malarkey* involved a claim of implied contract, not promissory estoppel. The Plaintiff there paid for a share of the business and the court reasoned from this and other circumstances that the parties mutually intended the employment relationship to be other than terminable at will. Further, the Plaintiff, having paid additional consideration, could be discharged only for cause. See, e.g., *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 233, 685 P.2d 1081 (1984)

The Court of Appeals' holding that Plaintiff presented insufficient evidence of a promise to support a promissory estoppel claim is affirmed; the trial court should have granted Defendants' motion for a judgment n.o.v.

WRONGFUL DISCHARGE

The trial court dismissed Plaintiff's claim that he had been wrongfully discharged in violation of public policy. In brief, Plaintiff alleged *****28** that Defendants circumvented Boeing's certification requirements regarding preproduction surveys of manufacturing facilities of parts suppliers. Plaintiff says that C&D falsely represented that parts produced at the Northwest Composites plant would be produced using ***176** the same equipment, personnel, and quality control system which had been used in a Boeing-certified California facility and then transferred up to ****445** the Washington plant. Plaintiff claims that he was fired to prevent him from revealing the misrepresentation. Plaintiff maintains the certification requirements imposed on C&D by its contract with Boeing are FAA mandated, and thus his discharge violated public policy (public safety) underlying those requirements. ⁵

FOOTNOTES

⁵ Plaintiff also argued to the trial court and the Court of Appeals that he was discharged in violation of public policy underlying the state electrical code, which Plaintiff says requires that Northwest Composites obtain a permit to install certain equipment at the plant. Both courts rejected this argument. Plaintiff has not argued this issue in his Amended Petition for Review, and we deem it abandoned.

*****29** WA[18] **[18]** The trial court granted Defendants' motion in limine to exclude evidence of any violation of Boeing's plant certification requirements. The trial court ruled that Plaintiff failed to offer evidence of a sufficient nexus between the Boeing certification requirements and his termination, and therefore the evidence was not admissible in support of a wrongful discharge claim. Absent the excluded evidence, Plaintiff conceded, the wrongful discharge claim failed. The trial court subsequently dismissed the wrongful discharge claim. The Court of Appeals affirmed. We agree that Plaintiff failed to present sufficient evidence of a nexus between his termination and the Boeing certification requirements. In light of this conclusion, we need not and do not reach the question whether certain federal regulations which Plaintiff argues underlie the Boeing certification requirements may serve as the basis for a claim of wrongful discharge in violation of public policy.

WA[19] **[19]** HN10 The trial court's ruling on the motion in limine had the effect of dismissing the wrongful discharge claim in entirety, and the trial court entered an order stating it treated the motion in limine as a motion *****30** for dismissal and/or summary judgment. Therefore, the summary judgment standard for appellate review is appropriate. The court engages in the same inquiry as the trial court. *Swanson v. [177] Liquid Air Corp.*, 118 Wn.2d 512, 518, 826 P.2d 664 (1992). Summary judgment is proper if

the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of

law.

CR 56(c); Swanson, at 518. Facts and the reasonable inferences therefrom are considered in favor of the nonmoving party, and summary judgment should be granted in favor of the moving party only if reasonable minds could reach but one conclusion from all the evidence. Swanson, at 518; Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

WA[20] [20] HN11 A cause of action in tort exists for wrongful discharge if the employee's discharge "contravenes a clear mandate of public policy." [***31] Thompson v. St. Regis Paper Co., 102 Wn.2d 219, 232, 685 P.2d 1081 (1984). In Washington, this exception to the terminable-at-will doctrine is "a narrow one". Wilmot v. Kaiser Aluminum. & Chem. Corp., 118 Wn.2d 46, 53, 821 P.2d 18 (1991); Thompson, at 232. "Wrongful termination of employment in violation of public policy . . . [is] an intentional tort." Cagle v. Burns & Roe, Inc., 106 Wn.2d 911, 916, 726 P.2d 434 (1986). The Plaintiff must establish the wrongful intent to discharge in contravention of public policy. Hibbert v. Centennial Villas, Inc., 56 Wn. App. 889, 894-95, 786 P.2d 309 (1990).

Plaintiff claims there is sufficient evidence of a nexus between the quality control issue and his discharge as follows: Based upon his prior experience, Plaintiff thought the Northwest Composites plant would need to be surveyed and approved before any parts could be accepted by Boeing. Plaintiff averred that this impression was confirmed in meetings with a Boeing buyer, and that Defendant Downey was present at one of the meetings. At a meeting held about 2 weeks before his discharge, Plaintiff raised the Boeing quality control survey issue with Downey, who purportedly said he would avoid preproduction qualification of the Washington plant by invoicing or shipping parts as if they were made in California. Plaintiff said in his affidavit that "I [*178] was very uncomfortable with this procedure but I thought that I had some [**446] time to 'work the problem.'" Clerk's Papers, at 1415.

Plaintiff further averred that on the Friday before he was discharged, Downey called George Bath, an employee of the Boeing buyer, and told him that C&D was moving the operation to Washington that weekend, and that the same personnel, equipment, and quality control system that had been used in California would be used at the new facility (to manufacture stowage bin doors). Plaintiff says he was never told about the phone call to Bath. Plaintiff maintains that the same personnel, equipment, and quality control system were not moved to the new facility.

The difficulty with these factual allegations is that there is no evidence Plaintiff communicated to Downey any of his concerns about the Boeing quality control certification procedures. In his own words, he thought he had time to "work the problem". The [***33] Court of Appeals correctly said that Plaintiff failed to show he communicated his opposition to the alleged violations of the certification procedure, and he never personally refused to implement a company program violating "public policy". See generally Farnam v. CRISTA Ministries, 116 Wn.2d 659, 668, 807 P.2d 830 (1991) (describing circumstances where terminations in violation of public policy have been found); Dicomes v. State, 113 Wn.2d 612, 618, 782 P.2d 1002 (1989) (same). Plaintiff has failed to present sufficient evidence of the required nexus to withstand summary judgment.

Other evidence upon which Plaintiff relies does not concern the Boeing certification requirements. For example, in an interrogatory answer is found: "Havens demonstrated that he could not accept management directives or accept company policy regarding such items as quality control." Pl.'s ex. 20. In supplementary answers, Defendants claimed Plaintiff was unwilling to perform in accordance with company philosophy, resisted taking direction regarding hiring of employees, including the California employee Plaintiff [*179] refused to hire for the quality control [***34] manager position, and was "defensive, personalizing

and disagreements [*sic*] and unwilling or unable to follow and accept company policy without continuously trying to justify the superiority of his own views." Pl.'s ex. 23.

Plaintiff and Defendants clearly disagreed about the quality control manager position and its nature and how many employees were needed for quality control at the plant, and did so virtually from the outset of their relationship. For example, Defendants thought the C&D employee at the California facility who was sent up to interview with Plaintiff should have been hired as the quality control manager. Plaintiff thought he was not qualified and did not hire him for the position.

While the parties disagreed about the quality control manager position at the plant and what person should be hired for the position, and how many quality control staff were needed at the plant, evidence of these disputes does not involve the Boeing certification requirements and the alleged violation of FAA regulations, and is not evidence of the required nexus. It is clear that Plaintiff himself recognized the difference between the two types of evidence. In an offer of proof on **[***35]** this matter, Plaintiff drew a clear distinction between "the staff for the quality control department" and "the necessity for a Boeing survey of the facility". Verbatim Report of Proceedings, at 1222; see Verbatim Report of Proceedings, at 1219-22.

The trial court and the Court of Appeals correctly determined that Plaintiff failed to present sufficient evidence of a nexus between his discharge and alleged public policy violations to avoid summary judgment.

NEGLIGENT MISREPRESENTATION

After Plaintiff rested his case, the trial court granted Defendants' motion for dismissal and/or a directed verdict on the negligent misrepresentation claim. Plaintiff's claim rested upon alleged misrepresentations as to promised **[*180]** authority and duration of employment. The court reasoned that enforcement of promises is the field of contract law, and that Plaintiff could make his arguments in contract. The Court of Appeals upheld the dismissal.

WA[21]¶[21] A motion for a directed verdict should be granted only if there is no evidence or reasonable inferences from the evidence **[**447]** which would sustain a verdict in favor of the nonmoving party. **[***36]** Sprague v. Sumitomo Forestry Co., 104 Wn.2d 751, 762, 709 P.2d 1200 (1985).

WA[22]¶[22] This court has adopted the Restatement (Second) of Torts § 552 (1977), which sets forth ^{HN12} the elements for a negligent misrepresentation cause of action:

(1) One who, in the course of his business, profession or employment . . . supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

See, e.g., Haberman v. WPPSS, 109 Wn.2d 107, 161-62, 744 P.2d 1032, 750 P.2d 254 (1987) (quoting Restatement (Second) of Torts § 552(1) (1977)), appeal dismissed, 488 U.S. 805, 102 L. Ed. 2d 15, 109 S. Ct. 35 (1988).

WA[23]¶[23] The proof must be clear, cogent and convincing. Sprague, at 762.

Plaintiff maintains that contrary to the view of the trial court, a negligent misrepresentation claim may be based upon promises of future conduct, **[***37]** citing Markov v. ABC Transfer & Storage Co., 76 Wn.2d 388, 396, 457 P.2d 535 (1969). Even if a future promise may underlie a negligent misrepresentation cause of action, Plaintiff has failed to present

sufficient evidence to satisfy the requirements of Restatement section 552 and withstand the motion for dismissal and/or a directed verdict.

The evidence which Plaintiff presented to the Court of Appeals of promises underlying the negligent misrepresentation claim is largely the same evidence he relied upon in his promissory estoppel claim. Because we agree that Plaintiff **[*181]** has failed to present sufficient evidence of a promise for the promissory estoppel claim, we agree with the Court of Appeals that this evidence cannot establish a promise upon which to base a negligent misrepresentation claim regarding conditions of employment in excess of the 1-year implied contract period.

WA[24]¶[24] WA[25]¶[25] Further, each element of section 552 must be satisfied, and it must be kept in mind that the standard of proof is clear, cogent, and convincing. HN13¶ There must be justifiable reliance upon the negligent misrepresentation. *E.g.*, **[***38]** Condor Enters. Inc. v. Boise Cascade Corp., 71 Wn. App. 48, 52, 856 P.2d 713 (1993). Ordinarily this is a question of fact. Barnes v. Cornerstone Invs., Inc., 54 Wn. App. 474, 773 P.2d 884, review denied, 113 Wn.2d 1012, 779 P.2d 730 (1989). However, "when reasonable minds could reach but one conclusion, questions of fact may be determined as a matter of law." Barnes, at 478 (quoting Hartley v. State, 103 Wn.2d 768, 775, 698 P.2d 77 (1985)).

The negligent misrepresentation claimed here involves whether Defendants misrepresented their intent to keep alleged promises. Plaintiff argued in briefing to the Court of Appeals that Defendants' misrepresentations are sufficiently established by evidence of the casualness of the hiring, evidence that Plaintiff was hired to eliminate a competitor in the field, and Downey's testimony that after the first year the pay scheme was subject to revision. Plaintiff argues the latter testimony contradicts what Downey represented at the time of the parties' negotiations. (In his Amended Petition for Review, Plaintiff has identified no specific evidence of misrepresentation. **[***39]**)

However, this evidence does not tend to establish any misrepresentations which misled Plaintiff and upon which he justifiably relied. Plaintiff knew as well as Defendants that the hiring process was casual and that he was a potential competitor. If there was carelessness about intent to perform exhibited through these circumstances, it was as known to Plaintiff as to Defendants. Moreover, any representations as **[*182]** to what would be paid after the first year were completely dependent upon whether Defendants retained Plaintiff -- he was, after the first year, a terminable-at-will employee who would be paid nothing at all if he was not retained. Plaintiff has identified no then presently existing false information upon which he justifiably relied, and reasonable minds would reach only this conclusion. As a matter of law, his negligent misrepresentation claim fails.

WA[26]¶[26] **[**448]** It must be remembered that insofar as any promises of performance are concerned, Plaintiff has prevailed in establishing a 1-year implied contract. Although promises of future conduct may support a contract claim (or similar claim such as promissory estoppel in an appropriate case), failure **[***40]** to perform them cannot alone establish the requisite negligence for negligent misrepresentation. High Country Movin', Inc. v. U.S. West Direct Co., 839 P.2d 469, 471 (Colo. Ct. App. 1992). This is because of the absence of any false representation as to a presently existing fact, a prerequisite to a misrepresentation claim.

The trial court properly granted the directed verdict in favor of Defendants on the negligent misrepresentation claim, and the Court of Appeals is affirmed on this issue.

Finally, Defendants maintain that the trial court erroneously excluded the testimony of one of Plaintiff's co-workers. Plaintiff maintains Defendants failed to preserve the issue. We agree. The offer of proof which involved this co-worker was made solely with respect to admissibility

of a diary entry (the particular entry is no longer at issue), and there was never any trial court ruling that the co-worker could not give independent testimony.

The Court of Appeals is affirmed in part and reversed in part. The promissory estoppel award of \$ 363,958 is reversed. The breach of contract award of \$ 65,901 is affirmed. As the Court of Appeals noted, the severance pay award of \$ 26,900 [***41] is subsumed by the breach of contract award, for a net principal amount of \$ 65,901. This case is remanded for recalculation [*183] of Plaintiff's attorney fee award which shall consist of a segregated award for services in the trial court relating to the breach of contract award, and for a segregated award for services in the Court of Appeals relating to the breach of contract award. There shall be no award of fees for services in this court. Judgment shall be entered in accordance with this opinion and its directions on remand.

Andersen, C.J., and Utter, Dolliver, Durham, Smith, Guy, Johnson, and Madsen, JJ., concur.

After modification, further reconsideration denied August 22, 1994.

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139 Wn. App. 772, *; 162 P.3d 1147, **;
2007 Wash. App. LEXIS 2105, ***

In the Matter of the Petition of the Seattle Popular Monorail Authority, a City Transportation Authority, To Acquire by Condemnation Certain Real Property for Public Use as Authorized by Resolution No. 04-16. HTK MANAGEMENT, LLC, ET AL., Appellants, v. ROKAN PARTNERS, ET AL., Respondents.

No. 58113-9-I and consolidated case No. 58782-0-I

COURT OF APPEALS OF WASHINGTON, DIVISION ONE

139 Wn. App. 772; 162 P.3d 1147; 2007 Wash. App. LEXIS 2105

July 23, 2007, Filed

PRIOR HISTORY: [*1]**

Superior Court County: King. Superior Court Cause No: 04-2-10035-6 SEA. Date filed in Superior Court: April 6, 2006 and July 20, 2006. Superior Court Judge Signing: Jeffrey M. Ramsdell.

In re Seattle Monorail Auth., 155 Wn.2d 612, 121 P.3d 1166, 2005 Wash. LEXIS 859 (2005)

CASE SUMMARY

PROCEDURAL POSTURE: In a case where appellant city monorail project abandoned a condemnation action, the Superior Court for King County (Washington) dismissed the condemnation action, vacated the stipulated judgment, and awarded respondents, the lessee and sublessee, costs and fees under Wash. Rev. Code § 8.25.075(1)(b). Appellant, the private property owner, and the monorail project appealed the trial court's decisions.

OVERVIEW: The monorail project's board of directors approved a settlement between the property owner and the monorail project where the monorail project assigned its rights in the stipulated judgment to the property owner. When the stipulated judgment was presented for entry, the lessee and sublessee filed motions to block its entry. Because the monorail project had no authority to confer upon the property owner its rights as a condemnor, and because the evidence established that the monorail project intended to abandon the condemnation and took affirmative steps to abandon the condemnation, the trial court did not err when it vacated the stipulated judgment, found the monorail project had abandoned the condemnation, and dismissed the condemnation proceeding. However, it was not entirely clear from the trial court's decision whether the trial court deducted attorney fees it determined were related solely to allocation issues, nor was it clear what fees it deducted. Without adequate findings of fact and conclusions of law explaining the

trial court's fee award, the appellate court could not meaningfully review the fee award.

OUTCOME: The appellate court affirmed the trial court's judgment dismissing the condemnation proceeding, vacating the stipulated judgment, and awarding attorney fees; however, the appellate court remanded the fee issue to the trial court for entry of additional findings of fact and conclusions of law that would explain its fee award so that the appellate court could meaningfully review the award.

CORE TERMS: condemnation, condemnation proceeding, eminent domain, stipulated judgment, abandoned, abandonment, attorney fees, condemnee's, assign, monorail, eminent domain, delegation, public use, fees incurred, municipal, private party, uncompleted, fee award, condemnor, intent to abandon, settlement, phase, abandon, private property, approving, private owner, redelegations, entity, conclusions of law, condemnation action

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HN1  The power of eminent domain is an inherent power of the state and redelegations of that power to private parties are invalid. [More Like This Headnote](#)

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HN2  The power of eminent domain is an attribute of sovereignty; it is an inherent power of the state. The limits of that power are set out in the [Wash. Const. art. I, § 16](#). [More Like This Headnote](#)

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HN3  See [Wash. Const. art. I, § 16](#).

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[Governments](#) > [Local Governments](#) > [Duties & Powers](#) 

HN4  The state legislature may expressly delegate its power of eminent domain to a city transportation authority. [Wash. Rev. Code § 35.95A.050\(1\)](#). Such legislative delegations are strictly construed, and thus, redelegations of eminent domain powers are generally held to be invalid. [More Like This Headnote](#)

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HN5  Abandonment of a condemnation proceeding has two elements: (1) the intent to abandon, and (2) the performance of an external act giving effect to the intent. Condemnation may be abandoned by the passage of a resolution or the repeal of the initial ordinance that permitted the commencement of the condemnation action. The intent necessary for an abandonment may be shown by actions, conduct, or declarations. [More Like This Headnote](#)

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HN6  If condemnation means anything it is that the governmental entity actually takes privately owned property and assigns it to public use. [More Like This Headnote](#)

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HN7  See [Wash. Super. Ct. Civ. R. 60\(b\)\(11\)](#).

[Civil Procedure](#) > [Appeals](#) > [Appellate Jurisdiction](#) > [Lower Court Jurisdiction](#) 
HN8  See [Wash. R. App. P. 12.2](#).

[Civil Procedure](#) > [Eminent Domain Proceedings](#) > [Attorney Fees](#) 
[Civil Procedure](#) > [Eminent Domain Proceedings](#) > [Costs](#) 
HN9  See [Wash. Rev. Code § 8.25.075](#).

[Civil Procedure](#) > [Eminent Domain Proceedings](#) > [Attorney Fees](#) 
[Civil Procedure](#) > [Eminent Domain Proceedings](#) > [Expert Witness Fees](#) 
HN10  See [Wash. Rev. Code § 8.25.070\(4\)](#).

[Civil Procedure](#) > [Eminent Domain Proceedings](#) > [Attorney Fees](#) 
HN11  Under [Wash. Rev. Code §§ 8.25.070](#) and [.075](#), a condemnee is not entitled to attorney fees incurred prior to a condemnation petition being filed. [More Like This Headnote](#)

[Civil Procedure](#) > [Eminent Domain Proceedings](#) > [Attorney Fees](#) 
HN12  The legislature, through [Wash. Rev. Code § 8.25.070](#), intends to award fees incurred by a condemnee to establish just compensation, but not fees incurred solely to apportion the compensation between condemnees. Fees incurred to establish just compensation include fees paid to produce evidence relevant in any way to the amount of just compensation. That includes fees incurred to produce evidence of the value of one of the condemnee's interests, if the value of that condemnee's interest is a factor for the trier of fact to consider in establishing just compensation of the property as a whole. [More Like This Headnote](#)

[Civil Procedure](#) > [Remedies](#) > [Costs & Attorney Fees](#) > [Attorney Expenses & Fees](#) > [General Overview](#) 
HN13  For purposes of an award of attorney fees, findings of fact and conclusions of law are required to establish an adequate record for appellate review. [More Like This Headnote](#)

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SUMMARY:

WASHINGTON OFFICIAL REPORTS SUMMARY

Nature of Action: The owner of property that a city transportation authority had sought to condemn for a monorail transportation project sought entry of a stipulated judgment for condemnation of the property. The property owner had negotiated the stipulated judgment with the transportation authority and then been assigned the transportation authority's rights in the stipulated judgment after the monorail project was terminated by the transportation authority following a negative public vote. Entry of the stipulated judgment was opposed by two parties: the holder of a long-term lease on the property and a sublessee that operated a parking garage thereon.

Superior Court: The Superior Court for King County, No. 04-2-10035-6, Jeffrey M. Ramsdell, J., on April 6, 2006, entered a judgment vacating the stipulated judgment and dismissing the condemnation action and, on July 21, 2006, entered a judgment awarding

the lessee and sublessee costs and attorney fees.

Court of Appeals: Holding that the transportation authority had abandoned the condemnation and had no authority to assign its rights therein to the private property owner and that the record was insufficient to review the attorney fee award, the court *affirms* the judgment vacating the stipulated judgment and the dismissal of the condemnation action and *remands* the case for further proceedings on the issue of attorney fees.

HEADNOTES

WASHINGTON OFFICIAL REPORTS HEADNOTES

WA(1) [1] Eminent Domain — Authority — Limitations — Constitutional Limitations. The state's power of eminent domain is an attribute of sovereignty; it is an inherent power. The limits of this power are set out in Const. art. I, § 16.

WA(2) [2] Municipal Corporations — Eminent Domain — Statutory Authority — Legislative Delegation — Construction — Strict Construction. The legislature's delegation of its power of eminent domain to a special purpose municipal corporation is strictly construed.

WA(3) [3] Municipal Corporations — Eminent Domain — Statutory Authority — Legislative Delegation — Redelegation — Validity — In General. A special purpose municipal corporation may not redelegate its legislatively granted power of eminent domain to another entity.

WA(4) [4] Municipal Corporations — Eminent Domain — Statutory Authority — Legislative Delegation — Assignment of Uncompleted Condemnation to Private Party — Validity. A special purpose municipal corporation may not assign its rights in an uncompleted condemnation proceeding to a private party.

WA(5) [5] Eminent Domain — Abandonment of Condemnation — Test. A condemnation proceeding initiated by a government agency in the exercise of the power of eminent domain will be deemed abandoned if the agency has the intent to abandon and performs an external act giving effect to such intent. A condemnation proceeding may be abandoned by the passage of a resolution or the repeal of the initial ordinance that permitted the commencement of the condemnation action. The intent necessary for an abandonment may be shown by actions, conduct, or declarations.

WA(6) [6] Administrative Law — Agency Authority — Source — Equity — Validity. Equity cannot be used to confer upon a government agency powers that are without legal authorization.

WA(7) [7] Eminent Domain — Abandonment of Condemnation — Assignment of Condemnation Rights to Private Owner — Effect. A government agency effectively abandons a proceeding to condemn private property for a public use by approving an assignment of its rights to the property to the private owner thereof. The act of approving the assignment to the private owner indicates an intent to abandon the condemnation and, because such approval qualifies as an abandonment of the condemnation, the assignment is not legally permissible. Condemnation means that the government actually takes privately

owned property and assigns it to a public use. Where the government, by its own admission, does not intend to take the property at all by assigning its rights in an uncompleted condemnation proceeding to the private owner of the property, the government thereby abandons the condemnation and has no rights to assign. Equity will not lie to enforce the assignment.

WA(8) [8] Appeal — Mandate — Subsequent Ruling by Trial Court — Validity. Under RAP 12.2, an appellate court's mandate of a case on review from a trial court does not prevent the trial court from subsequently ruling on an issue in the case so long as the ruling does not challenge issues decided by the appellate court.

WA(9) [9] Eminent Domain — Attorney Fees — Abandonment of Condemnation — In General. Under RCW 8.25.075(1)(b), a condemnee that succeeds in having a condemnation judgment vacated on the grounds that the condemnation proceeding has been abandoned by the condemning authority is entitled to an award of attorney fees and costs therefor.

WA(10) [10] Eminent Domain — Attorney Fees — Abandonment of Condemnation — Prepetition Expenses. When a condemnor abandons an eminent domain proceeding, RCW 8.25.070 and .075 do not authorize a condemnee to be reimbursed for attorney fees and expert witness fees incurred before the petition for condemnation was filed.

WA(11) [11] Courts — Stare Decisis — Court of Appeals — Court of Appeals Holding — Review Denied by Supreme Court. A decision of the Court of Appeals that the Supreme Court has declined to review constitutes binding law that must be followed in analogous cases.

WA(12) [12] Costs — Attorney Fees — Review — Basis in Record — Necessity. An award of attorney fees will not be sustained on appeal if the record before the court is insufficient to demonstrate the basis for the award or to allow meaningful review.

COUNSEL: George Kresovich and Timothy D. Benedict (of Hillis Clark Martin & Peterson), for appellant **HTK Management, LLC**.

P. Stephen DiJulio and Sharon E. Cates (of Foster Pepper, PLLC), for appellant Seattle Popular Monorail Project.

Richard C. Yarmuth and Jordan Gross (of Yarmuth Wilsdon Calfo, PLLC), for respondent Rokan Partners.

Paul A. Harrel, Daniel W. Ferm, and Megan L. Pedersen (of Williams Kastner & Gibbs, PLLC), for respondent AMPCO Systems Parking.

JUDGES: Written by: Grosse, J. Concurred by: Dwyer, J., Appelwick, CJ.

OPINION BY: GROSSE

OPINION

[*775] [1149]** ¶1 GROSSE, J. — ^{HN1} The power of eminent domain is an inherent power of the state and delegations of that power to private parties are invalid. Here, the Seattle Monorail Project agreed to assign its rights in an uncompleted condemnation proceeding to a private party. Because the Seattle Monorail Project did not have the power to make such an assignment, **[***2]** and because the Seattle Monorail Project's actions

evidenced its intent to abandon the condemnation proceedings, we affirm the trial court on this issue.

FACTS

¶2 In April 2004, the Seattle Popular Monorail Authority, a/k/a Seattle Monorail Project (SMP), filed a petition to condemn property owned by **HTK** Management, LLC. The subject property contains a parking garage. Rokan Partners holds a long-term lease on the property, and AMPCO System Parking operates the garage as a sublessee of Rokan. **HTK** challenged the trial court's finding of public use to the Supreme Court.

¶3 The parties reached a mediated settlement agreement contingent upon the outcome of the Supreme Court case. The settlement agreement called for the entry of a stipulated judgment if SMP prevailed in the suit. The **[*776]** stipulated judgment called for SMP to take title of the property through condemnation in return for a \$10,400,000 just compensation award, inclusive of all fees and costs.

¶4 On October 20, 2005, the Supreme Court in *In re Petition of Seattle Popular Monorail Authority*¹ affirmed the trial court's finding of public use and necessity. By that time, public concern had arisen over the financial **[***3]** viability to the monorail project. SMP placed a modified monorail proposal before voters on November 8, 2005. The voters rejected the proposal, effectively terminating the project for which the subject property was to be acquired. On November 9, 2005, the SMP board of directors passed a resolution authorizing steps to terminate SMP. On November 16, 2005, the Supreme Court issued its mandate.

FOOTNOTES

¹ 155 Wn.2d 612, 121 P.3d 1166 (2005).

¶5 In light of SMP's changed fortunes, negotiations were conducted between the parties to arrive at another settlement. In December 2005, the SMP board of directors approved a settlement between **HTK** and SMP where SMP assigned its rights in the stipulated judgment to **HTK**. In return, **HTK** waived any claims that it might have against SMP and indemnified and held SMP harmless from any other claims arising from this action. When the stipulated judgment was presented for entry, Rokan and AMPCO filed motions to block its entry.

¶6 The trial court found in favor of Rokan and AMPCO. Specifically, the trial court concluded that SMP had abandoned the condemnation proceedings when it agreed to assign its rights to **HTK** under the stipulated judgment. The court dismissed the condemnation **[***4]** action and vacated the stipulated judgment. Furthermore, the trial court concluded that because SMP abandoned the condemnation, Rokan and AMPCO were entitled to costs and fees under RCW 8.25.075(1)(b).

¶7 At a subsequent hearing, Rokan and AMPCO requested costs and fees. AMPCO requested a total award of \$311,780.97, and Rokan asked for \$295,724.20. **HTK** and **[*777]** SMP opposed the requested fees. The trial court awarded AMPCO \$247,609 and Rokan \$194,170.

¶8 **HTK** and SMP appeal the trial court's decisions vacating the stipulated judgment and awarding Rokan and AMPCO fees. Rokan cross-appeals the trial court's decision awarding it less than the full amount of its requested fees. AMPCO does not cross-appeal the decision to award it less than the full amount of its requested fees but asks that its fee award be affirmed.

ANALYSIS

¶9 This case presents the issue of whether a public entity's agreement to assign its **[**1150]** rights as a condemner to a private party under an uncompleted eminent domain proceeding constitutes an abandonment of the condemnation by the public entity. The trial court concluded that SMP lacked the power to assign its rights as condemner to **HTK**. Furthermore, SMP had abandoned the condemnation **[***5]** proceedings when it agreed to assign its rights to **HTK** under the stipulated judgment. For the reasons stated below, we agree with the trial court.

WA(1)¶[1] ¶10 **HN2**¶“The power of eminent domain is an attribute of sovereignty; it is an inherent power of the state.”² The limits of this power are set out in the Washington State Constitution, article I, section 16, which states:

HN3¶Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, and no right-of-way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed **[*778]** by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private **[***6]** property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public: *Provided*, that the taking of private property by the state for land reclamation and settlement purposes is hereby declared to be for public use.

WA(2)¶[2-4] ¶11 As with what happened in this case, **HN4**¶the state legislature may expressly delegate its power of eminent domain to a city transportation authority.³ Such legislative delegations are strictly construed, and thus, redelegations of eminent domain powers are generally held to be invalid.⁴ Here, SMP assigned its rights in an uncompleted condemnation proceeding to a private party, **HTK**. SMP lacked the authority to make such an assignment. The trial court was correct.

FOOTNOTES

² State v. King County, 74 Wn.2d 673, 675, 446 P.2d 193 (1968).

³ See RCW 35.95A.050(1).

⁴ King County, 74 Wn.2d at 675-76.

WA(5)¶[5-7] ¶12 Moreover, the trial court correctly concluded that SMP's approval of the assignment evidenced its intent to abandon the condemnation. The elements of abandonment of a condemnation proceeding are set forth in *Nichols on Eminent Domain*:⁵

^{HN5} Abandonment has *****7** two elements: the intent to abandon and the performance of an external act giving effect to the intent. Condemnation may be abandoned by the passage of a resolution or the repeal of the initial ordinance that permitted the commencement of the condemnation action. The intent necessary for an abandonment may be shown by actions, conduct, or declarations.

SMP's intent to abandon the condemnation is expressed in its resolution approving the assignment. By its own words, ***779** SMP approved the assignment because it "would permit the owner of that property to *keep the property* while at the same time protecting the Seattle Monorail Project and its taxpayers from any further liability, cost or expense related to the acquisition of that property." ^{HN6} If condemnation means anything, it is that the governmental entity actually takes privately owned property and assigns it to public use. Here, SMP by its own admission did not intend to take the property at all but, instead, intended to allow HTK (as SMP's assignee) ****1151** to remain the private owner of the property. It follows that SMP's approval of the assignment agreement by resolution was the external act demonstrating that SMP did not intend to take the property *****8** and assign it to public use.

FOOTNOTES

⁵ 6 JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 26D.01[1][b] (3d ed. 2006) (footnotes omitted).

⁶ (Emphasis added.)

¶13 HTK argues that the basis for the trial court's ruling was CR 60(b)(11). Rokan's motion cited as authority CR 60(b)(1), (b)(3), (b)(6), and (b)(11), while AMPCO's motion cited CR 60(b)(3) and (b)(11) as grounds for relief. The trial court's order does not state which rule it applied. ^{HN7} CR 60(b)(11) states, "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for ... [a]ny other reason justifying relief from the operation of the judgment." HTK argues that this rule is primarily equitable in nature; that the trial court failed to balance the equities in providing relief under this rule; and that if the equities are considered, they favor HTK and the entry of the stipulated judgment. Essentially, HTK argues that it was misled by Rokan and AMPCO into thinking that its deal with SMP would meet with their approval.

¶14 However, equity cannot be used to confer upon a city transportation authority like SMP powers that are without legal authorization. ⁷ Thus, equity cannot save HTK and SMP from the fact that the attempted *****9** assignment was not ***780** legally permissible, or from the fact that SMP's action in approving the assignment qualifies as an abandonment of the condemnation. Furthermore, the circumstances surrounding this case were highly unusual and would justify the trial court's use of CR 60(b)(11). Thus, the trial court did not abuse its discretion in exercising its powers under CR 60(b) to vacate the stipulated judgment, block the assignment, and find that SMP had abandoned the condemnation.

FOOTNOTES

⁷ See Finch v. Matthews, 74 Wn.2d 161, 172, 443 P.2d 833 (1968).

^{WA(8)} **[8]** ¶15 Additionally, SMP argues that RAP 12.2 requires the trial court to enter the stipulated judgment because the Supreme Court's mandate so requires. However, ^{HN8} RAP

12.2 states that "[a]fter the mandate has issued, the trial court may, however, hear and decide postjudgment motions otherwise authorized by statute or court rule so long as those motions do not challenge issues already decided by the appellate court." The issue before the trial court here was whether SMP had since abandoned the condemnation by assigning its rights in the stipulated judgment to **HTK** in an effort to reduce its administrative costs and reduce its potential liability. This issue *****10** was not before the Supreme Court in the prior litigation and, pursuant to RAP 12.2, the trial court was permitted to hear it and enter judgment on that issue.

¶16 In sum, because SMP had no authority to confer upon **HTK** its rights as a condemnor, and because the evidence establishes that SMP intended to abandon the condemnation and took affirmative steps to abandon the condemnation, the trial court did not err when it vacated the stipulated judgment, found SMP had abandoned the condemnation, and dismissed the condemnation proceeding.

Costs and Attorney Fees

WA(9) ¶9 ¶17 Because the trial court did not err in finding SMP had abandoned the condemnation proceedings, RCW 8.25.075 applies and Rakan and AMPCO are entitled to reasonable costs and attorney fees at trial and on appeal. HN9 ¶RCW 8.25.075 states in pertinent part:

[*781] (1) A superior court ... shall award the condemnee costs including reasonable attorney fees and reasonable expert witness fees if:

- (a) There is a final adjudication that the condemnor cannot acquire the real property by condemnation; or
- (b) The proceeding is abandoned by the condemnor.

... .

(4) Reasonable attorney fees and expert witness fees as authorized in this section shall be subject to *****11** the provisions of subsection ****1152** (4) of RCW 8.25.070 as now or hereafter amended.

HN10 ¶RCW 8.25.070(4) states:

Reasonable attorney fees as authorized in this section shall not exceed the general trial rate, per day customarily charged for general trial work by the condemnee's attorney for actual trial time and his or her hourly rate for preparation. Reasonable expert witness fees as authorized in this section shall not exceed the customary rates obtaining in the county by the hour for investigation and research and by the day or half day for trial attendance.

WA(10) ¶10 ¶18 Here, the trial court failed to explain its fee award decision in sufficient detail, and that has led the parties to argue several theories on appeal as to why they believe the decision was wrong, based on their own differing interpretations of the trial court's order. In its written order, the trial court handwrote the following explanation for its reduced fee award:

The court has reviewed the submissions of the parties and finds that the fees and

costs awarded to AMPCO and Rokan represent the reasonable attorney fees and reasonable expert witness fees authorized by RCW 8.25.075 and RCW 8.25.070 (4). *The court has made adjustments to the [***12] requested award amounts by subtracting fees not reasonably related to trial preparation in this matter.* ⁸

It is not entirely clear from the court's decision, but it is possible to assume based on the arguments of the parties **[*782]** below that the trial court relied on *State v. Trask* ⁹ and *Port of Grays Harbor v. Citifor, Inc.* ¹⁰ to deduct fees that it believed were not applicable to the just compensation phase of the litigation and, thus, not reasonably related to trial preparation.

FOOTNOTES

⁸ (Emphasis added.)

⁹ 91 Wn. App. 253, 957 P.2d 781 (1998).

¹⁰ 123 Wn.2d 610, 869 P.2d 1018 (1994).

¶19 In *Port of Grays Harbor*, the Supreme Court concluded that ^{HN11} under RCW 8.25.070 and .075 the condemnee was not entitled to attorney fees incurred prior to the condemnation petition being filed.

¶20 In *Trask*, Division Two of the Court of Appeals held that ^{HN12} the legislature, through RCW 8.25.070, intended to award fees incurred by a condemnee to establish just compensation, but not fees incurred solely to apportion such compensation between condemnees. Assuming that the compensation portion of condemnation proceedings contains a just compensation phase and an allocation phase, the court explained it reached its decision based on the **[***13]** concern that the fees incurred at the allocation phase (where the condemnees determined the division of the just compensation award) would be incurred in the State's absence, depriving the State of the opportunity to challenge their reasonableness. The court further held "that fees incurred to establish just compensation include fees paid to produce evidence relevant *in any way* to the amount of just compensation." ¹¹ This would include fees incurred to produce evidence of the value of one of the condemnee's interests, if the value of that condemnee's interest was a factor for the trier of fact to consider in establishing just compensation of the property as a whole. ¹²

FOOTNOTES

¹¹ Trask, 91 Wn. App. at 280.

¹² Trask, 91 Wn. App. at 280 n.55.

¶21 Rokan challenges the *Trask* court's reasoning, stating that the distinction drawn between the just compensation and allocation phases is a false one because the issues **[*783]** are often litigated together (and were so even in *Trask*) and, therefore, the State is often continuously in a position to challenge the reasonableness of the fees. Rokan argues the evil the *Trask* court wished to prevent in its decision does not justify its decision even **[***14]** under the facts in *Trask* and, therefore, should not justify the same result in this case where SMP remained a party to the suit and thus was able to challenge the reasonableness of the fees throughout the lawsuit.

WA(11)¶[11] ¶22 However, the *Trask* court reached its result even in the absence of the assumed facts that drove its analysis. That decision [**1153] was denied review by the Supreme Court and is now the law of the State of Washington and must be followed by this court and the trial court, no matter how questionable its reasoning.

WA(12)¶[12] ¶23 That said, it is not entirely clear from the trial court's decision whether the trial court deducted fees it determined were related solely to allocation issues, nor is it clear what fees it deducted. Without adequate findings of fact and conclusions of law explaining the trial court's fee award, we cannot meaningfully review the fee award.¹³ We thus remand the fee issue to the trial court for entry of additional findings of fact and conclusions of law that explain its fee award.

FOOTNOTES

¹³ *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998) HN13¶ (as to an award of fees, findings of fact and conclusions of law are required to establish an adequate record for appellate review).

¶24 For the [***15] above reasons, we affirm in part and remand in part.

APPELWICK, C.J., and DWYER, J., concur.

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148 Wash. 170, *; 268 P. 143, **;
1928 Wash. LEXIS 827, ***

Lillian Jacoby Price, Appellant, v. James R. Chambers et al., Respondents

No. 21225

Supreme Court of Washington, Department One

148 Wash. 170; 268 P. 143; 1928 Wash. LEXIS 827

June 19, 1928

PRIOR HISTORY: [***1] Appeal from a judgment of the superior court for King county, Beals, J., entered March 15, 1928, dismissing an action to recover moneys retained under an attorney's lien for services. Affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant clients sought review of a decision of the Superior Court for King County (Washington), which dismissed their action to recover moneys retained under respondent attorney's lien for services.

OVERVIEW: The client alleged that the attorney received \$ 1,000 for her use and benefit and that the attorney refused to pay the balance of the money, which he had collected. On review, the court affirmed the trial court's decision and held that, as between the parties to the action in which the judgment was entered, an appellate court had a right to determine all questions affecting the judgment raised by the parties properly before the court in some form of proceeding by which the matters could be properly adjudicated. The court held that the only question raised, which was for the establishment and enforcement of a lien, raised a question of equitable cognizance. The answer, according to the court, converted the action to one in equity, which was triable without a jury, even though the complaint pleaded merely an action for money had and received.

OUTCOME: The court affirmed the trial court's dismissal of the client's complaint against the attorney.

CORE TERMS: retaining, jury trial, charging lien, cognizance, equitable, charging, pleaded, common law, equitable issues

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HN1  The nature of an action as to its being one at law or in equity is determinable, not by the complaint alone, but by a consideration of all the issues raised by all of the pleadings. [More Like This Headnote](#)

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WA[1]  **[1] Jury (4) — Right to Jury Trial — Equitable Issues** A jury trial in an action against an attorney for money had and received is properly denied, where the answer raises equitable issues growing out of the attorney's claim for a lien upon the fund.

WA[2]  **[2] Attorney and Client (45) — Liens — Nature — Charges** An attorney has a charging, and not merely a retaining, lien upon moneys that came into his possession in the course of his employment.

COUNSEL: *Robert D. Hamlin*, for appellant.

James R. Chambers and *Charles E. Claypool*, for respondents.

JUDGES: French, J. Fullerton, C.J., Parker, Mitchell, and Tolman, JJ., concur.

OPINION BY: FRENCH

OPINION

[*170] [143]** The respondent, James R. Chambers, is an attorney at law. Plaintiff brought suit against him to recover the sum of \$ 338.25, claiming that, in the course of his professional employment, the respondent, as her attorney, received approximately \$ 1,000 for her use and benefit; that he paid to **[***2]** her certain amounts, and that on demand being made, refused to pay the balance of the money which he had collected. The answer denied generally any indebtedness, and alleged that respondent had been employed as attorney by the appellant and had represented her in a number of matters which, by the pleadings, appear to have been of considerable importance, and claiming that the **[*171]** retained balance of \$ 338.25 was held subject to an attorney's lien.

WA[1]  **[1]** **WA[2]**  **[2]** The reply made certain admissions and denials; appellant made proper and timely demand for a jury trial, and the refusal of the court to grant her a jury trial seems to be the only error which appellant is seriously urging.

HN1  "The nature of an action as to its being one at law or in equity is determinable, not by the complaint alone, but by a consideration of all the issues raised by all of the pleadings." *Thiel v. Miller*, 122 Wash. 52, 209 P. 1081.

See, also, *Peterson v. Philadelphia Mtg. & Trust Co.*, 33 Wash. 464, 74 P. 585; *Lindley v. McGlaufflin*, 57 Wash. 581, 107 P. 355; *Nolan v. Pacific Warehouse Co.*, 67 Wash. 173, 121 P. 451, Ann. Cas. 1913D 167.

Appellant contends that the lien of an attorney [***3] is but a retaining lien and does not, by having been pleaded in the answer, change the nature of the action to one of equitable cognizance. The contention is also made that the retaining lien may not be enforced, but may be used only to worry or embarrass the client into the payment of charges, and cites in support of such contention *Gottstein v. Harrington*, 25 Wash. 508, 65 P. 753. We cannot so read the opinion. It seems to us that the distinguishing difference between the charging and retaining lien is there clearly pointed out.

"Originally, at the common law, there was no attorney's charging lien. There was a general or retaining lien, which consisted in a right to retain the papers of the client left in the attorney's hands until the amount due him for services was paid; and this lien has been very generally recognized in American jurisprudence. [**144] The special or charging lien, which is also recognized by the statute law of this country, and especially of this state, applies only to judgments, [*172] money in hand or in the hands of the adverse party after notice. The statute of this state (Bal. Code, § 4772) is merely declaratory of the common law on the [***4] question of the general or retaining lien, but it recognizes the right to a special or charging lien; and provides the method of establishing the latter."

This court again, in a later case, clearly recognized that under certain circumstances an attorney may have a charging lien.

"The statute, Rem. & Bal. Code, § 136, which authorizes an attorney's lien on a judgment, makes no provision for the procedure to be following in enforcing the lien nor any procedure that would destroy it. There can be no question but that, as between the parties to the action in which the judgment was entered, the court has a right to determine all questions affecting the judgment raised by the parties properly before the court, in some form of proceeding by which the matters might be properly adjudicated." *State ex rel. Angeles Brewing & Malting Co. v. Superior Court*, 89 Wash. 342, 154 P. 603.

No question is raised but what the establishment and enforcement of a lien raises a question of equitable cognizance. The answer, having converted the action to one in equity, was triably without a jury, even though the complaint pleaded merely an action for money had and received. Appellants therefore were [***5] not entitled to a trial by a jury. *Thiel v. Miller, supra*.

Judgment affirmed.

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158 Wn.2d 523, *; 146 P.3d 1172, **;
2006 Wash. LEXIS 874, ***

CAROLE SORENSON, *Respondent*, v. BARBARA **PYEATT** ET AL., *Defendants*, HOUSEHOLD FINANCE CORPORATION III ET AL., *Petitioners*, WILLIAM F. WALKER ET AL., *Defendants*, MERITECH MORTGAGE SERVICES ET AL., *Petitioners*.

No. 77229-1

SUPREME COURT OF WASHINGTON

158 Wn.2d 523; 146 P.3d 1172; 2006 Wash. LEXIS 874

May 16, 2006.

November 9, 2006, Filed

PRIOR HISTORY: Sorenson v. **Pyeatt**, 126 Wn. App. 1047, 2005 Wash. App. LEXIS 1377 (2005).

CASE SUMMARY

PROCEDURAL POSTURE: Petitioners, a group of commercial lenders (lenders), sought review of the decision of the Court of Appeals (Washington), which reversed the trial court's judgment imposing an equitable lien against real property and foreclosing upon that property after the trial court had quieted title in the name of respondent, the owner.

OVERVIEW: A group of lenders sought to overturn an appellate court decision reversing the trial court's judgment imposing an equitable lien against real property and foreclosing upon that property after it had been quiet titled in the name of the owner. The equitable lien was imposed in partial satisfaction of a judgment that the trial court granted in favor of the lenders and against two other individuals who had forged quitclaim deeds to the property and used the property as collateral to secure roughly \$868,000 in loans from the lenders. The supreme court affirmed the holding reversing the trial court's imposition of an equitable lien on the property because there was no debtor-creditor type relationship between the lenders and the owner. Additionally, the lenders failed to establish that it was the owners' conduct, as opposed to one of the other individual's fraudulent conduct, upon which they relied to their detriment. The owner's right to quiet title in the property should not have been denied merely because she had previously engaged in some measure of prior inequitable conduct when such conduct was not directly connected to the present suit or creditors.

OUTCOME: The supreme court affirmed the judgment and remanded the case to the trial court for entry of an order setting aside the equitable lien imposed upon the property,

dismissing all claims asserted by the lenders against the owner, striking those portions of the previous judgment ordering foreclosure on the property, and quieting title to the property in the owner's name.

CORE TERMS: lender, equitable lien, deed of trust, deed, estoppel, equitable estoppel, equitable remedies, forged, equitable, repayment, disability, fraudulent, mortgage, estopped, collateral, ownership, promissory note, inequitable conduct, fraudulent conduct, innocent, owed, party asserting, security interest, real property, foreclosure, assignee, estop, record owner, supplemental brief, discretionary

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HN1  An equitable lien will be enforced in equity against specific property, though there is no valid lien at law; equity imposes liens either to carry out the intention of the parties to give a security or to prevent injustice, regardless of the intent. Equitable liens fall into two categories: (1) those created to give effect to an intention of the parties to secure payment of an obligation by subjecting to the payment of the obligation specified property, such as equitable mortgages and equitable pledges, and (2) those created by the court to protect a party against inequitable loss, regardless of intent. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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[Civil Procedure](#) > [Appeals](#) > [Standards of Review](#) > [Abuse of Discretion](#) 

HN2  In matters of equity, trial courts have broad discretionary power to fashion equitable remedies. The Supreme Court reviews the authority of a trial court to fashion equitable remedies under an abuse of discretion standard. However, it is a well-established rule that an equitable remedy is an extraordinary, not ordinary form of relief. A court will grant equitable relief only when there is a showing that a party is entitled to a remedy and the remedy at law is inadequate. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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HN3  The right to an equitable lien arises when a party at the request of another advances him money to be applied and which is applied to the discharge of a legal obligation of that other, but when, owing to the disability of the person to whom the money is advanced, no valid contract is made for its repayment. The doctrine of equitable lien has its prescribed boundaries. It is not a limitless remedy to be applied according to the conscience of the particular chancellor. Additionally, there are express limitations on when a trial court may impose the remedy of an equitable lien. [More Like This Headnote](#)

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HN4  A trial court's ability to impose an equitable lien is not limited to only when it serves the "purposes" of securing property settlements, alimony payments, and the award of community property. Rather, there are a number of circumstances where an equitable lien has been and may be an appropriate equitable remedy. A trial court is not foreclosed to apply this remedy when the particular legal circumstances and equities call for it. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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HN5  Even though an equitable lien is an equitable remedy and may arise from any number of varied facts and circumstances, this remedy has certain elements that must be established by a claimant before it can be imposed. The Supreme Court of Washington take this opportunity to reaffirms the decision in Falconer v. Stevenson decision, and the criteria that it indicated is to be applied by a trial court when determining whether to impose an equitable lien. In doing so, the supreme court gives meaning to its pronouncement in Falconer that the equitable lien doctrine has "prescribed boundaries" by making the imposition of an equitable lien a mixed question of law and fact. That is, henceforth, a trial court's conclusion as to whether the facts, as found, meet the requirements for granting an equitable lien will be reviewed for an error of law on appeal. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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HN6  An equitable lien is a remedy for debt determined to be owed in law. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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HN7  A trial court has broad discretionary powers in matters of equity. [More Like This Headnote](#)

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[Real Property Law](#) > [Ownership & Transfer](#) > [Transfer Not By Deed](#) > [General Overview](#) 

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HN8  Three elements must be established in order to support an equitable estoppel claim. It must be shown that (1) the conduct, acts, or statements by the party to be estopped are inconsistent with a claim afterward asserted by that party, (2) the party asserting estoppel took action in reasonable reliance upon that conduct, act, or statement, and (3) the party asserting estoppel would suffer injury if the party to be estopped were allowed to contradict the prior conducts, act, or statement. As effecting title to land, equitable estoppel is a doctrine by which a party may be prevented from setting up his legal title because he has through his acts, words, or silence led another to take a position in which the assertion of the legal title would be contrary to equity and good conscience. In Washington, very clear and cogent evidence is required to estop an owner out of a legal title to real property. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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HN9  Washington recognizes estoppel by silence. However, it is an essential element of an equitable estoppel claim that the party asserting estoppel show that the other's conduct induced him to believe in the existence of the state of facts and to act thereon to his prejudice. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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HN10  The comparative innocence doctrine provides that where two innocent persons must suffer due to the fraud of a third person, the loss should fall on the

"innocent" party who enabled the fraud. [More Like This Headnote](#)

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[Torts](#) > [Procedure](#) > [Statutes of Limitations](#) > [General Overview](#) 

HN11  [Wash. Rev. Code § 19.40.091\(a\)](#) provides, in essence, that a creditor's fraudulent transfer claim be brought within four years of the time the fraudulent transfer was made or the obligation was incurred. [More Like This Headnote](#)

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[Civil Procedure](#) > [Appeals](#) > [Reviewability](#) > [Preservation for Review](#) 

HN12  The Supreme Court of Washington will not address an argument raised for the first time in a supplemental brief and not made originally by the petitioner or respondent within the petition for review or the response to petition, [Wash. R. App. P. 13.7\(b\)](#). [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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HN13  It is a fundamental maxim that equity will not intervene where there is an adequate remedy at law. In determining whether to exercise equitable powers, Washington courts follow the general rule that equitable relief will not be accorded when there is a clear, adequate, complete remedy at law. Furthermore, it is a good equity policy that the person against whom the legal remedy is sought and authorized should be the same person against whom the equitable remedy is sought. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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SUMMARY:

Nature of Action: The record owner of a parcel of real property that was, without the owner's knowledge or authorization, fraudulently pledged by persons known to the owner in order to borrow money from several lenders sought to quiet title to the property.

Superior Court: The Superior Court for Whatcom County, No. 01-2-01842-2, Michael E. Rickert, J., on June 25, 2003, entered a judgment quieting title in the plaintiff, entered a judgment in favor of the lenders against the perpetrators of the fraud, imposed an equitable lien on the property in favor of the lenders, and authorized the lenders to foreclose on the property. The court also ruled, alternatively, that while the plaintiff took record title to the property, one of the perpetrators of the fraud remained the actual or beneficial owner and that, in the event the equitable lien on the property was overturned, the lenders' deeds of trust could be enforced directly against the perpetrator as owner of the property and that foreclosure on the property could occur on that basis.

Court of Appeals: The court *vacated* the equitable lien by an unpublished opinion noted at [126 Wn. App. 1047 \(2005\)](#).

Supreme Court: Holding that the requirements for imposing an equitable lien on the

property were not established, that the lenders do not have a legally enforceable security interest in the property due to fraud, that equity does not require the plaintiff to divest her full property interest to satisfy the lenders' judgment against the perpetrators of the fraud, and that the plaintiff is not equitably estopped from claiming title to the property as a result of her prior inequitable conduct, the court *affirms* the decision of the Court of Appeals and remands the case to the trial court for entry of an order (1) setting aside the equitable lien imposed on the property, (2) dismissing all claims asserted by the lenders against the plaintiff, (3) striking those portions of the previous judgment ordering foreclosure on the property, and (4) quieting title to the property in the plaintiff's name.

HEADNOTES

WASHINGTON OFFICIAL REPORTS HEADNOTES

WA[1] [1] Equity -- Remedies -- Determination Trial courts have broad discretionary power to fashion equitable remedies. However, an equitable remedy is an extraordinary, not ordinary, form of relief that should be granted only when a party is entitled to a remedy and there is no adequate remedy at law.

WA[2] [2] Equity -- Remedies -- Review -- Standard of Review A trial court's authority to fashion an equitable remedy is reviewed under the abuse of discretion standard.

WA[3] [3] Liens -- Equitable Liens -- Elements -- In General An equitable lien is an equitable remedy to enforce the repayment of a lawfully owed obligation, such as a debt. There are any number of varied facts and circumstances that would provide a basis for granting an equitable lien, but the equitable lien doctrine has prescribed boundaries. The remedy may be granted only when the following elements are established: (1) an advancement of money to a person at the person's request, (2) the money is applied to the discharge of a legal obligation of the person, (3) but, owing to the disability of the person to whom the money is advanced, (4) no valid contract is made for the repayment of the money advanced.

WA[4] [4] Liens -- Equitable Liens -- Mixed Question of Law and Fact -- Review Whether an equitable lien should be granted in a particular instance involves a mixed question of law and fact. Whether the facts, as found, meet the requirements for granting an equitable lien are reviewed for an error of law on appeal.

WA[5] [5] Liens -- Equitable Liens -- Enforcement of Debtor's Obligation -- Authority To Grant Valid Security Interest -- Necessity An equitable lien will not lie against property to enforce the repayment of a debt if the debtor has no power to grant a valid security interest in the property.

WA[6] [6] Liens -- Equitable Liens -- Enforcement of Debtor's Obligation -- Valid Promissory Note -- Absence of Disability A lender that is unable to enforce a deed of trust to obtain repayment of a sum owed under a promissory note because the debtor did not have the power to grant a valid security interest in the property encumbered by the deed is not entitled to an equitable lien on the property to secure repayment of the debt if the promissory note is not invalid as the debtor does not have a "disability" relating to repayment under the note. Where the lender has obtained a judgment on the note, the fact that the judgment may remain partially or fully unsatisfied due to the debtor's financial difficulties does not mean that the debtor has a "disability" for purposes of the contract's

validity; nor is a "disability" shown by the inability of the lender to enforce the invalid deed of trust.

WA[7] [7] Liens -- Equitable Liens -- Enforcement of Debtor's Obligation -- Property or Interest Owned by Debtor -- Necessity An equitable lien to enforce the repayment of a debt should be imposed only upon a property or interest owned by the person who incurred the debt.

WA[8] [8] Estoppel -- Elements -- In General The elements of equitable estoppel are (1) conduct, an act, or a statement by the party sought to be estopped that is inconsistent with a claim afterward asserted by that party; (2) the party asserting estoppel took action in reasonable reliance on the first party's conduct, act, or statement; and (3) the second party would suffer injury if the first party were allowed to contradict the prior conduct, act, or statement.

WA[9] [9] Estoppel -- Quieting Title -- Equitable Estoppel -- Elements -- Proof -- Degree of Proof As affecting title to land, equitable estoppel is a doctrine by which a party may be prevented from acquiring legal title because the party has, by acts, words, or silence, led another to take a position, and the party's assertion of legal title would be contrary to equity and good conscience. Very clear and cogent evidence is required to estop an owner of real property out of legal title to the property.

WA[10] [10] Estoppel -- Quieting Title -- Equitable Estoppel -- Elements -- Reliance -- Necessity Estoppel will not lie to prevent the record title owner of property from contesting the validity of a forged title instrument against an innocent purchaser or lender who holds the forged instrument if the innocent purchaser or lender did not act in reliance on any conduct, act, or statement by the record title owner. Even if the record title owner has engaged in some measure of inequitable conduct, absent a showing of nexus between that conduct and financial harm or other prejudice to the innocent purchaser or lender or a showing that the record owner personally benefited beyond retaining ownership of the land, estoppel will not lie.

WA[11] [11] Appeal -- Review -- Issue First Raised in Supplemental Brief -- In General An appellate court may decline to consider a claim or argument raised for the first time in a supplemental brief and not made originally by the petitioner or respondent in the petition for review or response to the petition.

WA[12] [12] Appeal -- Review -- Issues Not Raised in Trial Court -- In General An appellate court may decline to consider a claim or argument that was not raised in the trial court below.

WA[13] [13] Equity -- Remedies -- Remedy at Law -- Effect Equitable relief will not be granted to a party if the party has a clear, adequate, and complete remedy at law. The person against whom the legal remedy is sought and authorized should be the same person against whom the equitable remedy is sought.

COUNSEL: Jonathan P. Meier and Stephen J. Sirianni (of *Sirianni Youtz Meier & Spoonemore*), for petitioners.

Philip E. Rosellini (of *Law Offices of Philip E. Rosellini*), for respondent.

JUDGES: [***1] AUTHOR: Chief Justice Gerry L. Alexander. WE CONCUR: Justice Charles W. Johnson, Justice Barbara A. Madsen, Justice Richard B. Sanders, Justice Bobbe J. Bridge, Justice Tom Chambers, Justice Susan Owens, Justice Mary E. Fairhurst, Justice James M. Johnson.

OPINION BY: Gerry L. Alexander

OPINION

En Banc.

[1173] [*527]** P1 ALEXANDER, C.J. -- A group of commercial lenders (Lenders) ¹ seeks to overturn a decision of the Court of Appeals in which that court reversed the trial court's judgment imposing an equitable lien against real property located on Lummi Island and foreclosing upon that property after the trial court had quieted title in the name of Carole Sorenson. The equitable lien was imposed in partial satisfaction of a judgment the trial court granted in favor of the Lenders against Ken and Barbara **Pyeatt**, ² the latter of whom forged quitclaim deeds to the property and used the property as collateral to secure roughly \$ 868,000 in loans from the Lenders. Alternatively, the Lenders assert that Sorenson should be equitably estopped from claiming unencumbered ownership of the property.

FOOTNOTES

¹ The Lenders/petitioners are Saxon Mortgage, Inc., Bankers Trust Company, Meritech Mortgage Services, and Household Finance Corporation →III. **[***2]**

² Ken and Barbara **Pyeatt** are not parties to this appeal.

[1174]** P2 We hold that the Lenders are not entitled to relief, equitable or otherwise. In our view, the Court of Appeals correctly concluded that the Lenders failed to meet the criteria set forth by this court in *Falconer v. Stevenson*, 184 Wash. 438, 51 P.2d 618 (1935), for imposing an equitable lien. We hold, additionally, that it correctly concluded that Barbara **Pyeatt** had no power to give the Lenders a legally enforceable security interest in the Lummi Island property. We further conclude that equity does not call for divesting Sorenson of her full property interest to satisfy the Lenders' judgment against the **Pyeatts**.

P3 Finally, the Lenders have failed to show that they detrimentally relied on an admission, act, or statement by Sorenson--a predicate to establishing an equitable estoppel claim. Consequently, we affirm the Court of Appeals and remand to the trial court for an order quieting title to the **[*528]** Lummi Island property in Sorenson free and clear of all claims by the Lenders.

I

P4 Prior to commencement of this action in 2003, **[***3]** Carole Sorenson and Ken **Pyeatt** had been longtime friends. During the 1980s, Sorenson and **Pyeatt** engaged in a series of transactions in which Ken **Pyeatt** conveyed his interest in certain real property to Sorenson, including the Lummi Island real property at issue in this case. ³ Although these transfers had the effect of making Sorenson the record owner, as a practical matter, Ken **Pyeatt** retained incidents of ownership. ⁴ The trial court determined that these transactions were undertaken for the purpose of keeping title out of Ken **Pyeatt's** name in order that he might avoid his then-creditors and, possibly, to keep the properties out of the reach of the drug enforcement agency. ⁵ From time to time, Sorenson conveyed the properties back to Ken **Pyeatt** so that he could use the properties as collateral to borrow money. ⁶ After doing so, **Pyeatt** would reconvey the properties back to Sorenson.

FOOTNOTES

³ Unless otherwise noted, all facts cited herein are drawn from the trial court's findings of fact and conclusions of law and have not been challenged at this court by either the respondent or the petitioners. Unchallenged findings are verities on appeal. *In re Disciplinary Proceeding Against VanDerbeek*, 153 Wn.2d 64, 90 n.24, 101 P.3d 88 (2004). [***4]

⁴ For example, it was orally agreed upon that Ken **Pyeatt** would retain the privilege of occupying the various properties, including the Lummi Island property at issue here, as well as the ability to collect all incomes, rents, and proceeds of sale therefrom.

⁵ Those creditors included Ken **Pyeatt's** former wife and the Internal Revenue Service. However, that group of creditors did not include any of the present Lenders/petitioners.

⁶ In its oral ruling, the trial court noted that during the 1980s, at least 30 deeds of trust on various properties flowed back and forth between Mr. **Pyeatt** and other persons, including Sorenson.

P5 In late 1990, **Pyeatt** conveyed the Lummi Island property to Sorenson by a quitclaim deed. The deed was recorded with the Whatcom County Auditor's Office on December 4, 1990. Sorenson maintained record ownership [***529] of the property until the action leading to this appeal was commenced.

P6 In 1996, Ken **Pyeatt** married Barbara **Pyeatt**. **Pyeatt** disclosed to Barbara **Pyeatt** that he owned the Lummi property but that he was keeping it in Sorenson's name. In February 1998, Barbara [***5] **Pyeatt** began an extensive fraudulent borrowing and refinancing scheme. As part of this scheme, Barbara **Pyeatt** obtained two preprinted quitclaim deeds. Without Carole Sorenson's knowledge or consent, ⁷ she typed in the legal description of the Lummi Island property on the deeds. She then signed Sorenson's name as grantor and made herself the grantee. After the forged documents were notarized by Barbara **Pyeatt's** sister, they were recorded with the Whatcom County Auditor.

FOOTNOTES

⁷ Specifically, the trial court found that Sorenson was neither aware of the forged deeds nor of the **Pyeatts'** borrowing money using the Lummi property as collateral. Indeed, in its oral ruling, the trial court stated that Sorenson did nothing illegal or unethical, and "broke no law, committed no crime." Clerk's Papers at 113.

P7 Barbara **Pyeatt** and Ken **Pyeatt** subsequently entered into several loan transactions [***1175] with various lenders, which ended with one final loan/refinance in October 2000. Barbara **Pyeatt** pledged the Lummi Island property as collateral [***6] for these loans. Altogether, the **Pyeatts** borrowed hundreds of thousands from the Lenders. ⁸ The record shows that the **Pyeatts** used the fraudulently obtained loan money primarily as disposable income.

FOOTNOTES

⁸ As of March 2003, Barbara **Pyeatt** owed \$ 659,943 to Saxon Mortgage, a total that includes interest and penalties. In addition, Barbara **Pyeatt** had two outstanding loans with Household Finance, totaling \$ 211,000. Both of these loans were secured by deeds

of trust signed by Barbara **Pyeatt** pledging the Lummi Island property as collateral.

II

P8 In 2003, Sorenson filed suit in the Whatcom County Superior Court to quiet title to the Lummi Island property in her name. Sorenson named, among others, Barbara **Pyeatt** and the Lenders as defendants. The Lenders answered, seeking to enforce the forged deeds of trust in their [*530] favor. At trial, the trial court declared Carole Sorenson to be the record owner of the Lummi Island property and nullified the deeds of trust in favor of the Lenders on the basis that the quitclaim deeds, [***7] purporting to vest title in Barbara **Pyeatt**, had been forged. It then entered judgment against the **Pyeatts** in the amount of \$ 868,000, together with interest from the entry of judgment.

P9 Notwithstanding the fact that it had not entered a judgment against Sorenson, the trial court imposed an equitable lien ⁹ against the property in the amount of \$ 532,000 in partial satisfaction of the judgment the **Pyeatts'** creditors, including the Lenders, had obtained against the **Pyeatts**. The trial court reasoned that a lien should be imposed because Sorenson was "culpable" in failing to exercise a reasonable degree of oversight over the Lummi property, thereby helping to facilitate the **Pyeatts'** fraudulent conduct and serving as a "cause[-]in-fact" of the Lenders' financial losses. Clerk's Papers (CP) at 18, 19. Based on this conclusion, the trial court decreed that the Lenders were entitled to foreclosure on Sorenson's property because a judgment for money damages against the **Pyeatts** would have been an "illusory remedy." *Id.* at 22.

FOOTNOTES

⁹ *HN1* An equitable lien "will be enforced in equity against specific property, though there is no valid lien at law; equity imposes liens either to carry out the intention of the parties to give a security or to prevent injustice, regardless of the intent." HENRY L. McCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY § 118, at 319 (2d ed. 1948). Equitable liens fall into two categories: (1) "[t]hose created to give effect to an intention of the parties to secure payment of an obligation by subjecting to the payment of the obligation specified property, such as equitable mortgages and equitable pledges," and (2) those created by the court to protect a party against inequitable loss, regardless of intent. *Id.* The Lenders argue the latter inequitable lien form should be applied here.

[***8] P10 Apparently aware that the imposition of an equitable lien might be reversed on appeal, the trial court took the unusual action of concluding, alternatively, that while Sorenson took record title to the property, Ken **Pyeatt** remained the actual or beneficial owner. ¹⁰ Consequently, it [*531] held that, in the event its decision was overturned, the Lenders' deeds of trust could be enforced directly against Ken **Pyeatt** as owner and that foreclosure could occur on the property on that basis.

FOOTNOTES

¹⁰ Specifically, the trial court wrote: "[I]f the equitable mortgage described above and decreed in the accompanying judgment is set aside on appeal, this Court concludes that: (a) Ms. Sorenson never took actual (as opposed to record) title to the Lummi property; (b) Ken **Pyeatt** was, until entry of the accompanying judgment, the owner of the Property in all respects; and (c) Ken **Pyeatt** approved, ratified and benefited from the Lenders' Deeds of Trust, which are valid and enforceable in accordance with their terms." CP at 20-21.

[***9] P11 Sorenson appealed the trial court's imposition of the equitable lien. Division One of the Court of Appeals reversed the trial court's imposition of the lien, concluding that it had no authority to impose the equitable lien against Sorenson's property for the reason that the necessary elements for such a lien are not present in this case. The Lenders sought discretionary review here. We granted the petition for review. *Sorenson v. Pyeatt*, noted at 156 Wn.2d 1010, 132 P.3d 145 (2006).

[**1176] III

WA[1]¶[1] WA[2]¶[2] P12 This case requires us to determine both the parameters of the equitable lien doctrine and whether the Lenders are entitled to equitable relief. HN2¶ In matters of equity, "trial courts have broad discretionary power to fashion equitable remedies." *In re Foreclosure of Liens*, 123 Wn.2d 197, 204, 867 P.2d 605 (1994). The Supreme Court reviews the authority of a trial court to fashion equitable remedies under an abuse of discretion standard. *Blair v. Wash. State Univ.*, 108 Wn.2d 558, 564, 740 P.2d 1379 (1987). However, it is a well-established rule that an equitable remedy is an extraordinary, not ordinary, form of relief. HENRY L. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES [***10] of Equity § 22, at 47 (2d ed. 1948). A court will grant equitable relief only when there is a showing that a party is entitled to a remedy and the remedy at law is inadequate. *Orwick v. City of Seattle*, 103 Wn.2d 249, 252, 692 P.2d 793 (1984).

P13 The Lenders acknowledge that the deeds purporting to transfer title from Sorenson to Barbara **Pyeatt** were forged. However, they assert that they are entitled to relief [*532] on grounds that the Court of Appeals erred in according too much weight to this court's decision in *Falconer*, 184 Wash. 438, 51 P.2d 618, when reversing the trial court's imposition of an equitable lien, and it further erred by failing to give proper deference to the discretion of the trial court to fashion appropriate equitable remedies. Alternatively, the Lenders argue that Sorenson is equitably estopped from claiming unfettered ownership of the Lummi property, even in the face of her having record title. More specifically, the Lenders assert that Sorenson is precluded from contesting the validity of the deeds of trust held by the Lenders due to Sorenson's allegedly culpable conduct in facilitating the **Pyeatts'** fraudulent conduct through her long standing [***11] cooperation with Ken **Pyeatt** in shielding the Lummi Island property from creditors and in her failure to properly monitor title to the property. While we fully address each of the Lenders' arguments, we conclude that although Carole Sorenson engaged in inequitable conduct, neither the equities nor the law is on the Lenders' side.

A. Equitable Lien

P14 The principal question before us is whether the trial court erred in imposing an equitable lien against real property pledged as collateral for loans where the borrower (Barbara **Pyeatt**) obtained a record interest in that property by fraud and the court quieted title in the hands of Sorenson, who was not a party to the fraud and/or a debtor. Like the Court of Appeals, we answer "yes" to that question.

WA[3]¶[3] WA[4]¶[4] WA[5]¶[5] WA[6]¶[6] P15 As the Court of Appeals noted, the seminal Washington case applying the doctrine of equitable lien is *Falconer*, 184 Wash. 438. In *Falconer*, a court-appointed guardian mortgaged the ward's property to obtain funds to construct a house on the property. After the ward became emancipated through marriage, the lender's assignee sued on the note and sought to foreclose on the mortgage. Alternatively, the assignee sought an equitable [***12] lien. The trial court held that because the mortgage that was signed [*533] by the guardian was ineffective to encumber the property, it could not be foreclosed. The trial court went on, however, to impose an

equitable lien on the property in favor of the assignee. On review, this court held, after applying criteria for imposing an equitable lien adopted by the Missouri Supreme Court in Capen v. Garrison, 193 Mo. 335, 92 S.W. 368 (1906), that the trial court erred in granting the lien to the lender's assignee.

P16 In *Falconer*, we held that ^{HNS} the right to an equitable lien arises when:

"a party at the request of another advances him money to be applied and which is applied to the discharge of a legal obligation of that other, but when, owing to the disability of the person to whom the money is advanced, no valid contract is made for its repayment."

Falconer, 184 Wash. at 442 (quoting *Capen*, 193 Mo. at 349-50). We went on to note that "the doctrine of equitable lien has its prescribed boundaries . . . it is not a limitless remedy to **[**1177]** be applied according to the . . . conscience of the particular chancellor." *Id.* **[***13]** (quoting *Capen*, 193 Mo. at 349). Applying this standard, we indicated that the ward who owned the property that was mortgaged had no voice in the borrowing or expenditures of the borrowed money. Thus, we held that because the assignee was seeking to enforce against a minor who had no legal ability to make a binding agreement in the first instance, the security instrument was ineffective to encumber the property on which the trial court imposed the equitable lien.

P17 In analyzing the case now before us, the Court of Appeals adopted verbatim the *Falconer* court's "requirements" for imposing an equitable lien. It stated that "*Falconer* imposes express limitations on [when a trial court may impose] the remedy of an equitable lien." *Sorenson v. Pyeatt*, noted at 126 Wn. App. 1047, 2005 Wn. App. LEXIS 593, at *10. The Court of Appeals then struck down the equitable lien, stating that two of the "necessary elements for such a lien are not present in this case"--that is, (1) the Lenders made a valid contract with Barbara **Pyeatt** for **[*534]** repayment of the notes and (2) that Barbara **Pyeatt's** alleged financial inability to repay the notes is not a disability as **[***14]** that term is used in the "rule of *Falconer*." *Id.* at *11, 9.

P18 The Court of Appeals went further and stated that even if the Lenders in this case were able to overcome the express limitations imposed by the *Falconer* case on granting an equitable lien, they were unable to show that their request for a lien was for one of the three purposes identified by the appeals court in Northern Commercial Co. v. E.J. Hermann Co., 22 Wn. App. 963, 593 P.2d 1332 (1979). *Sorenson*, 2005 Wn. App. LEXIS 593, at *10. In *Northern Commercial*, a divorce case, the trial court imposed, without considering the equitable factors stated in *Falconer*, an equitable lien on the husband's real estate in favor of the wife. In imposing the lien, the court in *Northern Commercial* noted that other jurisdictions have imposed equitable liens in order to secure property settlements, alimony payments, and the award of community property. *N. Commercial*, 22 Wn. App. at 967-68. Picking up on the court's reasoning in *Northern Commercial*, the Court of Appeals noted that none of these three "purposes is present here." *Sorenson*, 2005 Wn. App. LEXIS 593, at *11. Thus, **[***15]** it held that the trial court had no authority to impose an equitable lien against *Sorenson's* property because the "necessary elements for such a lien are not present in this case." *Id.*

P19 The Lenders argue that the Court of Appeals erred in adopting an "overly technical and narrow" view of equity and by limiting a trial court's ability to impose an equitable lien to only those instances where the party requesting the lien can meet the elements set forth by this court in *Falconer*. Pet. for Review at 19. The Lenders assert that *Falconer* should be read to state certain conditions under which an equitable lien will be imposed. However, they argue the case should not be read as laying out the only such conditions under which an equitable lien will arise. Rather, the Lenders contend that primacy of a trial court's authority to fashion

an equitable remedy calls for this court **[*535]** to hold that an equitable lien may be imposed "where there is no valid lien at law and it is needed to prevent an injustice." Pet'rs' Suppl. Br. at 11-12 (quoting *N. Commercial*, 22 Wn. App. at 968 n.2 (citing McCLINTOCK, *supra*, § 118)).

P20 In response, Sorenson asserts that this court's **[***16]** decision in *Falconer* affirmatively sets forth the law on equitable lien in Washington. Sorenson contends that the elements necessary to establish an equitable lien and the boundaries with regard to its application are conclusively set forth in *Falconer*, and there is no need for further clarification. Sorenson then posits, contrary to the Lenders' position that the Court of Appeals should be reversed because it applied a narrow and inflexible approach to equity, that court should be affirmed because it adhered to well-established precedent when determining that the elements necessary to impose an equitable lien "are not present in this case." *Sorenson*, 2005 Wn. App. LEXIS 593, at *11. **[**1178]** We agree with Sorenson's position. ¹¹

FOOTNOTES

¹¹ We do, however, agree with the Lenders that an equitable lien may be imposed beyond those limited circumstances identified by the Court of Appeals in this case. That is, ^{HN4} we do not limit a trial court's ability to impose an equitable lien only when it serves the "purposes" of securing property settlements, alimony payments, and the award of community property. See *Sorenson*, 2005 Wn. App. LEXIS 593, at *11. Rather, we acknowledge that there are a number of circumstances where an equitable lien has been and may be an appropriate equitable remedy. See *N. Commercial*, 22 Wn. App. 963 (imposing equitable lien in context of community property law); *Webster v. Rodrick*, 64 Wn.2d 814, 817-18, 394 P.2d 689 (1964) (equitable lien imposed where defendant purchased home and other property with money embezzled from plaintiff); *Speirs v. Jahnsen*, 143 Wash. 297, 255 P. 117 (1927) (imposing equitable lien and order of foreclosure in favor of landowner in situation where landowner conveyed a portion of her property to building contractor in exchange for contractor's building structure on other land she owned, and contractor did not complete building as agreed). As stated elsewhere in this opinion, *Falconer* provides the framework for a trial court to follow when determining whether the imposition of an equitable lien is appropriate given the factual situation before it. But neither today's decision nor *Falconer* forecloses a trial court's ability to apply this remedy when the particular legal circumstances and equities call for it.

[*17]** P21 ^{HN5} Even though an equitable lien is an equitable remedy and may arise from any number of varied facts and circumstances, the Court of Appeals correctly concluded that this remedy has certain elements that must be established **[*536]** by a claimant before it can be imposed. Notwithstanding the Lenders' suggestion that *Falconer* is a "depression-era case" and outmoded, ¹² we take this opportunity to reaffirm the *Falconer* decision and the criteria we indicated are to be applied by a trial court when determining whether to impose an equitable lien. In doing so, we give meaning to our pronouncement in *Falconer* that the equitable lien doctrine has "prescribed boundaries" by making the imposition of an equitable lien a mixed question of law and fact. *Falconer*, 184 Wash. at 442. That is, henceforth, a trial court's conclusion as to whether the facts, as found, meet the requirements for granting an equitable lien will be reviewed for an error of law on appeal.

FOOTNOTES

¹² Pet. for Review at 17.

P22 Having made [***18] the determination that *Falconer* is the controlling authority in this case, disposition of this equitable lien issue becomes quite straightforward. We conclude, as did the Court of Appeals, that the Lenders have failed to establish under *Falconer* that they are entitled to an equitable lien. This is because, as was the factual circumstance in *Falconer*, there is a security instrument (the deed of trust) that does not effectively encumber the property against which the trial court imposed the lien. It is uncontroverted that Barbara **Pyeatt** forged the deeds that purported to convey title to the Lummi Island property to her and, thus, she had no power to grant a valid security interest in the property. Accord *Lewis v. Kujawa*, 158 Wash. 607, 617, 291 P. 1105 (1930). Moreover, there is nothing in the record that establishes the invalidity of the contracts for repayment between the Lenders and Barbara **Pyeatt**--i.e., the promissory notes signed by **Pyeatt**. Indeed, the trial court entered judgment against her and Ken **Pyeatt** on those notes, and that portion of the trial court's order has not been challenged. Furthermore, there is nothing in the record to suggest any "disability" [***19] on Barbara **Pyeatt's** part which relates to the invalidity of the contract to repay the notes. The fact that the judgment may remain partially or fully unsatisfied due to the **Pyeatts'** existing financial difficulties, [*537] and the inability of the Lenders to enforce the deeds of trust, is not a "disability" within the meaning of the rule of *Falconer*. See *Falconer*, 184 Wash. at 442; see also *Ellenburg v. Larson Fruit Co.*, 66 Wn. App. 246, 253, 835 P.2d 225 (1992). Accordingly, as the Court of Appeals determined, the Lenders' failure to satisfy these elements precluded the trial court from imposing an equitable lien in this case.

WA[7] [7] P23 Even if we were to step outside the parameters of *Falconer* as the Lenders urge us to do, we find no reason to uphold the trial court's imposition of the lien. It must be kept in mind that ^{HN6}an equitable lien is a remedy for debt determined to be owed in law. See *Ellenburg*, 66 Wn. App. at 252 [***1179] (citing *Nelson v. Nelson Neal Lumber Co.*, 171 Wash. 55, 61, 17 P.2d 626 (1932)). In each equitable lien case brought to our attention, an equitable lien was imposed only upon the property or interest owned [***20] by the person incurring the debt. Neither fact is present in this case.

P24 Here, the trial court's uncontroverted findings establish that Barbara **Pyeatt**, not Carole Sorenson, borrowed funds from the Lenders. The record shows that Barbara **Pyeatt**, not Carole Sorenson, signed the promissory notes upon which the trial court's judgment is based. Consequently, it was Barbara **Pyeatt**, not Carole Sorenson, who incurred the debt owed to the Lenders. The record also establishes that Barbara **Pyeatt** took possession of the property upon which the trial court imposed the lien by fraud, thus it was not hers to pledge. Furthermore, the trial court quieted title in the Lummi property with Sorenson after having determined that Ken **Pyeatt** quitclaimed such property over to her in late 1990. Thus, under the trial court's first alternate holding, which we sustain in part, Sorenson, not **Pyeatt**, is the owner of the property interest upon which the equitable lien is being imposed. As a result of the trial court's determination that **Pyeatt**, not Sorenson, is obligated to repay the notes, we conclude that there is no basis upon which to impose an equitable lien on Sorenson's property. The trial court, therefore, [***21] erred in doing so.

[*538] P25 In sum, the Lenders have not provided this court with authority which establishes that a Washington court may impose an equitable lien upon the property of a third party in order to satisfy a judgment entered against another person who has been determined to legally owe the debt. What is more, applying general equity principles, we do not see how we would be preventing an injustice by allowing the legal rights of Sorenson in this case to be cut down in order to provide the Lenders a "meaningful" remedy for Barbara **Pyeatt's** fraudulent conduct.

B. Equitable Estoppel

P26 The Lenders argue that Sorenson's history of "inequitable conduct" in relation to the

Lummi Island property should equitably estop her from claiming title to the property. Pet. for Review at 8. The Lenders assert that the trial court's alternative holding (which, as noted *supra* footnote 10, was a determination that while Sorenson took record title to the property, Ken **Pyeatt** remained the actual owner and, as a result, the Lenders' deeds of trust, though fraudulent, could be enforced against him) provides a basis on which this court can affirm the trial court's order. ¹³

FOOTNOTES

¹³ Like the Court of Appeals, we are troubled by the fact that the trial court made alternative, directly inconsistent conclusions of law in this case. The Court of Appeals noted, when presented with the trial court's alternative conclusions, that (1) the Lenders' deeds of trust were not valid because valid title cannot pass via a fraudulent conveyance instrument and (2) the Lenders' deeds of trust are valid because Ken **Pyeatt** remained the actual owner of the Lummi property and ratified his wife's actions in encumbering the property. The "deeds of trust are either void or valid--they cannot be both." *Sorenson*, 2005 Wn. App. LEXIS 593, at *12-13. We are mindful that ^{HN7} a trial court has broad discretionary powers in matters of equity. However, the trial court's decision in this case to make inconsistent alternative holdings constitutes both an abuse of that broad discretion and an error of law, thereby serving as separate grounds for affirming the Court of Appeals' decision to invalidate the equitable lien and to nullify the Lenders' deeds of trust on the Lummi Island property.

[**22] ^{WA[8]}[8] ^{WA[9]}[9] P27 ^{HN8} Three elements must be established in order to support an equitable estoppel claim. It must be shown that (1) the conduct, acts, or statements by the party to be estopped are inconsistent with a claim afterward asserted by that party; (2) the party asserting estoppel took action in [**539**] reasonable reliance upon that conduct, act, or statement; and (3) the party asserting estoppel would suffer injury if the party to be estopped were allowed to contradict the prior conduct, act, or statement. *Pub. Util. Dist. No. 1 of Klickitat County v. Walbrook Ins. Co.*, 115 Wn.2d 339, 347, 797 P.2d 504 (1990). As affecting title to land, equitable estoppel is a doctrine by which a party may be prevented from setting up his legal title because he has through his acts, words, or silence led another to take a position in which the assertion of the legal title would be contrary to equity and good conscience. *Fla. Land Inv. Co. v. [**1180**] Williams*, 98 Fla. 1258, 116 So. 642 (1928). In Washington, "very clear and cogent evidence" is required "to estop an owner out of a legal title to real property." *Tyree v. Gosa*, 11 Wn.2d 572, 578, 119 P.2d 926 (1941).

^{WA[10]}[10] P28 The Lenders acknowledge that [**23**] estoppel cannot transform a forged deed into a valid deed. Rather, the Lenders argue that estoppel can be applied to prevent a party who has record title from contesting the validity of a forged title instrument against the innocent purchaser/lender who holds the forged deed. Based upon this theory, the Lenders assert that Carole Sorenson's "culpability" in serving as Ken **Pyeatt's** "straw person" in the scheme to keep his property out of the reach of creditors precludes her from challenging the validity of the Lenders' deeds of trust. Pet'rs' Suppl. Br. at 1. The Lenders argue also that Sorenson was culpably negligent in failing to monitor title to the Lummi property and, thus, she helped to facilitate the **Pyeatts'** fraud. As a result, they argue that her silence as to the **Pyeatts'** activities estops her from claiming legal title to the property.

P29 In response to this argument, Sorenson contends that the Lenders' equitable estoppel claim has no merit because (1) she did not act inconsistently toward this group of Lenders as she held recorded title to the Lummi property from 1990 forward and (2) that the reliance element is not met because the Lenders relied on Barbara **Pyeatt's** fraudulent [**24**] [**540**] conduct, and not on any conduct on her part. We agree with Sorenson that the

reliance requirement is not met. ¹⁴

FOOTNOTES

¹⁴ Arguably, the Lenders have satisfied the first and third requirements--that Sorenson has taken an inconsistent position and that they will suffer more than \$ 800,000 in financial injury if not allowed to foreclose on the Lummi Island property. As to the first requirement, if one views Sorenson's conduct prior to the final time **Pyeatt** quitclaimed the property to her in 1990, the Lenders are correct that Sorenson has taken inconsistent positions in relation to her ownership of the property. The unchallenged findings show the following: Sorenson paid no consideration for the properties deeded to her; she orally agreed not to sell or mortgage the property or to take steps to evict **Pyeatt** from such properties; and, on at least one occasion, quitclaimed the Lummi Island property back to **Pyeatt** so that he could use the property as collateral to borrow from a lender that is not a party to this case. Then, when faced with this present action, she has asserted full ownership rights, thereby excluding **Pyeatt** from exercising any incidental rights she previously accorded to him. However, if one views Sorenson's conduct post-1990, the Lenders' position becomes less meritorious.

[**25] P30 The second element of the three-part equitable estoppel test requires the party asserting estoppel to show that he reasonably relied to his detriment on an act, admission, or statement of the party to be estopped. Here, the Lenders assert that they reasonably relied on a "title that Ms. Sorenson helped manipulate." Pet'rs' Suppl. Br. at 7. They argue that if it were not for Sorenson's negligence in remaining silent in the face of Ken **Pyeatt's** history of using his property to defraud creditors, the Lenders would not have relied to their detriment on the **Pyeatts'** representations that they were the actual owners of the Lummi property.

P31 The Lenders correctly point out that ^{HN9} Washington recognizes estoppel by silence. See Strand v. State, 16 Wn.2d 107, 115, 120, 132 P.2d 1011 (1943). However, it is an essential element of an equitable estoppel claim that the party asserting estoppel show that the other's conduct induced him to believe in the existence of the state of facts and to act thereon to his prejudice. 31 C.J.S. Estoppel and Waiver §§ 59, 78 (1996); Elmonte Inv. Co. v. Schafer Bros. Logging Co., 192 Wash. 1, 72 P.2d 311 (1937) (It is essential [**26] to an equitable estoppel that the person asserting the estoppel changed his position in reliance upon the representations or conduct of the party sought to be estopped.).

P32 Here, the record does not support the Lenders' assertion that Sorenson's actions either induced them to [**541] provide Barbara **Pyeatt** with loans or that Sorenson anticipated that this group of Lenders would take the actions they did. This is because Sorenson was neither aware of nor did she sanction Barbara **Pyeatt's** forgery of the deeds. The record shows, rather, that Carole Sorenson became aware of the fraudulent activities of Barbara **Pyeatt** only when she read a notice of a trustee's sale published in the local newspaper. ¹⁵ [**1181] Furthermore, it is undisputed that Sorenson was not aware that Barbara **Pyeatt** was using the Lummi property as collateral to borrow money from this group of Lenders. It is also undisputed that Sorenson did not personally benefit from the money the **Pyeatts** borrowed. Finally, it was Barbara **Pyeatt**, not Sorenson, who signed the Lenders' deeds of trust. In sum, the record does not support the Lenders' assertion that Sorenson's ignorance of the **Pyeatts**, fraudulent conduct, which they equate to willful blindness, [**27] induced them to advance funds to the **Pyeatts**.

FOOTNOTES

¹⁵ Barbara **Pyeatt** defaulted on the loans and, in due course, Saxon Mortgage conducted

a nonjudicial foreclosure. Bankers Trust submitted the highest bid and obtained a trustee's deed on the property.

P33 We readily agree with the Lenders that Sorenson engaged in some measure of inequitable conduct. To be sure, Sorenson was aware of, and helped participate in, Ken **Pyeatt's** schemes during the 1980s and into 1990 to keep his property out of the reach of creditors. In addition, when Ken **Pyeatt** wanted to sell or borrow against one of the properties he deeded to Sorenson during this time, he would simply ask Sorenson for a reconveyance. Sorenson even testified that she "accommodate[d]" Ken **Pyeatt** during this period. Verbatim Report of Proceedings at 59; CP at 12.

P34 Although we are loath to sanction, however tangentially, Sorenson's conduct, we are constrained in this case by the law and by the record. The record does not establish a nexus between Sorenson's prior inequitable **[***28]** conduct and the Lenders' alleged financial harm in this case. As demonstrated by the factual findings noted above, the transactions between Ken **Pyeatt** and Sorenson appear to have **[*542]** been directed toward deceiving a group of creditors wholly separate from the present petitioners. This disconnect between Sorenson's prior conduct and the Lenders' "losses" in this case is further shown when one considers that the Lenders did not become creditors of the **Pyeatts** until seven years after Ken **Pyeatt** quitclaimed the Lummi property to Sorenson in 1990. Thus, there is no merit to the Lenders' assertion that Sorenson participated in or was otherwise responsible for passing of a false title and that she is the "cause in fact" of their financial injury. Pet'rs' Suppl. Br. at 16. Consequently, the Lenders have failed to satisfy the required elements for establishing an equitable estoppel claim. Neither did they present the clear and cogent evidence needed to estop Sorenson, as record owner, from asserting all rights associated with her legal title. *Accord Tyree, 11 Wn.2d 572*

C. Adequate Remedy at Law

P35 The Lenders advance two additional claims for relief. They argue Sorenson should **[***29]** be estopped from taking unfettered title to the property under the doctrine of comparative innocence. ¹⁶ They assert also that the 1990 deed from Ken **Pyeatt** to Sorenson should be invalidated on the grounds that it was a fraudulent conveyance. ¹⁷ We reject these claims as well.

FOOTNOTES

¹⁶ *HN10* The comparative innocence doctrine provides that where two innocent persons must suffer due to the fraud of a third person, the loss should fall on the "innocent" party who enabled the fraud. *Stohr v. Randle, 81 Wn.2d 881, 882-83, 505 P.2d 1281 (1973).*

¹⁷ The trial court dismissed this issue, concluding that the Lenders' claim under the uniform fraudulent transfer act was time-barred under *RCW 19.40.091(a)*. *HN11* *RCW 19.40.091(a)* provides, in essence, that a creditor's fraudulent transfer claim be brought within four years of the time the fraudulent transfer was made or the obligation was incurred. Here, the trial court determined that Ken **Pyeatt's** transfer of the Lummi property in 1990 was fraudulent but that the Lenders' claims did not arise until 1997--outside the four-year period provided in the statute. The Lenders argue that the trial court misapplied the applicable time frame for extinguishing their cause of action. For reasons stated herein, we do not reach the merits of that claim.

[*30]** *WA[11]* **[11]** *WA[12]* **[12]** P36 First, we dispose of these claims on procedural

grounds. The statute of frauds claim is improperly [*543] raised for the first time in a supplemental brief. Therefore, we adhere to the general rule that ^{HN12} this court will not address an argument "raised for the first time in a supplemental brief and not made originally by the petitioner or respondent within the petition for review or the response to petition." Cummins v. Lewis [**1182] County, 156 Wn.2d 844, 851, 133 P.3d 458 (2006) (citing Douglas v. Freeman, 117 Wn.2d 242, 258, 814 P.2d 1160 (1991)); RAP 13.7(b). In addition, the Lenders did not raise the comparative innocence claim to the court below and, thus, it is not timely. Hous. Auth. v. N.E. Lake Wash. Sewer & Water Dist., 56 Wn. App. 589, 595 n.5, 784 P.2d 1284 (1990); RAP 13.7(a).

^{WA[13]} [13] P37 Second, ^{HN13} it is a fundamental maxim that equity will not intervene where there is an adequate remedy at law. Accord Orwick, 103 Wn.2d 249; McCLINTOCK, supra, § 22, at 48; 30A C.J.S. Equity § 25 (1992). In determining whether to exercise equitable powers, Washington courts follow the general [***31] rule that equitable relief will not be accorded when there is a clear, adequate, and complete remedy at law. City of Lakewood v. Pierce County, 144 Wn.2d 118, 126, 30 P.3d 446 (2001). Furthermore, we think it a good equity policy that the person against whom the legal remedy is sought and authorized should be the same person against whom the equitable remedy is sought. Accord McCLINTOCK, supra, § 23; 30A C.J.S., supra, § 94.

P38 In this case, the Lenders, as Barbara **Pyeatt's** creditors, brought suit on promissory notes executed by Barbara **Pyeatt** in favor of the Lenders. The Lenders recovered judgment against the **Pyeatts** and their marital community in the amount of \$ 868,000, together with interest from the date the judgment was entered. The trial court also determined that the Lenders are "entitled to recover their attorneys' fees" against the **Pyeatts** and their marital community. The trial court's entry of judgment in favor of the Lender claimants on the money owed to them by Barbara **Pyeatt** is sufficient evidence that a remedy at law exists, that the Lenders in this case have availed themselves of this relief, and that equity does not call for our [*544] granting them [***32] the additional and extraordinary relief they seek.

P39 In raising these additional grounds for relief, the Lenders again assert that due to the **Pyeatts**, lack of funds and property to satisfy this judgment, they will likely never be accorded full relief for their losses. Even so, the remedy at law accorded to the Lenders in this case is valid, although the likelihood of full payment is small. We conclude that the Lenders have failed to show how the equities would be served by requiring, in essence, Sorenson to bear the burden of satisfying the Lenders' judgment against the **Pyeatts**.

IV

P40 In sum, we affirm the Court of Appeals' holding reversing the trial court's imposition of an equitable lien on the Lummi Island property in favor of the Lenders because there is no debtor-creditor type relationship between the Lenders and Sorenson and principles of equity do not call in this case for our imposing this extraordinary form of relief. We also uphold the Court of Appeals' application of our prior decision in Falconer, 184 Wash. 438, notwithstanding the Lenders' suggestion that it should be modified or abandoned. Furthermore, we deny the Lenders' equitable estoppel claim. The [***33] Lenders failed to establish that it was Sorenson's conduct, as opposed to Barbara **Pyeatt's** fraudulent conduct, upon which they relied to their detriment. What is more, we conclude Sorenson's right to quiet title in the Lummi Island property should not be denied merely because she previously engaged in some measure of prior inequitable conduct, when such conduct was not directly connected to the present suit or creditors. As a result, we remand this case to the trial court for entry of an order (1) setting aside the equitable lien imposed upon the Lummi Island property, (2) dismissing all claims asserted by the Lenders against Sorenson, (3) striking those portions of the [*545] previous judgment ordering foreclosure on the property, and (4) quieting title to the property in Sorenson's name.

C. JOHNSON, MADSEN, SANDERS, BRIDGE, CHAMBERS, OWENS, FAIRHURST, and J.M. JOHNSON, JJ.,
concur.

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*** Statutes current through the entire 2009 Regular Session (2009 c 580) ***
*** Annotations current through June 11, 2009 ***

TITLE 60. LIENS
CHAPTER 60.40. LIEN FOR ATTORNEY'S FEES

GO TO REVISED CODE OF WASHINGTON ARCHIVE DIRECTORY

Rev. Code Wash. (ARCW) § 60.40.010 (2009)

§ 60.40.010. Lien created -- Enforcement -- Definition -- Exception

(1) An attorney has a lien for his or her compensation, whether specially agreed upon or implied, as hereinafter provided:

(a) Upon the papers of the client, which have come into the attorney's possession in the course of his or her professional employment;

(b) Upon money in the attorney's hands belonging to the client;

(c) Upon money in the hands of the adverse party in an action or proceeding, in which the attorney was employed, from the time of giving notice of the lien to that party;

(d) Upon an action, including one pursued by arbitration or mediation, and its proceeds after the commencement thereof to the extent of the value of any services performed by the attorney in the action, or if the services were rendered under a special agreement, for the sum due under such agreement; and

(e) Upon a judgment to the extent of the value of any services performed by the attorney in the action, or if the services were rendered under a special agreement, for the sum due under such agreement, from the time of filing notice of such lien or claim with the clerk of the court in which such judgment is entered, which notice must be filed with the papers in the action in which such judgment was rendered, and an entry made in the execution docket, showing name of claimant, amount claimed and date of filing notice.

(2) Attorneys have the same right and power over actions to enforce their liens under subsection (1)(d) of this section and over judgments to enforce their liens under subsection (1)(e) of this section as their clients have for the amount due thereon to them.

(3) The lien created by subsection (1)(d) of this section upon an action and proceeds and the lien created by subsection (1)(e) of this section upon a judgment for money is superior to all other liens.

(4) The lien created by subsection (1)(d) of this section is not affected by settlement between the parties to the action until the lien of the attorney for fees based thereon is satisfied in full.

(5) For the purposes of this section, "proceeds" means any monetary sum received in the action. Once proceeds come into the possession of a client, such as through payment by an

opposing party or another person or by distribution from the attorney's trust account or registry of the court, the term "proceeds" is limited to identifiable cash proceeds determined in accordance with RCW 62A.9A-315(b)(2). The attorney's lien continues in such identifiable cash proceeds, subject to the rights of a secured party under RCW 62A.9A-327 or a transferee under RCW 62A.9A-332.

(6) Child support liens are exempt from this section.

HISTORY: 2004 c 73 § 2; Code 1881 § 3286; 1863 p 406 § 12; RRS § 136.

NOTES: PURPOSE -- INTENT -- APPLICATION -- 2004 C 73: "The purpose of this act is to end double taxation of attorneys' fees obtained through judgments and settlements, whether paid by the client from the recovery or by the defendant pursuant to a statute or a contract. Through this legislation, Washington law clearly recognizes that attorneys have a property interest in their clients' cases so that the attorney's fee portion of an award or settlement may be taxed only once and against the attorney who actually receives the fee. This statute should be liberally construed to effectuate its purpose. This act is curative and remedial, and intended to ensure that Washington residents do not incur double taxation on attorneys' fees received in litigation and owed to their attorneys. Thus, except for RCW 60.40.010(4), the statute is intended to apply retroactively." [2004 c 73 § 1.]

EFFECT OF AMENDMENTS.

2004 c 73 § 2, effective June 10, 2004, designated the introductory paragraph as subsection (1); redesignated former subsections (1) through (3) as subsections (1)(a) through (1)(c); added subsection (1)(d); redesignated former subsection (4) as subsection (1)(e); and added subsections (2) through (6).

Rev. Code Wash. (ARCW) § 8.25.070 (2009)

§ 8.25.070. Award of attorney's fees and witness fees to condemnee -- Conditions to award

(1) Except as otherwise provided in subsection (3) of this section, if a trial is held for the fixing of the amount of compensation to be awarded to the owner or party having an interest in the property being condemned, the court shall award the condemnee reasonable attorney's fees and reasonable expert witness fees in the event of any of the following:

(a) If condemnor fails to make any written offer in settlement to condemnee at least thirty days prior to commencement of said trial; or

(b) If the judgment awarded as a result of the trial exceeds by ten percent or more the highest written offer in settlement submitted to those condemnees appearing in the action by condemnor in effect thirty days before the trial.

(2) The attorney general or other attorney representing a condemnor in effecting a settlement of an eminent domain proceeding may allow to the condemnee reasonable attorney fees.

(3) Reasonable attorney fees and reasonable expert witness fees authorized by this section shall be awarded only if the condemnee stipulates, if requested to do so in writing by the condemnor, to an order of immediate possession and use of the property being condemned within thirty days after receipt of the written request, or within fifteen days after the entry of an order adjudicating public use whichever is later and thereafter delivers possession of the property to the condemnor upon the deposit in court of a warrant sufficient to pay the amount offered as provided by law. In the event, however, the condemnor does not request the condemnee to stipulate to an order of immediate possession and use prior to trial, the condemnee shall be entitled to an award of reasonable attorney fees and reasonable expert witness fees as authorized by subsections (1) and (2) of this section.

(4) Reasonable attorney fees as authorized in this section shall not exceed the general trial rate, per day customarily charged for general trial work by the condemnee's attorney for actual trial time and his or her hourly rate for preparation. Reasonable expert witness fees as authorized in this section shall not exceed the customary rates obtaining in the county by the hour for investigation and research and by the day or half day for trial attendance.

(5) In no event may any offer in settlement be referred to or used during the trial for any purpose in determining the amount of compensation to be paid for the property.

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

RICHARD W. PIERSON,

Appellant,

v.

WESLEY F. RIEDEL and LANA L. RIEDEL, husband and wife;
and SKAGIT COUNTY,

Respondents.

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I hereby declare under penalty of perjury under the laws of the State of Washington, that a true and correct copy of:

Brief of Appellant (dated 10/5/09)

was served on the party(ie)/attorney(s) listed below, on the date and in the manner specifically set forth:

K. Garl Long
Attorney at Law
1215 S. Second Street, Suite A
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Attorney for Respondents

Via delivery by WA Legal on
10/5/09

DATED at Bothell, Washington, this 5th day of October, 2009.



Juli R. Gerimonte, Paralegal

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