

71905-0

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NO. 71905-0-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

SANDRA J. ARCHDALE,
Appellant/Cross-Respondent

vs.

SHARYL L. O'DANNE,
Respondent/Cross-Appellant

BRIEF OF APPELLANT

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FILED
COURT OF APPEALS
DIVISION I
NOV 11 2010
EVERETT, WA

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A. INTRODUCTION:

Appellant, Sandra J. Archdale (“Archdale”), is the equitable owner of a condominium located at 820 E. Cady Road, Apt. G105, in Everett (“the Condo”). She is asking this court to:

1) Reverse the trial court’s decision refusing to quiet title to the Condo, despite Archdale being its equitable and constructive owner;

2) Reverse the trial court’s decision ordering Archdale to “purchase” the Condo by May 14, 2014, or, in the alternative, ordering the forced sale of the Condo if Archdale does not “purchase” it by May 14, 2014;

3) Reverse the trial court’s decision ordering payment to Respondent Sharyl O’Danne (“O’Danne”) of 25% of the net proceeds of the sale of the Condo;

4) Reverse the trial court’s finding that Archdale’s action as a whole was frivolous within the meaning of RCW 4.84.185;

5) Reverse the trial court’s order awarding O’Danne \$53,396.00 in attorney’s fees and \$1,992.91 costs; and

6) Remand this matter back to the trial court for determination of an award to Archdale for her reasonable attorney’s fees and costs.

In 2004, O’Danne agreed to take title to the Condo in her name as an accommodation to Archdale, since Archdale was separated from her

husband and did not want his name on the title. Archdale used her separate funds to purchase the Condo and paid all mortgage payments, taxes, insurance, and dues associated with the Condo.¹ O'Danne never transferred title to Archdale as promised, prompting Archdale to initiate a quiet title action.

The trial court refused to quiet title in to the Condo in Archdale, ordered her to “purchase” it, and, absent such “purchase,” ordered its forced sale within 6 months of trial on a finding that Archdale acted in bad faith in not paying off the underlying note and deed of trust upon receipt of the proceeds from her mother’s estate. The trial court found the action frivolous based on findings that Archdale “induced” O’Danne to purchase the Condo through a bad faith misrepresentation that she would use her inheritance to pay off the mortgage, Archdale “had no need to resort to litigation or call upon the equitable powers of the Court,” and that Archdale “did not have a factual or legal basis for asserting her claim that she was entitled to a constructive or other trust.”

Archdale asserts she acted in good faith. Archdale further claims it was O’Danne’s refusal to honor her promise to quit-claim the Condo’s

¹ At the time they were due, Archdale did not pay the mortgage payments for February and March 2012. Sharyl initially made these payments, and Archdale has since reimbursed her.

title to Archdale, and O'Danne's refusal to transfer title until the estate of the parties' mother was settled, that compelled Archdale to initiate a quiet title action. Archdale also asserts her action for a constructive or resulting trust was brought in good faith and was not frivolous.

B. ASSIGNMENTS OF ERROR:

1. The trial court erred in refusing to quiet title to the Condo, despite finding Archdale to be its equitable and constructive owner. CP 12:13-15, CP 151, ¶1, CP 152, ¶¶7, 8, Ex. 26.

2. The trial court erred in finding Archdale refused to pay off the Condo's mortgage because "she found out that she would not be able to take the property as her separate property [...] because she was still married." CP 152, ¶3.

3. The trial court erred in limiting the constructive trust to six months and ordering Archdale to "purchase" the Condo by May 14, 2014 (CP 153, ¶¶8.a, 10), or, in the alternative, ordering the forced sale of the Condo if Archdale was unable to "purchase" it by May 14, 2014 (CP 153, ¶8.b).

4. The trial court erred in granting O'Danne of 25% of the net proceeds of the sale of the Condo (CP 153, ¶8.c.ii).

5. The trial court erred in finding Archdale's action frivolous (CP 13, ¶2).

6. The trial court erred in awarding attorney's fees and costs to O'Danne as the "prevailing party" (Finding 1, CP 11, 12, 13 and 14).

7. The trial court erred in failing to award attorney's fees and costs to Archdale.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR:

1. Whether the court should have quieted title in the Condo to Archdale, subject to encumbrances of record?

2. Whether Archdale's action was brought in good faith and was not frivolous?

3. Whether the court should have awarded attorney's fees and costs to O'Danne pursuant to RCW 4.84.185.

4. Whether Archdale is entitled to an award for her reasonable attorney's fees and costs on contractual and equitable basis, and for having to respond to O'Danne's claim of a frivolous action.

D. STATEMENT OF THE CASE:

Archdale filed this quiet title action on June 4, 2010, alleging O'Danne refused to honor her promise to quit claim the Condo's title to Archdale so Archdale could refinance the Condo's mortgage in her own name. CP 296, CP 300:6-8. Further, Archdale filed this action because O'Danne operated under the false assumption that a March 2007 court

order prohibited her from transferring the Condo's title to Archdale. CP 5, CP 29, CP 32, November 13, 2013 VR at 126:6-17.

Bench trial of this matter occurred in Snohomish County Superior Court before the Honorable Millie M. Judge on October 10, 2014 and November 13 and 14, 2014. October 10, 2014 VR 1-44, November 13 and 14, 2014 VR 1-230. After trial, the court issued a Decision and Order on November 14, 2014, finding equitable grounds for granting Archdale a constructive trust in the Condo (CP at 152, ¶¶2, 7-8) but refusing to quiet title in Archdale. CP at 152, ¶2. Further, the trial court ordered Archdale to "purchase" the Condo no later than 5:00 p.m. on Monday, May 14, 2014 via a Purchase and Sale Agreement whereby O'Danne would transfer title via quit-claim deed to Archdale upon Archdale satisfying the underlying debt. CP 153 ¶8.a. The trial court ordered the forced sale of the Condo if Archdale was unable to "purchase" it by May 14, 2014. CP 153 ¶8.b. Finally, the trial court ordered payment to O'Danne of 25% of the excess proceeds of the Condo's sale as "compensation for the use of her credit" by Archdale. CP 153 ¶8.c.ii.

In its November 14, 2013 Decision and Order, the trial court also found the litigation was not frivolous or brought in violation of CR 11. CP at 154, ¶12. However, on January 27, 2014, the court granted reconsideration, amending paragraph 12 of its November 14, 2013

Decision and Order and allowing O'Danne to bring a motion for attorney's fees and costs pursuant to RCW 4.84.185, the frivolous lawsuit statute.

On April 4, 2014, the trial court entered findings and an order granting O'Danne's motion for attorney's fees and costs, totaling \$55,388.91. CP 15-18. On April 18, 2014, the trial court entered "corrected" findings, *nunc pro tunc* to April 4, 2014. CP 11-14. On May 5, 2014, the trial court entered a judgment confirming its April 4, 2014 decision and order, as amended, *nunc pro tunc* to April 4, 2014. CP 1-3.

E. ARGUMENT:

1. Standard of Review - Abuse of Discretion

Because of the merger of law and equity in Washington, appellate courts review trial court decisions in equitable proceedings for abuse of discretion. *See Wilhelm v. Beyersdorf*, 100 Wn.App. 836, 850, 999 P.2d 54, 62 (2000) (trial court did not abuse discretion in reforming easement to reflect its actual use), *and see Coy v. Raabe*, 77 Wn.2d 322, 462 P.2d 214 (1969).

Likewise, the standard of review regarding prevailing party sanctions under RCW 4.84.185 is abuse of discretion. Bldg. Indus. Ass'n of Washington v. McCarthy, 152 Wn. App. 720; 218 P.3d 196 (2009); State ex rel. Quick-Ruben v. Verharen, 136 Wn.2d 888, 903; 969 P.2d 64

(1998). Abuse of discretion “[...] occurs when the trial court takes a view no reasonable person would take, or applies the wrong legal standard to an issue.” Wright v. Dave Johnson Ins. Inc., 167 Wn.App. 758, 775; 275 P.3d 339 (2012), review denied, 175 Wn.2d 1008; 285 P.3d 885 (2012). A court abuses its discretion in awarding sanctions under RCW 4.84.185 if any claim advances to trial with reasonable cause:

[T]he language and the history of the frivolous lawsuit statute (RCW 4.84.185) are clear. The lawsuit, as a whole, that is in its entirety, must be determined to be frivolous and to have been advanced without reasonable cause before an award of attorneys’ fees may be made under the statute.

Biggs v. Vail, 119 Wn.2d 129, 137; 830 P.2d 350 (1992).

In *Biggs I*, we reversed the trial court’s award of fees under RCW 4.84.185 because the trial court found only three of four claims asserted by Biggs to be frivolous. Because the fourth claim advanced to trial, the suit could not be considered frivolous in its entirety. Thus, fees under RCW 4.84.185 were not appropriate. *Id.* at 132, 137, 830 P.2d 350. Under *Biggs I*, if any claims advance to trial, a trial court’s award of fees under RCW 4.84.185 cannot be sustained.

Verharen, *supra*, 136 Wn.2d at 903-04.

2. The trial court abused its discretion in refusing to quiet title in Archdale.

The trial court refused to quiet title in the Condo to Archdale, despite imposing a constructive trust in her favor, and despite the parties’ agreement that Archdale is the Condo’s constructive owner. CP 151 ¶2,

Ex. 26. The trial court did so based on the erroneous finding that Archdale promised to pay off the underlying mortgage “as soon as she received her inheritance[.]” CP 152 ¶6. In fact, O’Danne testified on direct examination the parties had no agreement as to when Archdale would pay off the mortgage, November 13, 2013 VR 17:9-19; and she agreed Archdale was the Condo’s constructive owner. *See* Ex 26. Regardless, the equities favor quieting title in Archdale when she pays off the Condo’s mortgage.

Fee simple title is not necessary to plead and prove a quiet title action. Some possessory interest is sufficient, as is equitable title. W. Stoebuck, J. Weaver, Ejectment and Quiet Title Actions, 18 Wash.Prac., Real Estate § 11.3 (2d ed.).

A constructive trust is an equitable remedy which arises when the person holding title to property has an equitable duty to convey it to another on the grounds that they would be unjustly enriched if permitted to retain it. Constructive trusts are imposed when there is clear, cogent and convincing evidence of the basis for impressing the trust.

City of Lakewood v. Pierce Cnty., 144 Wn.2d 118, 126, 30 P.3d 446, 450 (2001)

Constructive trusts can be imposed in broad circumstances not arising to fraud or undue influence. Baker v. Leonard, 120 Wn.2d 538, 547, 843 P.2d 1050 (1993). Indeed, when legal title to property has been obtained through any means or circumstances rendering it unconscientious

for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust. Kausky v. Kosten, 27 Wash.2d 721, 727–28, 179 P.2d 950 (1947) (quoting 4 S. Symons, Equity Jurisprudence § 1053, at 119 (5th ed. 1941)). The trial court rightly impressed such a trust in Archdale in the present case. CP 151 ¶2.

In Smith v. Monson, 157 Wn.App. 443, 236 P.3d 991 (2010), a case similar to the present one, the plaintiff conveyed property to a relative so the relative could borrow money for the plaintiff. Rather than conveying the property back to the plaintiff when the plaintiff paid off the underlying debt on the property, the relative conveyed it to family members. Id. at 445. The Smith court held the plaintiff's action was one of an equitable mortgage, and the defendant had an equitable duty to convey it back to the plaintiff once the plaintiff paid off the mortgage. Id. at 447.

Like the defendant in Smith, O'Danne has an equitable duty to convey title back to Archdale, subject to encumbrances. This can be accomplished by O'Danne simply signing a quit-claim deed to Archdale and placing it in escrow, or by O'Danne simply holding title until Archdale pays off the Condo's mortgage, then transferring it to Archdale via quit-claim deed. Any other result would be unconscionable and inequitable. The trial court's refusal to quiet title in Archdale, subject to

encumbrances, ignores O'Danne's equitable duty to convey title to Archdale. As such, the trial court abused its discretion in not quieting title.

3. The trial court abused its discretion in ordering Archdale to “purchase” the Condo by May 14, 2014, or, in the alternative, ordering the forced sale of the Condo if Archdale were unable to “purchase” it by May 14, 2014.

For the same reason the court abused its discretion in refusing to quiet title in Archdale, it abused its discretion in ordering Archdale to “purchase” the Condo by May 14, 2014, or, in the alternative, ordering the forced sale of the Condo if Archdale were unable to “purchase” it by May 14, 2014. The court in the present case found clear, cogent and convincing evidence for granting Archdale a constructive trust in the Condo. CP 151 ¶2. Indeed, the parties agreed Archdale is the Condo's constructive owner. Ex. 26. It necessarily follows that O'Danne has a duty to convey title to the Condo to Archdale, subject to encumbrances of record. See City of Lakewood, *supra*, 144 Wn.2d at 126, and see Brooke v. Robinson, 125 Wn. App. 253, 257, 104 P.3d 674 (2004). By ordering Archdale to purchase the Condo by May 14, 2014, or, in the alternative, ordering the forced sale of the Condo by that date, the trial court ignored O'Danne's equitable duty to convey title to Archdale. As such, the trial court abused its discretion.

4. The trial court erred in granting O’Danne of 25% of the net proceeds of the sale of the Condo.

The trial court erroneously granted O’Danne 25% of the net proceeds from any sale of the Condo. CP 153, ¶8.c.ii. Because the constructive trust imposes an equitable duty on O’Danne to convey the Condo’s title to Archdale once Archdale pays off the underlying mortgage, it necessarily follows that O’Danne would be unjustly enriched if she were allowed to receive any proceeds from the sale of the Condo. See City of Lakewood, *supra*, 144 Wn.2d at 126; and see Brooke, *supra*, 125 Wn.App. at 257:

“[A] person who is unjustly enriched at the expense of another is liable in restitution to the other.” Quasi contracts, or contracts implied by law, are founded on the equitable principle of unjust enrichment that one should not be “unjustly enriched at the expense of another.” A person has been unjustly enriched when he has profited or enriched himself at the expense of another contrary to equity. Enrichment alone will not trigger the doctrine; the enrichment must be unjust under the circumstances and as between the two parties to the transaction. Three elements must be established for unjust enrichment: (1) there must be a benefit conferred on one party by another; (2) the party receiving the benefit must have an appreciation or knowledge of the benefit; and (3) the receiving party must accept or retain the benefit under circumstances that make it inequitable for the receiving party to retain the benefit without paying its value.

Dragt v. Dragt/DeTray, LLC, 139 Wn.App. 560, 576; 161 P.3d 473, 482 (2007) (internal citations omitted).

O'Danne received the benefit of "ownership" of the Condo without the burden. Archdale has paid all costs associated with the Condo. O'Danne suffered no adverse consequences from Archdale missing two mortgage payments in February and March 2012, as O'Danne neither applied for nor was denied any credit as a result. CP 186:14-16. Further, Archdale has since reimbursed O'Danne for those payments.

By contrast, O'Danne failed to act in an equitable manner. She kept the proceeds from escrow refund checks related to the Condo's mortgage even though she knew they belonged to Archdale. CP 20:9-19, 23:5-18. She never asked the Condo's mortgage lender, Chase Bank, whether it would consent to transferring title to Archdale, despite the Bank's authority to do so, and despite Archdale's repeated demands that she do so since 2005. CP 179:8-20; 185:2-186:6; 193:15-18; Ex. 39, p.18. Likewise, O'Danne never asked Chase Bank to hold a quit-claim deed in escrow pending Archdale obtaining funds to pay off the underlying debt on the mortgage, despite Archdale asking her to do so for years. CP 193:4 - 194:11. O'Danne cited "security" as her rationale for refusing to put the Condo's title in escrow. 194:25 - 195:4. Despite her multiple representations to the contrary, when Archdale presented O'Danne with an offer to pay off the underlying obligation on the Condo in its entirety, O'Danne

refused unless Archdale simultaneously paid off of a separate judgment against Archdale in the Franzen Estate action. CP 53:5-11.

It would be inequitable for O'Danne to receive any proceeds from the sale of the Condo, as she has not acted in equity, and she would be unjustly enriched thereby. There is no reason to force the sale of the Condo as long as Archdale continues to make all payments associated with it. However, if the Condo is sold, all excess proceeds should go to Archdale. The trial court abused its discretion in ordering otherwise.

5. The Trial Court Erred in Awarding “Frivolous Action” Attorney’s Fees and Costs.

A lawsuit or defense, *in its entirety*, must be determined to be frivolous and to have been advanced without reasonable cause before an award of prevailing party attorneys’ fees can be made pursuant to RCW 4.84.185. Biggs, *supra*, 119 Wn.2d 129, 133; 830 P.2d 350, 352 (1992). “A case is not necessarily frivolous because a party ultimately loses on a factual or legal ground.” W.R.P. Lake Union Ltd. P’ship v. Exterior Servs., Inc., 85 Wn.App. 744, 752; 934 P.2d 722, 727 (1997). Indeed, a claim can even be found meritless but not frivolous. See, e.g., Lockhart v. Greive, 66 Wn.App. 735, 744; 834 P.2d 64, 69 (1992).

An action is only frivolous if it “cannot be supported by any rational argument based in fact or law.” Granville Condo. Homeowners

Ass'n v. Kuehner, 177 Wn.App. 543; 312 P.3d 702, 710 (2013), quoting Wright v. Dave Johnson Ins. Inc., 167 Wn.App. 758, 785; 275 P.3d 339, *review denied*, 175 Wash.2d 1008; 285 P.3d 885 (2012). Under RCW 4.84.185, the trial court is not empowered to sort through the lawsuit, search for abandoned frivolous claims and then award fees based solely on such isolated claims. Biggs, *supra*, 119 Wn.2d at 136. Indeed, when an action is not *entirely* frivolous, an award of *any* sanctions under RCW 4.84.185 is unwarranted, even for allegedly frivolous causes of action. Id. at 133-37.

The court in Wright, *supra*, found the trial court abused its discretion in awarding fees under RCW 4.84.185 when it found the plaintiff's testimony not credible. At the hearing on the Wright Defendants' post-judgment motion for fees under RCW 4.84.185, the trial court opined, "What is a frivolous lawsuit [or] defense other than you know it when you see it[.]" and referring to the Plaintiff's "deceitfulness," "dishonesty," and "basically false testimony." The Wright court held the trial court applied the wrong standard, reasoning that,

[e]ven if we disregard Wright's testimony, as we must, based on the trial court's credibility determination, the evidence viewed in the light most favorable to Wright nevertheless shows a dispute was ongoing between Wright and Johnson over Wright's compensation. [...] Even though Wright's counterclaim ultimately failed, it cannot be said that it was entirely frivolous.

Wright, supra., 167 Wn.App. at 785-87.

Like the trial court in Wright, supra, the trial court in the present case used the wrong standard in awarding attorney's fees and costs to O'Danne:

My problem is I am hung up on the law and the requirement that I find the matter as a whole was frivolous. I do find -- I do find that the relief that Ms. Archdale sought was largely not granted to her and that she could have obtained relief without coming to court. [...] So I guess I am finding based on that that Ms. Archdale's claims were frivolous and I will grant attorney's fees in favor of Ms. O'Danne under 4.84.185. I am hopeful that this is not subject to reversible error when the Court of Appeals looks at it, but you know, when I look at the equities here, there is just no question that Ms. O'Danne was in the right and her sister Ms. Archdale was in the wrong. And the fact that the relief that was granted was largely in favor of Ms. O'Danne and not in favor of Ms. Archdale weighs heavily on me, so that is my decision for now and we'll see where you parties take it from here.

March 10, 2014 VR 19:6-23.

Contrary to the trial court's finding (CP 16 - 17, March 10, 2014 VR 19), Archdale's action was well-grounded in law and in fact. This action to quiet title was filed pursuant to RCW 7.28.120, as Archdale has superior title to O'Danne's legal title. CP 305:1-3. Archdale's claim for a constructive trust was supported by evidence other than her own testimony, proceeded to trial, and the court found clear, cogent and convincing evidence to support it. CP 152, ¶8. Indeed, O'Danne's

intransigence necessitated the action. On March 23, 2007, the Snohomish County Superior Court entered an Order in the *Estate of Beverly Franzen* matter, Docket No. 03-4-01343-4, providing in part as follows: “No party shall encumber, sell, or transfer the condominium without approval of both parties’ counsel.” CP 29. As a practical matter, this language protected Archdale from O’Danne’s actions, as Archdale was not on title to the condominium and therefore had no ability to encumber, sell or transfer it. Nonetheless, O’Danne took the position that this language somehow prohibited transfer of the Condo’s title to Archdale until the estate matter was resolved:

This simply means that according to the court papers [...], “no party will be allowed to transfer or sell the condominium at this time.” This still stands and will continue to stand until the estate has been settled.

CP 32.

O’Danne’s intransigence on this issue forced Archdale to seek the assistance of the court in compelling O’Danne to transfer title to the Condo. Indeed, O’Danne’s prior counsel suggested to Archdale at the end of the Estate trial that she file a quiet title action. CP 5, November 13, 2013 VR at 126:6-17.

In response to the Complaint in this action, O’Danne also baselessly alleged Archdale “removed funds from the estate coffers to pay

for the earnest money and the appraisal” on the Condo. CP 33. In her deposition on July 25, 2013, O’Danne conceded this was not true:

2 Q. And Page 3 of this document, Paragraph 5, Line 5, the
3 sentence towards the end of that line says, Contrary
4 to Sandra Archdale’s assertions, I have never
5 attempted to deny the fact that Sandra Archdale is the
6 equitable owner of this property and is entitled to
7 possession of the property and the tax deductions for
8 the payment of interest each year on the note and deed
9 of trust against this property.

10 Did I read that correctly?

11 A. That’s what it says.

12 Q. And do you agree with that statement?

13 A. Yes.

14 Q. So you have never tried to claim the property-tax
15 deductions for the condominium?

16 A. Never.

17 Q. And you’ve never claimed the mortgage interest, on
18 your taxes, for the condominium?

19 A. Never.

20 Q. And you agree Ms. Archdale paid all of the down
21 payment and other costs required to complete the
22 initial purchase; correct?

23 A. Yes.

24 Q. Okay. And do you know what the source of those funds
25 was?

1 A. I would assume from the inheritance. I didn’t write
2 the check, so I really couldn’t answer that.

3 Q. When you say the inheritance, you’re referring to your
4 sister’s share of the inheritance from your mother’s
5 estate?

6 A. Her share, yes.

CP 36-37.

Contrary to the trial court’s finding (CP 13:7-10), O’Danne was unwilling to convey the condominium to Archdale upon a simultaneous

payoff of the mortgage balance, necessitating trial. When Archdale presented O'Danne with such an offer, O'Danne refused to transfer title to the Condo to Archdale without a simultaneous payoff of a separate judgment against Archdale in the *Franzen Estate* action. CP 53:5-11. Archdale was thus compelled to proceed to trial.

Contrary to the court's finding (CP 13, ¶2.b.), Archdale needed to bring this action. Indeed, the action afforded Archdale the opportunity to acquire title to the Condo without O'Danne's demand that the purchase be contingent on payment of the judgment in the estate action. Archdale's constructive trust and resulting trust claims were necessary and brought in good faith. The constructive trust claim advanced to trial, and the court, exercising its equity powers, granted Archdale the relief she requested. CP 152, ¶7. Therefore, the court abused its discretion in finding Archdale's action frivolous. See *Biggs, supra*, 119 Wn.2d at 137; and see *Verharen, supra*, 136 Wn.2d at 903-04.

**6. The Trial Court Erred in Awarding O'Danne
\$53,396.00 in Attorney's Fees and \$1,992.91
Costs as the "Prevailing Party".**

Even if Archdale's action were entirely frivolous (which it is not), an attorney fee award under RCW 4.84.185 is predicated on the party requesting fees being the prevailing party. See *Rawe v. Bosnar*, 167 Wn. App. 509, 513, 273 P.3d 488, 489-90 (2012), *review denied*,

175 Wn.2d 1003, 285 P.3d 884 (2012). Although a successful defendant can recover as a prevailing party [*see Marine Enters., Inc. v. Sec. Pac. Trading Corp.*, 50 Wn.App. 768, 772, 750 P.2d 1290 (1988)],

In general, a prevailing party is one who receives an affirmative judgment in his or her favor. If neither wholly prevails, then the determination of who is a prevailing party depends upon who is the substantially prevailing party, and this question depends upon the extent of the relief afforded the parties.

Riss v. Angel, 131 Wn.2d 612, 633-34, 934 P.2d 669, 681 (1997).

O'Danne did not receive a judgment in her favor. Archdale received, in part, the relief she was requesting, namely, a constructive trust in the Condo. O'Danne is not the prevailing party, and Archdale prevailed, in part, on her claim for the imposition of a constructive trust. Therefore, assuming *arguendo* that Archdale's action was entirely frivolous, the court may not award attorney's fees to O'Danne under RCW 4.84.185.

Contrary to the trial court's finding (CP 16:15-16), Archdale's abandonment of her constructive trust theory at trial does not make O'Danne the "prevailing party" for purposes of awarding attorney's fees under RCW 4.84.185. Archdale brought this action to quiet title under alternate constructive or resulting trust theories. She abandoned the

resulting trust theory, not because it was without merit, but because it became unnecessary:

A resulting trust arises where a person makes or causes to be made a disposition of property under circumstances which raise an inference that he does not intend that the person taking or holding the property should have the beneficial interest in the property. An essential element of a resulting trust is that there be an *intent* that the beneficial interest in property not go with the legal title. By definition, this intent is not express but may be inferred from the terms of the disposition or from the accompanying facts and circumstances. When the person asserting the trust has paid the consideration for the property, a presumption arises that a trust exists in that person's favor, absent evidence of a contrary intent.

Engle v. Breske, 37 Wn.App. 526, 528, 681 P.2d 263, 264 (1984) (internal citations omitted, emphasis in original).

O'Danne admittedly took title in the Condo for Archdale with the intent that the beneficial interest not go with the title, but instead to Archdale. Additionally, the law presumes Archdale has a resulting trust in the condo since she paid the consideration for the property. *Id.* Archdale did not abandon this theory at trial because it was meritless, as O'Danne asserts; rather, she abandoned it because it became unnecessary to pursue, as she believed going into trial that the parties agreed she had a constructive trust in the Condo. October 10, 2013 CP 4:12-20. Regardless, voluntary dismissal of a claim does not amount to a final judgment for purposes of determining a statutory prevailing party attorney

fee award. Wachovia SBA Lending, Inc. v. Kraft, 165 Wn.2d 481, 491; 200 P.3d 683, 687-88 (2009). Indeed, statutory attorney fee provisions require final judgment to be operative. *Id.*

7. This Matter Should be Remanded to the Trial Court for a Determination of an Award to Archdale for her Reasonable Attorney's Fees and Costs.

a. Pursuant to RCW 4.84.330, Archdale is Entitled to Attorney's Fees and Costs Under the Deed of Trust's Contractual Provision.

RCW 4.84.330 provides as follows:

In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorneys' fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, **whether he or she is the party specified in the contract or lease or not**, shall be entitled to reasonable attorneys' fees in addition to costs and necessary disbursements. [Emphasis supplied.]

The deed of trust on the Condo provides, in pertinent part, as follows:

"26. Attorney's Fees. Lender shall be entitled to recover its reasonable attorneys' fees and costs in any action or proceeding to construe or enforce any term of this Security Instrument."

Considering the remedial purpose behind the enactment of RCW 4.84.330, Washington applies unilateral contractual attorney fee provisions bilaterally. Herzog Aluminum, Inc. v. Gen. Am. Window Corp., 39 Wn.App. 188, 196-97, 692 P.2d 867, 872 (1984). Archdale is

the *de facto* borrower under the deed of trust to the condo, having made all mortgage, insurance, tax, assessment and HOA payments related to the Condo. That Archdale did not sign the deed of trust is not dispositive of whether she is entitled to attorney's fees and costs upon prevailing on an action to construe or enforce any term of that deed. See Herzog Aluminum, *supra*, 39 Wn.App. at 195-97. Archdale brought this action to enforce her equitable right to title to the Condo that is the subject of the deed of trust containing an attorney's fees clause that is, by operation of Washington law, reciprocal. This is also an action involving construction of a term of the Deed of Trust, namely the lender's authority to consent to transfer title. See Ex. 39, ¶18. Archdale is asking the court to quiet title to the property that is the subject of that deed of trust in her favor and against O'Danne. Thus, upon prevailing, Archdale is entitled to attorney's fees and costs, pursuant to RCW 4.84.330, and requests attorney's fees on appeal, pursuant to RAP 18.1.

b. O'Danne's Vexatious Conduct During the Course of the Litigation Warrants Attorney's Fees on an Equitable Basis.

Washington courts follow the American rule in not awarding attorney fees as costs except by contract, statute, or a recognized equitable exception. City of Seattle v. McCready, 131 Wn.2d 266, 273-74; 931 P.2d 156, 160 (1997). The Washington Supreme Court has explicitly

recognized four equitable exceptions to the American rule, one of which is bad faith or misconduct of a party. *Id.* “Procedural bad faith is unrelated to the merits of the case and refers to ‘vexatious conduct during the course of litigation.’ “ Rogerson Hiller Corp. v. Port of Port Angeles, 96 Wn.App. 918, 928; 982 P.2d 131, 136 (1999) (internal citations omitted).” Division One recognized that this type of bad faith could support the award of attorney’s fees:

[W]e hold that a trial court’s inherent authority to sanction litigation conduct is properly invoked upon a finding of bad faith. A party may demonstrate bad faith by, *inter alia*, delaying or disrupting litigation. [citation omitted]. The court’s inherent power to sanction is “governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.” [citation omitted]. Sanctions may be appropriate if an act affects “the integrity of the court and, [if] left unchecked, would encourage future abuses.” [citation omitted.]

State v. S.H., 95 Wash.App. 741, 747, 977 P.2d 621 (1999).

O’Danne acted in bad faith in the following ways:

1) knowingly keeping the proceeds of escrow refund checks to which she was not entitled (CP 20:9-19, 23:5-18);

2) relying on a misreading of a court order in refusing to transfer the Condo’s title until the estate of the parties’ mother was settled (CP 27:22 - 33:10);

3) failing to ask Chase Bank whether it would consent to transferring title to Archdale (CP 179:8-20; 185:2-186:6; 193:15-18);

4) refusing to place the Condo's title in escrow pending Archdale obtaining funds to pay off the underlying mortgage;

5) failing to ask Chase Bank to hold a quit-claim deed in escrow pending Archdale obtaining funds to pay off the underlying debt on the mortgage, despite Archdale asking her to do so for years (CP 193:4 - 194:11); and

6) refusing to transfer title when presented with a cash offer to pay off the underlying mortgage (CP 53:5-11).

O'Danne's actions and delay tactics can only be described as vexatious. Archdale is entitled to her reasonable attorney's fees and costs for O'Danne's procedural bad faith, and requests attorney's fees and costs on appeal pursuant to RAP 18.1.

c. Archdale is entitled to attorney's fees and costs for having to respond to O'Danne's claim of a frivolous action.

RCW 4.84.185 provides as follows:

In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense. This determination

shall be made upon motion by the prevailing party after a voluntary or involuntary order of dismissal, order on summary judgment, final judgment after trial, or other final order terminating the action as to the prevailing party. The judge shall consider all evidence presented at the time of the motion to determine whether the position of the nonprevailing party was frivolous and advanced without reasonable cause. In no event may such motion be filed more than thirty days after entry of the order. The provisions of this section apply unless otherwise specifically provided by statute.

O'Danne's defense against this quiet title action that this quiet title action was itself frivolous. It "cannot be supported by any rational argument based in fact or law." Granville Condo. Homeowners Ass'n, *supra*, 177 Wn.App. 543, 556. Accordingly, upon prevailing on this issue, Archdale should be awarded her reasonable attorney's fees and costs, pursuant to RCW 4.84.185, and on appeal, pursuant to RAP 18.1.

F. CONCLUSION:

The trial court erred in refusing to quiet title to the Condo, despite finding Archdale to be its equitable and constructive owner. O'Danne has an equitable duty to convey title back to Archdale once she pays off the mortgage. It necessarily follows the trial court erred in limiting Archdale's constructive trust to six months and ordering Archdale to "purchase" the Condo by May 14, 2014, or, in the alternative, ordering the forced sale of the Condo if Archdale was unable to "purchase" it by May 14, 2014.

The trial court also erred in granting O'Danne of 25% of the net proceeds of the sale of the Condo. To do so would be to grant equity to one who has not done equity. Further, O'Danne would be unjustly enriched if she were to receive any proceeds from any sale of the Condo.

The trial court erred in finding Archdale's action frivolous. Archdale's action was well-grounded in law and in fact. Archdale's claim for a constructive trust was supported by evidence other than her own testimony, proceeded to trial, and the court found clear, cogent and convincing evidence to support it.

The trial court erred in awarding attorney's fees and costs to O'Danne as the "prevailing party." Archdale's action was not frivolous. Even if it were, O'Danne did not receive a judgment in her favor. Therefore, O'Danne is not the "prevailing party" and not entitled to fees and costs pursuant to RCW 4.84.185.

The trial court erred in failing to award attorney's fees and costs to Archdale. This matter should be remanded to the trial court for a determination of an award to Archdale for her reasonable attorney's fees and costs in contract, equity, and law, as outlined above.

RESPECTFULLY SUBMITTED this 25 day of August, 2014.

DENO MILLIKAN LAW FIRM, PLLC

A handwritten signature in black ink, appearing to read 'J. Nichols', written over a horizontal line.

Joel P. Nichols, WSBA No. 23353
Attorney for Appellant, Sandra J. Archdale

AFFIDAVIT OF SERVICE

STATE OF WASHINGTON)
) ss.
COUNTY OF SNOHOMISH)

Kristine E. Allen, being first duly sworn on oath, deposes and states: On the 25th day of August, 2014, I caused to be served by legal messenger, the following: **Appellant's Opening Brief,**

to the following:

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1/1
NOTARIZED
STATE OF WASHINGTON
AUG 25 PM 2:38

SIGNED AND SWORN to before me this 25th day of August, 2014.



NOTARY PUBLIC
Printed Name: Denecia R. Evans
In and For the State of Washington
Residing at: Bellevue
My Commission Expires: 5/27/17