

No. 72615-3-I  
(Appeal of King County No. 13-2-02001-7)

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

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MICHELLE MERCERI,  
*Appellant,*

v.

SHAWN CASEY JONES,  
*Respondent.*

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REPLY BRIEF OF APPELLANT

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Elena Luisa Garella  
Law Office of Elena Luisa Garella  
3201 First Avenue South, Suite 208  
Seattle, Washington 98134  
(206) 675-0675  
law@garella.com

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COURT OF APPEALS OF  
STATE OF WASHINGTON  
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## I. REPLY TO STATEMENT OF THE CASE

Merceri's Appellant's Brief documented that Michelle Merceri and Shawn Casey Jones were involved in numerous real estate investments and transactions, including the purchase of her home<sup>1</sup>; Jones co-signed on Merceri's mortgage in exchange for \$15,000<sup>2</sup>; the economy tanked in 2008, leading to hostility directed at Merceri by Jones and deep distrust between the parties<sup>3</sup>; Jones remains on title to her home<sup>4</sup>; Jones has no interest in the Property other than avoiding payment of the mortgage<sup>5</sup>, and neither Jones nor Merceri have been able to release Jones from the debt or clear Jones from the title to Merceri's home.<sup>6</sup> Merceri cannot control the disposition of her home and Jones' credit is severely impacted. CP 2153:20-21.

Merceri sought equitable relief from the trial court, but the trial court failed to grant any relief. As a result of the trial court's decision, Merceri and Jones are locked in the status quo until 2037, when the loan principal becomes due. CP 216.

Although he portrays himself as a victim, Jones is not without fault. While he complains that Merceri "inflated" the purchase price on the

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<sup>1</sup> CP 155-56; 170; 493-95; 2078-79.

<sup>2</sup> CP 2074-75, 1359 Finding of Fact No. 3.

<sup>3</sup> CP 84, 150-153, 1359 Finding of Fact No. 2.

<sup>4</sup> CP 1360 ¶¶ 6, 15; CP 1333, Finding of Fact No. 1.

<sup>5</sup> CP 1359, Finding of Fact No. 3.

<sup>6</sup> CP 1361, Finding of Fact No. 14.

Property to obtain a loan of \$2.8 million, Jones himself executed the Real Estate Purchase and Sale Agreement. Ex. 3. There was nothing wrong with that, because the reported sales price was permitted by lender Countrywide and the parties to the transaction. It was based on a \$4.1 million appraisal. CP 2266:17-20; Ex. 76. The un rebutted testimony established that elevated sales prices are often allowed on construction conversion mortgages for distressed properties CP 2246:3-12; 2248:2-5; 1236-41. Merceri spent hundreds of thousands of dollars remodeling the Property by December 2007, and more later. Ex. 67, CP 2169:11-70:7; 2171:22-72:19. Had the market not crashed, the Property likely would have been sold or refinanced as contemplated by the parties.

Jones executed the loan he now questions in exchange for a quick \$15,000, under circumstances in which it was reasonably foreseeable that he could be on the hook for a very large loan. As the trial court commented. “We have the defendant who can’t get off his loan and is personally liable. We have the plaintiff who can’t refinance the house. And these parties have put themselves in a completely ridiculous situation...” CP 2122.

Jones also accuses Merceri of informing the lender that the home would be owner-occupied even though Jones did not intend to live on the Property. The fact is that Jones executed the Deed of Trust, advising the lender that he intended to reside in the home, when he did not so intend. Ex.

70, p.5, ¶6.<sup>7</sup> Merceri, however, does live in the home.

With his incomplete recitation of history, Jones hopes that this Court will infer that Merceri was involved with fraud and that his hands are sparklingly clean. However, Jones introduced no witnesses in support of his various allegations and the trial court made no findings of fraud. Nor did it conclude that the parties were in *pari delicto*. CP 2302:4-7, CP 1362 (COL No. 3). Both Jones and Merceri profited from, and were later wounded by, the economic real estate bubble of the early 2000s. Shortly after the market imploded, Jones understood. On June 30, 2008, he wrote:

My personal opinion is this. I don't believe she has done anything with tying myself with the business partnerships I have with her with any intent of deceit. I do think that when the economy turned things snowballed on her, and out of stubbornness or thinking she could devise a plan to clear everything, things got deeper into problems.

CP 2084:19-25. Jones and Merceri were also victimized by the willingness of banks to lend against dreams. As the trial court observed, “[P]art of the reason we got here is because Countrywide -- they were a crooked organization.” CP 2307:20-21.

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<sup>7</sup> Later in the brief, Jones charges that Merceri “falsely told the lender she planned to live there when she really planned to ‘flip it.’” *Resp. Br.*, p. 27. This is mere wordplay. The un rebutted testimony was that Merceri intended to live in the home and did in fact live in the home. CP 2222:15-23. There is nothing legally or morally objectionable to living in a home while remodeling it in order to sell it later for a higher price. The person who misled the lender about the intention to live in the home was Jones. CP 2223:19-2224:6.

Jones also told opposite stories to two different courts. By misleading at least one of them, he has managed to keep his name on title to the home because he is liable on the loan, but he has also obtained a two million dollar judgment compensating him for precisely the same liability based upon his claim that his signature on the loan document was forged.<sup>8</sup>

Jones' earnest pleas that he has been willing to "cooperate with any deal that would remove him from title and from the loan" are belied by his previous demands for additional compensation in exchange for his "cooperation," his abusive emails and texts, the trial court's own observations, and the hostile tone of the Response Brief itself. He goes so far as to tag Merceri a "narcissist." Resp. Br., p. 22, fn. 17.

Throughout his Statement of the Case, Jones introduces "facts" which are not supported by the record. For example, at Resp. Br. p. 1, fn. 1, Jones claims that the Property has been assessed at about \$1.8 million. This assertion is not part of the record. In any event, assessed values are not admissible as evidence of fair cash market value. American State Bank v. Butts, 111 Wash. 612, 614, 191 P. 754 (1920). It is also irrelevant,

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<sup>8</sup> Jones has admitted, in his pleadings, that the damages for the forgery claim directly relate to his liability on the mortgage: "Once Mr. Jones' liability for the \$2.8 million mortgage loan is eliminated **-whether by proving forgery, refinancing, or selling-** and assuming he has not had to make any loan payments in doing so, he will quit claim his interest in the property just as the parties originally agreed." CP 93:14-18. (Jones quotes this passage at pp. 12 and 39 of his Brief. Tellingly, he omits the emphasized phrase.)

because this “fact” does not bear on whether or not the trial court should have granted equitable relief as requested by Merceri.

Next is the claim at Resp. Br. p. 9, ¶9, that Merceri was sued for “running a mortgage rescue scam.” This allegation also was not considered by the trial court. Jones introduces it to this Court to tar Merceri with unproven claims.<sup>9</sup> Given that Jones was a business partner with Merceri, purchasing properties from distressed homeowners and reselling them later back to the sellers, it is a peculiar attack as well. CP 2027:25-28:1.

At Resp. Br. p. 10, fn. 4, Jones invites this court to view an internet link that he charges is Merceri’s brokerage license suspension. Again, this information was not relied upon by the trial court. It is simply another crack at dirtying Merceri, who is addressing her issue with DFI.

Footnote 5 at Resp. Br. p. 14, is yet another smear, accusing Merceri of bankruptcy fraud. There is no evidence in the record that Merceri was found to have committed bankruptcy fraud, and the only evidence indicates that Merceri was in good standing with the Bankruptcy Court. CP 731.

None of Jones’ contentions, described above, should be considered in this Appeal. They are prejudicial, and they violate RAP 10.3(a)(5). That rule requires that the Statement of the Case be a “fair statement of the facts

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<sup>9</sup> Jones states all lawsuits were “settled.” In fact, this Court may take judicial notice that the McDowell claim was dismissed on summary judgment. Appendix A.

and procedure relevant to the issues presented for review, without argument. Reference to the record must be included for each factual statement.”

The remainder of Jones’ Statement of the Case is marred by various revealing deficiencies and omissions.

Jones asserts that he “offered to cooperate to sell the property [and] Ms. Merceri refused to cooperate.” Resp. Br., p. 11, ¶15. The trial exhibit he relies on, No. 50, appears to be merely his counsel’s declaration without the supporting exhibits. Cooperation is in the eye of the beholder, and a mere offer to cooperate does not establish that the cooperation will be reasonable. There was no finding of fact that Jones was cooperative while Merceri refused to cooperate.

Jones asserts that Merceri promised to pay him \$140,000 upon the refinance of her home. The \$140,000 was for an old debt that was unrelated to the Hunts Point Property. CP 2228:14-18. This allegation only underscores the fact that Jones holds his position on title hostage to unrelated grievances. He frankly admits: “Jones agreed in the settlement agreement that ‘upon payment of the \$140,000’ for the old debt, he would quit claim his interest in the Property.” Resp. Br., 9-10, ¶10.

The fact is that both parties attempted to negotiate out of their stalemate. RP 11/1/13, 11:13-13:10; 17:1-18:23. But Jones would not agree to remove himself from title until after his liability on the loan is released.

CP 93:14-18. And Merceri cannot negotiate a sale or a refinance, which would result in Jones' release, without Jones agreeing to the terms of the sale or refinance because he is on title. As Jones testified at trial, "Well, when it comes to selling the house, it is our house." CP 2088:17-18 (emph. added). Nothing in this record even hints that these two parties will ever be able to resolve anything through cooperation. *See* CP 1361 (FOF No. 14).

At Resp. Br., p. 14, ¶27, Jones theorizes that Merceri's motion for contempt somehow was driven by a claim she had against the Washington Department of Transportation for damages to the property. Three of the trial exhibits cited by Jones in support of his theory (Nos. 81-83) were not admitted at trial. CP 1284. Even if considered, they are dated before May 2013 when Merceri became aware that she might even have a claim against WSDOT. The date of the taking that gave rise to the WSDOT claim was after she filed for bankruptcy. The claim was a post-petition asset. CP 712:1-13; 727-28; 731-32.<sup>10</sup>

Jones complains about the motions brought by Merceri's attorneys in the trial court. Obviously, things went sideways for Merceri, and for that reason, among others, she retained a different attorney to handle this appeal. New counsel can step back and reevaluate a difficult case. Indeed, because

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<sup>10</sup> This Court may take judicial notice that the Bankruptcy Trustee abandoned all claim to the potential WSDOT proceeds in 2015. Appendix B.

of this second look, Merceri has chosen to appeal narrow issues: Whether the trial court erred when it failed to grant any equitable relief and whether sanctions were warranted.

In short, while Jones' Statement of the Case smears Merceri, it does nothing to undermine Merceri's essential point that these two litigants are locked in an untenable situation, and that a trial court, sitting in equity, did nothing to resolve the issues.

Merceri respectfully requests that this Court resolve the impasse by remanding to the trial court with direction to consider equitable relief and by reversing the sanctions award.

## **II. ARGUMENT IN REPLY**

Jones does not rebut the pertinent facts. Rather than addressing the primary issue on appeal—whether the trial court should have resolved a situation in which a hostile party remains on title to the other party's home—Jones requests that this Court leave the parties in the same mess that they have been in for years. Instead of offering solutions, he raises irrelevant issues and takes sarcastic jabs at Merceri and her lawyers.

### **A. STANDARD OF REVIEW**

Jones argues that the trial court's decision to deny equitable relief is reviewed for abuse of discretion. However, “[w]hile the fashioning of the remedy may be reviewed for abuse of discretion, the question of whether

equitable relief is appropriate is a question of law.”<sup>11</sup> In this case, at

Conclusion of Law No. 4, the trial court stated:

At closing argument, Merceri’s counsel suggested that the Court compel Jones to execute a quit claim deed to be held in escrow to be recorded, until the lender releases him of liability as part of any sale. The Court does not have the power to impose such relief, which had not been formally requested in the pleadings, and finds that even if it did, such a remedy would not be appropriate.<sup>12</sup> See also: Preliminary Post-Trial Order, §5.

CP 1362. The trial court’s conclusion that it did not have the power to impose the springing quit claim remedy involves a question of law which must be reviewed de novo. Bank of Am., NA v. Prestance Corp., 160 Wn.2d 560, 564, 160 P.3d 17 (2007). Similarly, its conclusion that a “formal request in the pleadings” is required in order to permit the imposition of an equitable remedy is a question of law.

It is also a question of law whether the trial court erred when it failed to grant any equitable relief whatever, leaving the parties in the same situation they were in prior to the commencement of the action. This latter issue is particularly pointed given the trial court’s Preliminary Post-Trial Order, §5, which commented:

The Court has determined that it does not have the authority to fashion the remedy proposed by plaintiff in closing argument. **Nonetheless, the court remains concerned that**

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<sup>11</sup> Niemann v. Vaughn Cmty. Church, 154 Wn.2d 365, 374, 113 P.3d 463 (2005).

<sup>12</sup> The trial court proffers no explanation as to why such a remedy would be inappropriate or inequitable.

**termination of this lawsuit will not bring the parties any closer to a true resolution of the issues.**

CP 1334, emph. added. As discussed in the Brief of Appellant, the trial court did indeed have the power to resolve the issues, even if a creative fix was required. And there is no requirement that the precise relief to be fashioned must be requested in pretrial pleadings in a case sounding in equity.

**B. THIS IS NOT AN APPEAL OF THE DENIAL OF QUIET TITLE**

In her January 2013 Complaint, Merceri pleaded that “plaintiff have such further or different relief as may be just and/or equitable in the premises.” CP 3. The springing quitclaim resolution, which would allow Merceri to negotiate with lenders or buyers while ensuring that Jones would be released from liability on the loan, was suggested by Merceri at a hearing in November 2013:

[This is] a release of interest and hold harmless. It's an agreement that says, Ms. Merceri will not pursue any option or will not accept any deal unless it releases him from the loan. We want him to sign a quiet title... We'd be happy to put that in the registry of the court and enter this release in the registry of the court. RP 11/1/13, 12: 6-13.

In her April 2014 trial brief, Merceri reminded the trial court that it has “tremendous discretion to fashion a remedy ‘to do substantial justice to the parties and put an end to the litigation.’” CP 1060-61 (citing Young v. Young, 164 Wn.2d 477, 487-88, 191 P.2d 1258 (2008)).

Jones, however, launches his quiet title argument with the claim that “[t]hroughout the case and until after she lost at trial, Merceri sought one

thing on her quiet title claim: To remove Jones from title.” Resp. Br., p. 19. As established above, this is simply not accurate. Merceri has asked for equitable relief since the inception of the lawsuit. She suggested the “springing quitclaim” both six months before trial and during closing arguments, not “after she lost at trial” as snidely suggested by Jones. RP 11/1/13, 12: 6-13, CP 2306:16- 2307:16; 2313:3-2314:13.

Jones’ myopic focus on only one aspect of the relief sought by Merceri is tied to his defense of the trial court’s decision to not quiet title in Merceri. But whether or not the trial court erred when it declined to quiet title in Merceri is **not** an issue in this appeal. Merceri did **not** assign error to that decision. The errors she asserts relate to the trial court’s refusal to grant any sort of equitable relief. Br. of App., p. 3.

Jones proceeds to compare this case with Walker v. Quality Loan Serv., 176 Wn. App. 294, 308 P.3d 716 (2013) and Bavand v. One West Bank, 176 Wn. App 475, 502-03, 309 P.3d 636 (2013). He loosely adopts language from Walker and Bavand to defend the trial court’s decision to not quiet title in Merceri.<sup>13</sup> But neither case addresses the propriety of denying equitable relief in a case involving competing claims to the control and ownership of property.

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<sup>13</sup> For example, at Resp. Br., p. 21, Jones replaces the word “lender” in the Walker opinion with the words “a co-borrower.”

In both Walker and Bavand, the appellants/borrowers asserted that Mortgage Electronic Registration Systems illegally had been assigned as beneficiary of the deeds of trust securing the appellants' loans. Because MERS was not a lawful beneficiary of the deeds of trust, the appellants contended that it could not assign its purported interest to other corporations which then initiated foreclosures. Both borrowers brought actions to enjoin or invalidate the foreclosure sales and to quiet title.

Walker and Bavand reversed summary judgment and remanded for trial on Deed of Trust Act issues. Walker, 176 Wn. App. at 323, Bavand, 176 Wn. App. at 482. The dismissals of the appellants' quiet title actions, however, were affirmed. While a deed of trust may be defective because it designates MERS as a beneficiary, that defect does not invalidate the underlying obligation, which is held by someone else. The appellant "cite[d] no authority recognizing this defect as a basis to void a deed of trust and offer[ed] no equitable reason why a court should recognize his claim." Walker, p. 322. *See, also*, Bavand, pp. 501-503. In other words, you can't relieve yourself of a valid debt simply because the wrong entity rolls down the pike to enforce it.

Walker and Bavand have little relevance to the Merceri-Jones

predicament.<sup>14</sup> This case does not involve MERS, attempted foreclosure, or the Deed of Trust Act. Merceri has not claimed that the underlying note should be extinguished. Rather, the Assignments of Error focus on whether or not the trial court erred when it concluded that it could not grant any equitable relief whatsoever—even after Merceri established that Jones has no interest in her home other than relief from liability on the note.

**C. THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT CONCLUDED THAT EQUITABLE RELIEF WAS NOT AVAILABLE.**

The trial court concluded, as a matter of law, that it did not have the power to order Jones to execute a springing quitclaim deed. It dismissed all of Merceri’s claims (including her plea for equitable relief) with prejudice. CP 1362-63. The decision that equitable relief was not available also was an error of law. When sitting in equity, the court’s duty is to exercise its equity power and grant relief upon a clear showing of necessity.<sup>15</sup>

Jones contends that the trial court had the discretion to reject Merceri’s suggestion because it was made in closing arguments. Resp. Br., p. 24-24. In support, Jones cites to a foreclosure case, In re Proceedings of King

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<sup>14</sup> Walker relates to the predominant issue in this appeal in only one way. The decision points out that “the equities of the situation would likely... require the court to deem that the real beneficiary is the lender whose interests were secured by the deed of trust ...” Walker, 176 Wn. App. at 322 (citing Bain v. Metro. Mortg. Grp., Inc., 175 Wn.2d 83, 114, 285 P.3d 34 (2012)). This instruction supports Merceri’s position that a trial court’s duty in equity is to resolve the situation before it.

<sup>15</sup> Blanchard v. Golden Age Brewing Co., 188 Wash. 396, 416; 63 P.2d 397 (1936), *see also*, Esmieu v. Hsieh, 92 Wn.2d 530, 535; 598 P.2d 1369 (1979).

County, 123 Wn.2d 197, 867 P.2d 605 (1994). It is unclear why Jones believes that King County backs his argument. King County affirms a *post-judgment* motion for recovery of real estate brought under CR 60(b). It also recites the familiar rule that “[i]n matters of equity... trial courts have broad discretionary power to fashion equitable remedies.” Id., at 204.<sup>16</sup>

Merceri and Jones are in a pickle. Merceri cannot sell or refinance her home unless Jones agrees to the terms of the sale because he is on title. If the parties cannot agree, Jones (and Merceri) remain indebted for \$2.5 million. Jones testified that his credit is “taking a hit.” CP 2153:20-21. He does not want either the substantial debt or a foreclosure on his credit record. CP 2320:8-11. As the trial court noted, “Mr. Jones isn't going to buy -- be able to buy his own home, he won't be able to buy anything else or do anything else with his life until this is off.” CP 2311:6-9.

Jones's response to this dilemma is to contend that he has always been willing to “cooperate.” *See, e.g., Resp. Br.* p. 2. For example, Jones was willing to sign a quitclaim upon a refinance if Merceri paid him \$140,000 for an unrelated debt. CP 1361 (Finding of Fact 13); Resp. Br., p. 9, ¶10. This sample of Jones' “cooperation” only emphasizes the need for equitable relief.

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<sup>16</sup> State Ex Rel Gibson v. Superior Court, 39 Wash. 115, 80 P. 1108 (1905), cited in the Resp. Br. at fn. 25, concerns whether mandatory or prohibitory injunctions may be superseded on appeal. It does not support the Merceri v. Jones trial court's conclusion that it did not have the power to grant equitable relief.

Without such relief, Jones remains in a position to undermine or exert control over Merceri's sale and refinance efforts, or to make collateral demands in exchange for a promised quitclaim.

Thus far, Jones has twice asked for \$140,000 (CP 177; 185), demanded to pick the realtor (CP 491), required that Merceri move out of the house "ASAP" (CP 491), caused the loss of a sale by making unfounded allegations of forgery (CP 530), admitted that thwarting any deal by Merceri gives him "a whole lot of satisfaction" (CP 2152; Ex. 31), sought to have her escorted out of her home by a sheriff (CP 2153:13-14), encouraged the bankruptcy trustee "to throw anything at her to impede her from making any money from her stuff in the house" (CP 2547) and attempted to use the leverage of his claimed status as "part-owner" to "facilitate getting her out with nothing," (CP 2153:14-15; Ex. 32). Even at trial in 2014, Jones testified that "The Hunts Point house I would like to disappear, I want it to be short sold." CP 2144:18-19.

Jones is furious with Merceri, as is also established by his obscene texts to her and by the trial court's own observations. CP 55-58; RP 11/1/13, 19:2-4; 21-23; CP 2122; 2311; 2317. The efforts to resolve the issue between the parties from 2008 and 2014 were unsuccessful. CP 1361, ¶ 14. (Finding of Fact 14).

Faced with this state of affairs, the trial court left the parties in the same position for the next 23 years.<sup>17</sup> The trial court commented:

I'm also am not loving that this has gone on and on and on forever, and would like to find a way that, within a short period of time, we can get him off that loan and Ms. Merceri can do what she wants with the house. So that's and **although it's true the easiest thing to do absolutely would be to leave them in the situation they find themselves; that just seems miserable to everybody.**

CP 2317:5-17 (emph. added). Unfortunately, the trial court did take the easy way out, leaving both parties in that miserable situation. It provided no guidance at all. The decision leaves Jones free to take inequitable advantage of Merceri's investment of over a million dollars in her home by putting conditions on his agreement to quitclaim.<sup>18</sup>

For example, it is undisputed that if Merceri were to win the lottery, and pays the debt, Jones should quitclaim the Property to her. But the trial court did not even go so far as to order Jones to quitclaim if the mortgage is paid. Were Merceri to pay it, and Jones, for reasons of his own, declined to quitclaim, Merceri would either have to pay him off or bring another lawsuit. And that lawsuit, according to Jones, would be precluded by res judicata and other theories. Resp. Br., pp. 28-29. The trial court did not

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<sup>17</sup> The principal borrowed by the parties becomes due in 2037. CP 216.

<sup>18</sup> The undisputed evidence showed that Merceri had invested over a million dollars into the remodel of the home by about the end of 2008. Ex. 67, CP 2169:11 2170:7; 2171:22-2172:19. *Cf. Cummings v. Anderson*, 94 Wn.2d 135, 142, 614 P.2d 1283 (1980) ("a cotenant should not be permitted to take inequitable advantage of another's investment.")

even accomplish the minimal measure of memorializing the parties' equitable rights in an enforceable order.

Merceri urged the trial court to order Jones to sign a quitclaim that would be released from escrow for recording contemporaneously with his removal from liability on the mortgage. On appeal, Jones speculates that this remedy "could lead to potentially serious tax and liability consequences to Jones." Resp. Br., p. 27. There is nothing in the record that supports that claim. Indeed, at trial, Jones professed to agree with the general concept:

MR. ADAMSON: ...if you look at Exhibit 88, it's dated February 27, and it's me writing to Mr. Stern [Merceri's counsel] to offer exactly what he's saying right now. And if you look at exhibit -- I shouldn't say "exactly;" it's offering certainly to cooperate in any sale or other transaction.<sup>19</sup>

CP 2318:1-7. At trial, Jones' objection to the proposed remedy was not that it was unfair, but rather that such an order was not requested in the Complaint and that it would order him to do something that he supposedly was willing to do anyway. CP 2318:1-7; 2319:24 -2320:4.

Nonetheless, if Jones can establish on remand that the springing quitclaim solution is inequitable or unworkable, the trial court can explore other remedies. It can consider receivership. It can consider the appointment of a neutral facilitator to work out the details of the sale process

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<sup>19</sup> The trial court was skeptical of Jones' assurances: "But [Jones] also kind of wanted, you know, why he cared how it was going to be sold, you know; that it had to be staged, it had to be ... there is so little trust, that's I suppose what I'm responding to." CP 2320:12-16.

or refinance with the prospective purchaser or lender. It can consider court supervision over any proposed prospective deal. It could order Merceri to arrange for sale or refinance within a reasonable period of time, or order Jones to not contact Merceri's potential lenders or buyers. The trial court can consider any solution that embraces the facts that Jones' only interest is in debt relief and that the parties intended that Merceri would have the right and the ability to resell or refinance the home. At the very least, it must order Jones to quitclaim the Property upon payment of the first mortgage.

Jones' Response never addresses the cases, listed in the Appellant's Brief at pages 28-31, establishing that the trial court has broad powers to resolve the situation. Nor does he explain why the trial court was correct when it failed to grant any form of equitable relief. He doesn't respond because the trial court erred. RCW 7.28.010 itself permits the court "to make or cancel any deed or conveyance of whatsoever nature, or do any other act to carry into effect the judgment or the decree of the court."

Courts can and should adopt flexible measures where title is at issue. For example, in Cummings, an unmarried couple acquired property together. The petitioner brought an action for partition while both parties were still liable on the real estate contract. The court instead quieted title in the petitioner and ordered him to obtain a release of the respondent from liability on the contract. Cummings, 94 Wn.2d at 138. With only minor

revisions to the trial court's order, the Supreme Court affirmed. Id., at 145.

Merceri cited Cummings to the trial court and in her Appellants' Brief. CP 1061-1062; 2305:4-10. Along with the other cases cited by Merceri, Jones ignores the opinion. Nonetheless, Cummings resonates. The "original purpose [of the purchase of the property] has been frustrated by the change in their relationship to each other and to the property, a change for which the petitioner was not responsible." Cummings, 94 Wn.2d at 143. As in Cummings, Merceri's and Jones' original plans were thwarted first by the economy, and then by the termination of their friendship. In equity, therefore, the trial court should have, and could have, exercised "great flexibility in fashioning relief for the parties." Id.

For various reasons, wise and unwise, people agree to be on loans and on title together. The trial courts are invested with the responsibility to deliver substantial justice when these arrangements fail. Dismissal with prejudice was not the correct or fair result.

**D. JONES OBTAINED DOUBLE RELIEF BECAUSE HE PRESENTED INCONSISTENT POSITIONS TO TWO COURTS.**

In his 2010 case against Avista Escrow Services, Jones obtained a judgment on grounds that his signatures on the closing documents for the Property were forged, and those forged signatures were notarized by Avista employees. CP 1084-85. Jones claimed the forgery of the Hunts Property

documents cost him \$2.04 million, and he obtained a judgment which included that amount. CP 1093; 1107-08. In this case, Jones admitted signing or authorizing the documents. CP 89:5-6; 2069:20-23.

Jones' argues that judicial estoppel does not apply because his position in both Avista and this case is the same: "he is being held liable for the mortgage loan." Resp. Br., p. 32. This is illogical and irrelevant.<sup>20</sup> The fact is, Jones has received relief twice from two different courts based on utterly inconsistent positions. He got one court to award him \$2 million to compensate him for his losses due to liability on the mortgage because the documents were false. Then he got the second court to defeat Merceri's quiet title claim because he attested that he authorized the loan.

Merceri moved the trial court to prohibit Jones from contradicting his previous judicial statements. CP 1069-78. The trial court did not understand the issue, commenting "[Jones] hasn't been all that inconsistent in terms of the issues in this lawsuit." CP 2305:17-18; 2329:9-11. Despite briefing on the issue (see CP 1069-77), the trial court did not grasp that the doctrine bars a party from making a factual assertion in a proceeding which directly contradicts an earlier assertion made in the same proceeding **or a**

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<sup>20</sup> App. Br. at 38: "This reasoning is analogous to the contention that an earlier lawsuit that successfully asserted that Mr. Smith ran over plaintiff and caused plaintiff's damages does not estop plaintiff's second lawsuit claiming that Mr. Miller ran over him and caused the same damages."

**prior one.**<sup>21</sup> The trial court's error of law allowed Jones to play "fast and loose with the courts." Rockwell Int'l Corp. v. Hanford Atomic Metal Tr. Council, 851 F.2d 1208, 1210 (9th Cir. 1988).

Jones now asserts that he has not collected on the Avista judgment. Resp. Br., p. 32. However, he could collect in the future. Jones also has sued the attorney who represented him in Avista. At trial he admitted that his malpractice suit will offset his damages. CP 2125:12-26:7. If Jones does collect, he can pocket the funds awarded him in compensation for his liability on the mortgage while remaining on title to Merceri's home. Nothing prohibits him from a double dip based on his conflicting stories.

**E. THE TRIAL COURT ERRED WHEN IT SANCTIONED MERCERI AND HER ATTORNEYS.**

Jones requested \$53,793 in fees and costs for claimed CR 11 and RCW 4.84.185 violations. CP 1395-1408. The court awarded him a total of \$24,338. Of that, \$20,338 was based on RCW 4.84.185, payable by Merceri and her attorneys.<sup>22</sup> CP 1835.

As set forth in the appellate brief, the RCW 4.84.185 claim must be reversed because it was submitted after the thirty day time limit imposed

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<sup>21</sup> See, Note, Judicial Estoppel: The Refurbishing of a Judicial Shield, 55 Geo.Wash.L.Rev. 409, 410-12 (1987). The doctrine is properly applied where the "party's prior inconsistent position benefited the party or was adopted by the court." Johnson v. Si-Cor Inc., 107 Wn. App. 902, 904; 28 P.3d 832 (2001).

<sup>22</sup> Jones is correct at Resp. Br. p. 45, when he states that RCW 4.84.185 does not permit sanctions against attorneys. His footnote No. 111 is also correct.

by that statute. Jones has no response to the argument other than to assert that the award should be upheld under other theories, the court's inherent authority to sanction bad faith litigation conduct or CR 11.

This record, however, does not support the award of \$24,338 in sanctions against Merceri or her counsel. Three conditions must be met before an attorney can be subjected to sanctions: (1) the pleading must not be well grounded in fact; (2) it must not be well grounded in law; and (3) viewed objectively, the attorney must have failed to make a reasonable inquiry into the factual or legal basis of the matter. Rhinehart v. Seattle Times, Inc., 59 Wn. App. 332, 341, 798 P.2d 1155 (1990).

The quiet title claim was neither baseless nor frivolous. There are sufficient grounds to bring a quiet title claim when “the party in possession is incommoded or damnified by the assertion of some claim or interest in the property adverse to [her].”<sup>23</sup> Merceri and her counsel knew that Jones, who had been paid his \$15,000 as a compensated guarantor, was asserting that he was an owner of the Property. He was making demands regarding its sale or refinance. His position was and is that “[b]eing able to control disposition of the property until the loan is discharged is a valuable right” that he holds by virtue of his position on title. 1246:18-19, Resp. Br., p. 41.

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<sup>23</sup> McGuinness v. Hargiss, 56 Wash. 162, 164; 105 P. 233 (1909) (citing Teal v. Collins, 9 Ore. 89 (1881)). McGuinness was overruled on other grounds by Rorvig v. Douglas, 123 Wn.2d 854, 861; 873 P.2d 492 (1994).

While Jones flatly asserts that “you can't ask someone to co-sign a loan and be on title and then sue to remove them from title while the loan is still outstanding,” he cites no authority for this supposedly “obvious” rule. Resp. Br. at 37. This is because there is no such rule. As discussed above, the courts have wide discretion to craft a remedy to address difficult problems relating to the ownership and control of property—and do so all the time (particularly in dissolutions of marriages and joint ventures).

Jones brought two motions to dismiss the quiet title claim. The trial court denied the first one, and Jones withdrew the second. CP 539; 1242-53; 2299:24-25. The trial court itself understood that there were serious, intractable issues between the parties that require resolution. RP 11/1/13, 20:19-22; CP 1835: 8-9.

Nor was the abuse of slander claim baseless or frivolous. Jones had filed claims that his signatures relating to the purchase of the Property had been “forged,” even though he knew that he had signed or authorized Merceri to sign for him. CP 18-20;<sup>24</sup> 1093; 89:5-6; 2069:20-23. A sale of the Property actually was blocked by Jones’ forgery claim. CP 530. Jones’ disparagement resulted in Merceri’s loss because she was unable to sell. CP 84-85. While these events occurred three years before the suit, Merceri’s

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<sup>24</sup> The Fairweather Place property listed on CP 18-20 is the Hunts Point Property at issue.

efforts to sell or refinance were ongoing. There was no way for Merceri to know whether Jones had continued to spread the forgery story that he told Bank of America in 2009 and the Avista court in 2010. Ex. 43, CP 1084-85. Under these facts, it was reasonable for her attorneys to bring the slander of title claim.

Finally, Merceri pleaded for just and equitable relief. This plea, as discussed herein, was necessitated by the hostility between the parties, who are jointly on title to her home. The trial court could have and should have managed the extraction of the parties from their impasse.

In short, this was not an action advanced without reasonable cause or in bad faith. The pleadings relating to quiet title and slander of title were grounded in fact, grounded in law, and based upon a reasonable inquiry into the factual and legal bases of the matter. Rhinehart at 59 Wn. App. 341. Just because Merceri has not prevailed is not a basis for the award of fees. Sanctions are not a fee-shifting mechanism where such fees would otherwise be unavailable. John Doe v. Spokane & Inland Empire Blood Bank, 55 Wn. App. 106, 111, 780 P.2d 853 (1989).

The only motion filed by Merceri for which the trial court awarded CR 11 sanctions (\$4,000) was the motion to disqualify. CP 1834-35. Jones melodramatically claims that the motion accuses his attorney of being a “domestic abuser.” Resp Br., p. 43. It does not. CP 2459-70. It catalogues

contacts that Mr. Adamson had with third parties in what Merceri's counsel believed were efforts to undermine her client in the bankruptcy and with the lender and were therefore relevant to her claims. CP 2459-70, 753-807. Yes, some of the language equates Adamson's actions with Jones' harassment. However, Adamson was in fact trying to revoke Merceri's bankruptcy. CP 846:19-23. And Jones (through Adamson) had accused Merceri and her attorney of "carry[ing] out a scam to defraud the lender, her creditors, and/or the bankruptcy court" and being "desperate," "greedy," and motivated by "hatred." CP 562; 573. Both counsel were intemperate in the heat of battle. Given the context of this bitter litigation, the CR 11 sanctions relating to the Motion to Disqualify should be reversed. Furthermore, there are no grounds upon which to award fees to Jones on appeal.

### **III. CONCLUSION**

The trial court erred when it failed to provide any direction to the parties as to how to resolve this multi-year dispute. It erred by imposing severe sanctions against Merceri and counsel for bringing claims that the court had the power to resolve, and should have resolved. The case should be remanded with instruction to the trial court to apply its equitable powers by developing a fair exit plan for these unhappy litigants. In addition, the sanctions imposed by the court should be reversed.

RESPECTFULLY SUBMITTED this 4<sup>th</sup> day of September, 2015.

By: Elena Garella  
Elena Luisa Garella, WSBA No. 23577

LAW OFFICE OF ELENA LUISA GARELLA  
3201 First Avenue South, Suite 208  
Seattle, Washington 98134, (206) 675-0675  
[law@garella.com](mailto:law@garella.com)

Attorney for Appellants Merceri, Fullmer and Stern

Certificate of Service

I, the undersigned, certify that on the 4<sup>th</sup> day of September, 2015, I caused a true and correct copy of this pleading to be served, by the method(s) indicated below, to the following person(s):

By U.S. First Class mail, pre-paid, to:

Matt Adamson  
Jameson Babbitt Stites & Lombard, PLLC  
801 Second Avenue, Suite 1000  
Seattle, WA 98104

Elena Garella  
Elena Luisa Garella, WSBA No. 23577

2015 SEP -4 AM 11:49  
CLERK OF APPELLATIONS  
STATE OF WASHINGTON

Below is the Order of the Court.

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*[Handwritten Signature]*

**Marc Barreca**  
**U.S. Bankruptcy Judge**  
(Dated as of Entered on Docket date above)

UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

In re:  
Michelle Catherine Merceri,  
Debtor.  
  
Brandon L. McDowell and Christina  
McDowell, Husband and Wife; Karen  
Darrin, as Guardian of the Person and  
Estate Of John P. Beckman, a Single  
Man; Greg K. Shampine, a Single Man;  
and Thelma E. and Denise E. Muecke,  
Mother and Daughter,  
Plaintiffs,  
vs.  
Michelle Catherine Merceri,  
Defendant.

NO. 10-23826-MLB  
  
ADV. NO. 11-01169-MLB  
  
ORDER GRANTING DEFENDANT'S  
MOTION FOR SUMMARY JUDGMENT

THIS MATTER came on regularly for hearing before the above-signed Judge of the above-entitled court upon the Motion of the Defendant, Michelle Merceri, for a summary judgment of dismissal against Plaintiffs. Prior to the hearing, Plaintiffs Karen Darrin, Greg K. Shampine, Thelma E. Muecke, and Denise E. Muecke, filed motions for dismissal. The Court has previously entered Orders dismissing those plaintiffs with prejudice.

ORDER GRANTING DEFENDANT'S  
MOTION FOR SUMMARY JUDGMENT - 1  
2nd SJ order.wpd

MARC S. STERN  
ATTORNEY AT LAW  
1825 NW 65<sup>TH</sup> STREET  
SEATTLE, WA 98117  
(206)448-7996

Appendix A - 1

1 The Court considered the records and files herein, the exhibits, the Notice of Facts  
2 Deemed Admitted, the declarations filed by the parties, the argument of counsel, and deems itself  
3 fully advised in the premises. The Court hereby incorporates, pursuant to Bankruptcy Rule 7052  
4 and Fed. R. Civ. P. 52 (a), its oral decision, a transcript of which is attached hereto as **Exhibit 1**.  
5 Now, therefore the Court finds

- 6 1. There are no genuine issues as to any material fact, and
- 7 2. The Defendant is entitled to judgment as a matter of law.

8 Now, therefore, it is

9 ORDERED that all claims of Plaintiffs Brandon L. McDowell and Christina McDowell,  
10 the only remaining Plaintiffs in this case, are dismissed with prejudice; and it is further

11 ORDERED that Defendant may submit a cost bill in accordance with the rules.

12 */// End of Order ///*

13 Presented by:

14 */s/ Marc S. Stern*  
15 Marc S. Stern, WSBA #8194  
16 Attorney for Defendant Michelle Merceri

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1 UNITED STATES BANKRUPTCY COURT  
2 WESTERN DISTRICT OF WASHINGTON  
3 AT SEATTLE  
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5 In re: )  
6 MICHELLE CATHERINE MERCERI, ) No. 10-23826  
7 Debtor. )  
8 )  
9 BRANDON L. McDOWELL and )  
10 CHRISTINA McDOWELL, husband )  
11 and wife; et al., )  
12 Plaintiffs, )  
13 vs. ) No. 07-01367  
14 MICHELLE CATHERINE MERCERI, )  
15 Defendants. )

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16 TRANSCRIPT OF THE DIGITALLY-RECORDED RULING  
17 BY THE HONORABLE MARC L. BARRECA  
18 SEPTEMBER 7, 2012  
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23 Reported by: Robyn Oleson Fiedler  
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A P P E A R A N C E S

For the Plaintiffs:

MS. DIANNE K. CONWAY  
Attorney at Law  
GORDON THOMAS HONEYWELL LLP  
1201 Pacific Avenue, Suite 2100  
Tacoma, WA 98402  
Phone: 2530620-6523  
dconway@gth-law.com

For the Defendant:

MS. SUSAN L. FULLMER  
Attorney at Law  
1825 N.W. 65th Street  
Seattle, WA 98117  
Phone: 206-567-2757  
susan@fullmerlaw.info

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(Oral argument was heard but not transcribed.)

THE COURT: All right. I've written something up here, and nothing I learned in oral argument really changed it. I may have to adjust a couple of things as I get to them, but -- this will take a minute, but you've waited this long patiently and I appreciate that.

Summary judgment is appropriate where there's no genuine issue as to material fact. FRCP 56(c) Facts are to be construed in the light most favorable to the non-moving party. Exceptions to discharge are construed liberally in favor of the debtor and strictly against the objecting parties. In Re Bernard, 96 F3d 129, Ninth Circuit 1996.

That said, discharge is equitable in nature and intended only for honest but unfortunate debtors. The objecting party must establish its case by a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 1991.

The standard for 523(a)(2), fraud and

1 fraudulent misrepresentation, is that, (1) the debtor  
2 made representations, (2) that at the time she knew to  
3 be false, (3) made the representations with the  
4 intention and purpose of deceiving the creditor, (4)  
5 the creditor justifiably relied on those  
6 representations, (5) that the creditor sustained losses  
7 proximately resulting from the debtor's  
8 representations. And that's set forth in several  
9 places, including In Re Eschi 887 F3d 3ed 1082, Ninth  
10 Circuit 1996.

11 The standard for a 523(a)(6) willful and  
12 malicious injury claim is -- in the Ninth Circuit --  
13 that the willful injury requirement's met only when the  
14 debtor has subjective motive to inflict injury or when  
15 the debtor believes that injury is substantially  
16 certain to result from his or her own conduct. In Re  
17 Ormsby, 591 F3d 1199, Ninth Circuit 2010. But a debtor  
18 is charged with knowledge in the natural consequences  
19 of her actions.

20 (B) a malicious injury involves, (1) a  
21 wrongful act, (2) done intentionally, (3) which  
22 necessarily causes injury, and (4) which is done  
23 without just excuse or cause -- again, that's set forth  
24 in Ormsby -- (5) the McDowells are the only remaining  
25 plaintiff, (6) defendant Michelle Merceri has renewed

1 her motion for summary judgment on 523(a)(2) and  
2 (a)(6), on the 523(a)(2) and (6) claims against her.

3 The McDowell Residential Option to Purchase  
4 Agreement, or ROPA, was submitted as Exhibit 46 in  
5 support of the defendant's motion for summary judgment.  
6 The copy of the ROPA that was submitted into evidence  
7 by defendant is signed by plaintiffs, the optionees,  
8 but is not signed by the optionor. It has a fax  
9 transmission date of May 23, 2006, indicating that it  
10 was signed by plaintiffs and then sent from Brandon  
11 McDowell to Michelle Merceri on May 23, 2006.

12 The ROPA signed by plaintiffs clearly  
13 indicates that the buyback price had been raised to  
14 \$385,000 and that the rental price had been raised to  
15 \$2,400 per month. The McDowell settlement statement  
16 was submitted as Exhibit 48 in support of defendant's  
17 motion for summary judgment. It clearly shows that  
18 approximately \$39,000 of equity was to be paid to  
19 Alternative investors.

20 Further, the following facts are deemed  
21 admitted, since plaintiffs failed to respond timely to  
22 defendant's requests for admissions: (1.1) Eventual  
23 payoffs for the McDowell's encumbrances, first  
24 mortgage, second mortgage lien, et cetera -- I'm  
25 quoting right from the request -- for the June 15th,

\*

1 2006 closing for the sale of the above property to  
2 James Aylesworth [phonetic] were higher than originally  
3 estimated when the McDowell's first contacted  
4 Alternative. (1.2) Brandon and/or Christina McDowell  
5 received the addendum assigning proceeds to Alternative  
6 prior to May 23rd, 2006.

7 (1.3) The nine-page fax sent by Brandon  
8 McDowell to Alternative on May 23, 2006, included the  
9 addendum signing proceeds. (1.4) Brandon and  
10 Christina McDowell signed Brandon and Christina  
11 McDowell's initials on the addendum assigning proceeds  
12 prior to faxing it to Alternative on May 23rd, 2006.

13 (1.5) Brandon and Christina McDowell knew that  
14 Alternative had to pay an additional \$19,344.86 for the  
15 closing to proceed.

16 (1.6) Brandon and Christina McDowell agreed  
17 to increase the buyback price from \$365,000 to \$385,000  
18 to offset the additional \$19,344.86 Alternative paid at  
19 closing. (1.7) Brandon and Christina McDowell urged  
20 Vista Escrow, either directly or through Alternative,  
21 to hurriedly prepare the closing documents so the sale  
22 would close prior to June 16, 2006, the foreclosure  
23 date. (1.8) Brandon and/or Christina McDowell  
24 received the rent coupons from Kathy Merceri on or  
25 about July 14, 2006.

1                   And clearer from the documentation is that  
2                   that fax that was in question that was then admitted  
3                   contained the higher rent amount and -- it contained  
4                   the higher rent amount and the lower so-called owner's  
5                   equity from the closing.

6                   Analysis. 523(a)(2) Fraud and Fraudulent  
7                   Misrepresentation. Plaintiffs have not put forth  
8                   sufficient facts to create a fact issue rebutting  
9                   defendant's assertion that she did not commit fraud or  
10                  make fraudulent representations. The plaintiffs  
11                  admitted that the encumbrances on the residence were  
12                  different than both parties anticipated. This  
13                  discrepancy obviously necessitated the change in the  
14                  terms of the original deal.

15                  Although plaintiffs initially asserted that  
16                  they had no knowledge of the altered terms of the ROPA  
17                  and that they had no knowledge that they were conveying  
18                  the equity in their house, Merceri presented facts,  
19                  records and other documents showing that the plaintiffs  
20                  had full knowledge the terms prior to the transaction  
21                  closing. Plaintiffs then admitted the substance of the  
22                  facts presented by Merceri by failing to respond to  
23                  defendant's request for admissions.

24                  Further, the documents that the plaintiffs  
25                  acknowledged to have received and signed are wholly

1 inconsistent with their version of events and with the  
2 assertions of what Merceri told them the deal was.  
3 There is such a discrepancy between what the documents  
4 say and what plaintiffs allege Merceri told them  
5 regarding the transaction, that plaintiffs could not  
6 prove justifiable reliance on Merceri's alleged  
7 misrepresentations.

8           Justifiable reliance is a matter of the  
9 qualities and characteristics of the particular  
10 plaintiff and the circumstances of the particular case,  
11 rather than of the application of the community  
12 standard of conduct to all cases. However,  
13 justifiability is not without some limits. A person is  
14 required to use his senses and cannot recover if he  
15 blindly relies upon a misrepresentation, the falsity of  
16 which would be patent to him if he had utilized the  
17 opportunity to make cursory examination or  
18 investigations.

19           Let me make sure I'm quoting that from the  
20 right -- I'll give you the citation for that in a  
21 minute.

22           In Taylor v. Demopolis, 2008 Bankruptcy Lexus  
23 2860 at 27, Bankruptcy Northern District of Illinois,  
24 2008, the court concluded that a party may not close  
25 their eyes to the clear language in a contract and then

1 claim that they justifiably relied on oral  
2 misrepresentations contrary to such language. The  
3 Court reasoned that a cursory review of the documents  
4 signed by the creditor would have revealed all of the  
5 information that she alleges was misrepresented or not  
6 disclosed by the debtor.

7 Similarly, in *Lyle v. Lyle*, 334 B.R. 324-335,  
8 Bankruptcy District of Massachusetts, 2005, the Court  
9 ruled that a plaintiff may not act like an ostrich with  
10 its head in the sand when confronted with evidence that  
11 a debtor's misrepresentations was false and thereafter  
12 claim the reliance was justifiable.

13 In *Joyce v. Wish*, 2012 Bankruptcy Lexis 1733,  
14 34-35, the Court found that the person entering into a  
15 large financial transaction needs to read the documents  
16 before signing them or get a lawyer to read them, and  
17 concluded that it is not justifiable to assign  
18 commercial documents without reading them. See also  
19 *Atcovich v. Shafer*, 206 B.R. 95-98, Bankruptcy Middle  
20 District of Pennsylvania, 1997, concluding that  
21 reliance was not justifiable when the plaintiffs signed  
22 a document whose unsound nature would have been  
23 discovered by the most casual observations.

24 Compare *Tomlin v. Robbins*, 2007 Bankruptcy  
25 Lexis 1419, Bankruptcy Eastern District of Tennessee,

1 2007, finding justifiable reliance despite plaintiff  
2 signing a document blatantly inconsistent with oral  
3 representations, because the plaintiff in that case had  
4 a limited education, could read and write only to a  
5 limited extent, had glaucoma and cataracts, which  
6 limited her vision, and required a conservator because  
7 she could not handle her own personal financial  
8 affairs.

9 Also compare *Stern v. Goddard*, 2009  
10 Bankruptcy Lexus 1612 at 23-25, Bankruptcy District of  
11 Arizona, 2009, finding plaintiff's reliance on the  
12 representation that debtor and debtor's daughter would  
13 assist him in securing a lien against debtor/daughter's  
14 property, justifiable because debtor's daughter was  
15 experienced in real estate and plaintiff and debtor  
16 were close personal friends in constant communication.

17 Also *Edwards v. White*, 2011 Bankruptcy Lexus  
18 4704 at 26, Bankruptcy Southern District of Alabama,  
19 2011, finding justifiable reliance despite a plan of  
20 signing a document inconsistent with debtor's oral  
21 representations, because the plaintiff had not  
22 completed high school and had never purchased real  
23 property.

24 I don't have any of those factors here. So  
25 even if a fraud -- a misrepresentation had been

1 committed, there was no justifiable reliance on it  
2 based on the document that had been received by the  
3 McDowells a couple of weeks, frankly, before the  
4 closing.

5 523(a)(6) Willful and Malicious Injury.  
6 Plaintiffs have not put forth sufficient facts to rebut  
7 defendant's assertion that she did not willfully or  
8 maliciously injury plaintiffs. The documents  
9 acknowledged and signed by plaintiffs are apparently  
10 consistent with the transaction that actually took  
11 place. And plaintiffs have not alleged facts  
12 sufficient to rebut Merceri's assertions that she  
13 committed no wrongful act.

14 To the extent plaintiffs were injured, they  
15 have not shown that it was a result of a willful or  
16 malicious act by Ms. Merceri. Ms. Merceri may have  
17 prayed on people in difficult situations, but not in a  
18 manner that rises to willful and malicious injury.

19 Based on -- and the quotes were actually from  
20 a Supreme Court case that I didn't have the cite for.  
21 It was Field v. Mann's, 516 U.S. 59-74, U.S. Supreme  
22 Court, 1995.

23 So based on that analysis and the uncontested  
24 facts in the case, I will grant the defendant's summary  
25 judgment. I will also grant a request for costs, but

1 that gets into a different discussion which we should  
2 have. As I understand it, the McDowell's either have or  
3 will shortly get a discharge in bankruptcy.

4 UNIDENTIFIED FEMALE SPEAKER: They were  
5 discharged last month, I believe.

6 THE COURT: So besides needing a bill of  
7 costs to be submitted with a couple of weeks' notice, I  
8 also don't see -- I mean, I will take briefing to the  
9 contrary if there is some case law out there on it, but  
10 my gut reaction is that the discharge would have  
11 applied to any even contingent claim for costs if those  
12 costs were incurred prior to the date of petition.

13 It's a little muddy because the debtor plowed  
14 ahead with -- I mean, that debtor, now plaintiff,  
15 plowed ahead with the case, even after her bankruptcy,  
16 and she could have stopped it at that point and stopped  
17 the liability. But having tried to think about it but  
18 haven't frankly researched it, it doesn't occur to me,  
19 sua sponte, a good basis for finding that costs  
20 incurred prior to her date of petition would not have  
21 been discharged in her discharge. But obviously, you  
22 can brief that if you think to the contrary when you  
23 submit your bill of costs.

24 And I'll take an order from the defendant's  
25 counsel to that effect.

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CERTIFICATE

ROBYN OLESON FIEDLER certifies that:

The foregoing pages represent a complete transcript of the digitally-recorded proceedings. Some editing changes may have been made at the request of the Court.

These pages constitute the original or a copy of the original transcript of the proceedings to the best of my ability.

Signed and dated this 1st day of October, 2012.

by |s| Robyn Oleson Fiedler  
ROBYN OLESON FIEDLER,  
Certified Court Reporter.



1 IT IS HEREBY FURTHER ORDERED that within fourteen (14) days of the date of this  
2 order the trustee will file a motion to dismiss the complaint in Adversary No. 14-01451.

3 *//// END OF ORDER ///*

4 Presented By:

5 THE LIVESEY LAW FIRM  
6

7 */S/ Rory C. Livesey*

8 

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Rory C. Livesey, WSBA #17601  
Of Attorneys for Trustee

9 The Livesey Law Firm  
10 600 Stewart Street, Suite 1908  
Seattle, WA 98101  
11 (206) 441-0826  
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**ORDER AUTHORIZING TRUSTEE TO  
ABANDON PROPERTY OF THE ESTATE**  
150427hOrd Page 2

THE LIVESEY LAW FIRM  
600 Stewart Street, Suite 1908  
Seattle, WA 98101  
(206) 441-0826