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

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

MICHELLE MERCERI,
Appellant,

v.

SHAWN CASEY JONES,
Respondent.

BRIEF OF APPELLANT

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COURT OF APPEALS DIV I
STATE OF WASHINGTON

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Second Designation of Clerk's Papers (in process)

Plaintiff's Motion to Disqualify Opposing Counsel, dated April 10, 2014, Sub No. 104.

Declaration of Susan Fullmer dated May 28, 2015, Sub No. 270, attaching the exhibits to the Declaration of Susan Fullmer filed December 18, 2013.

Declaration of Susan Fullmer May 28, 2015, Sub 271, attaching the attachments to Plaintiff's Objection filed June 4, 2014.

Third Designation of Clerk's Papers (in process)

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I. INTRODUCTION

This case is an unfortunate result of the 2008 implosion of the housing bubble. It involves a soured friendship between appellant Michelle Merceri and respondent Shawn Casey Jones. In 2006, Merceri sought to purchase a home in Hunts Point, Washington (the “Property”). Respondent Shawn Casey Jones co-signed the loan in exchange for a payment from Merceri of \$15,000. The Property was purchased subject to a Deed of Trust in favor of the lender, Countrywide. It was titled in both names, and Jones is a co-borrower on the 2.8 million dollar loan. Merceri moved into the home and still resides there. Merceri paid Jones the \$15,000.

Although Jones was an owner of record, as a practical matter (and as found by the trial court), Merceri exclusively retained the incidents of ownership. Both parties agree that Jones was not entitled to any portion of the “fruits” of a future sale of the home, were the Property to sell for more than the loan amount. *Id.* Jones’ only benefit from the deal was the receipt of the \$15,000. He is, however, potentially liable to the lender as a co-borrower on the mortgage.

In 2006, the parties trusted the booming housing market. They anticipated that Merceri would refinance or sell the Property soon, relieving Jones from liability. At that point, they agreed, he would quitclaim his interest to Merceri. But the economic crisis of 2008 intervened. Merceri

was unable to refinance and ultimately filed for bankruptcy. Merceri asserts that her efforts to refinance or sell were interfered with by Jones, who was embittered by his belief that Merceri had cheated him.

In 2013, Merceri brought claims against Jones for slander of title, quiet title and any other just or equitable relief. This Appeal is the result of the trial court's refusal to consider granting equitable relief that would have permitted Merceri to negotiate a refinance or sale of her home while protecting Jones from being held liable on the loan.

Nine years later, Jones is still on title, and still liable on the loan. Merceri, who lives in the home, is impeded from refinancing it or selling it without the cooperation of Jones, because he is on title. And the mutual distrust of the two parties has resulted in years of litigation in the U.S. Bankruptcy Court, the King County Superior Court, and now this Court.

Merceri asks this Court to reverse the trial court's dismissal of her case, order the equitable relief requested, or remand for further proceedings. Merceri and her trial counsel, Susan Fullmer and Marc Stern, also request that this court reverse the trial court's order imposing sanctions.

II. ASSIGNMENTS OF ERROR

Assignment of Error No. 1: The trial court erred when it dismissed Merceri's action without providing any relief to the parties to resolve the dispute.

First Issue Pertaining to Assignment of Error No. 1: Whether the trial court, sitting in equity, erred by failing to grant relief because it concluded that the Complaint did not request the precise form of relief proposed by the plaintiff following trial.

Second Issue Pertaining to Assignment of Error No. 1: Whether the trial court erred when it refused to order the defendant to sign a contingent quitclaim deed that would have removed him from title only upon his release from the underlying loan and refused to consider any other form of equitable relief.

Third Issue Pertaining to Assignment of Error No. 1: Whether the trial court erred when it dismissed plaintiff's equitable claims with prejudice, leaving her in a legal position which the trial court itself describes as "untenable."

Assignment of Error No. 2: The trial court erred when it permitted the defendant to present legal theories and facts that were clearly inconsistent with positions he had taken in previous litigation in which he received a judgment in his favor.

Issue Pertaining to Assignment of Error No. 2: Whether the court should have applied the doctrine of judicial estoppel to prevent double relief (both a money judgment for a mortgage and a judgment permitting him to

remain on title in order to protect him from losses relating to the mortgage) where that party pleaded inconsistently in the two actions.

Assignment of Error No. 3: The trial court erred when it ordered substantial sanctions against the plaintiff and her attorneys.

First Issue Pertaining to Assignment of Error No. 3: Whether the trial court erred by holding that Jones, as a prevailing party in a quiet title action, was entitled to fees and costs.

Second Issue Pertaining to Assignment of Error No. 3: Whether the trial court erred when it granted over \$20,000 in fees and costs for violations of RCW 4.84.185, where the lawsuit was initiated based on documented facts, the plaintiff was in an untenable situation, and where the plaintiff obtained some relief.

Finding of Facts Challenged: First, that the slander of title claim was not supported by evidence of any false statement and was factually and legally baseless. See CP 1832 ¶1.a; CP 1834 ¶1. Second, that the quiet title claim was legally baseless. See CP 1834 ¶2.

Third Issue Pertaining to Assignment of Error No. 3: Whether the court erred when it granted fees and costs pursuant to RCW 4.84.185 even though the motion was untimely.

Fourth Issue Pertaining to Assignment of Error No. 3: Whether the trial court erred when it sanctioned counsel for \$4,000 for bringing a

motion to disqualify or continue which was based on emergent facts indicating that opposing counsel may have been involved in facts at issue.

Finding of Fact Challenged: That the motion to disqualify or to continue was unimaginable, unacceptable, false, and made in bad faith and without reasonable basis. See CP 1833 ¶1.c.¹

Assignment of Error No. 4: The trial court erred when it denied Merceri's motions for reconsideration.

Issue Pertaining to Assignment of Error No. 4: Whether the trial court erred when it refused to reconsider decisions that were not substantially just and where additional evidence was presented.

III. STATEMENT OF THE CASE

A. MERCERI'S AND JONES' AGREEMENT

In 2006, Appellant Michelle Merceri purchased a home in Hunts Point, Washington ("the Property"). In order to enhance her loan application, her then-close friend and business associate, Respondent Shawn Casey Jones, agreed to co-sign the mortgage in exchange for a payment from Merceri of \$15,000. CP 1359 ¶1, ¶3; 2074. The property was purchased subject to a Deed of Trust in favor of the lender, Countrywide.

¹ Other findings of fact are critical of Merceri and counsel. However, these findings do not appear to be the basis of the fee and costs awards. In the event this Court finds them to be relevant, Merceri challenges these additional findings: CP 1832 ¶1.b; 1833 ¶2, 3.

CP 1360, ¶4. Merceri paid Jones the \$15,000. CP 2074-75.

Jones never lived at, or visited, the Property. CP 83. He did not pay any mortgage payments, taxes, insurance or utilities; assist with or pay for upkeep or renovations; or take any other active part in the property. CP 1360 ¶8, ¶10. Rather, Merceri moved into the home and remodeled it. CP 1360 ¶8. She took out another loan for \$200,000, also secured by the Property, in her name alone. CP 1360 ¶7; 2202. By 2008, following the remodels, the Property was appraised at \$6,000,000. CP 146-147.

B. EVENTS PRIOR TO THE LAWSUIT

Merceri's and Jones' relationship deteriorated with the economy. CP 84; 150-153; 1359 ¶2. Merceri stopped making mortgage payments by 2010, and filed for bankruptcy in November of 2010.² CP 84 ¶26; 85 ¶28; 1360 ¶8.

A number of disputes erupted between Merceri and Jones, both between themselves and involving other people, properties, and entities. CP 1361 ¶13. In July of 2009, Jones filed a fraud report with the Bank of America³ asserting that Merceri had forged his name on closing documents

² The Trustee of her bankruptcy abandoned the Property, so it is no longer in the bankruptcy. CP 478.

³ The original lender was Countrywide. In 2008 or 2009, Bank of America took over the loan. CP 1360 ¶9. Merceri denies that she forged Jones' signature. A notary declared that Jones signed on various transactions that he claimed had been forged. CP 83 ¶13; 1934-36.

for several properties, including the Hunts Point Property. CP 18-20;⁴ CP 2105. Jones retracted the claim (at least insofar as it involved the Property) in these proceedings, admitting that he had either signed the loan documents or authorized Merceri to sign for him. CP 89-90; 2138. Nonetheless, in 2010 he successfully parlayed his forgery allegation into a 3.4 million dollar default judgment against Avista Escrow Corporation for “facilitating transactions using forged real estate documents.” CP 1085; 1107-1108.⁵ Of the 3.4 million dollars, about two million dollars of the judgment is attributed to the Hunts Point property. CP 1072-1073, CP 1093. Jones also sued Merceri, the Bank of America, and his own attorneys for alleged malpractice relating to the Avista lawsuit.⁶

Merceri sought to refinance or sell in order to relieve herself of the 2.8 million dollar debt. See, e.g., CP 141-143, 178, 188-207. Her efforts were hampered by Jones. In September of 2008, Jones insisted on the payment of \$140,000 (for a debt he claimed Merceri owed on another matter) before he would sign off on a quitclaim to allow a refinancing. CP

⁴ CP 18-20 is a letter sent by Mr. Jones’ attorneys to the Bank of America. At CP 19-20 “Fairweather Pl.” is referenced. That is the Hunts Point Property. See CP 1.

⁵ Jones v Avista Escrow Corp., Pierce County No. 10-2-08883-6.

⁶ Jones v Merceri, King County No. 08-2-38831-0, CP 1879; Jones v Bank of America, et al., Snohomish County, No. 13-2-04891-2, CP 1126-1135; Jones v. Ryan Swanson Cleveland et al., King County, No. 13-2-35395-4, CP 1112-1124.

177;⁷ 180-181; 2228-2229. In 2009, Merceri negotiated a short sale of the Property with no deficiency. However, according to real estate broker Matthew Steel, it was “impossible” to close that sale because “Jones interfered... At some point Bank of America informed me that a fraud transaction investigation had been opened regarding the subject property, and the bank put the sale on hold indefinitely. Consequently, the sale was lost.” CP 530.

In January of 2010 Jones made a similar demand to that of 2008, stating that he would only record a quit claim deed upon the receipt of \$140,000. CP 1361 ¶13, 185. Later in 2010, Jones insisted that he would only sign the listing agreement and the required disclosure if he were permitted to select the realtor, the house be staged properly, and Merceri “moves out ASAP.” CP 491; 2146-47. Jones also asserted that he was an owner, or a co-owner, of the property. CP 180; 231:25*;2150-51. He even complained that Merceri was living in the home that he “co-owns.” CP 233:18.

Jones openly expressed his intention to block Merceri. For example,

⁷ Letter from Jones’ attorney to Merceri’s attorney: “As a result, we return to a very basic first step: **Mr. Jones agrees to cooperate in Ms. Merceri's efforts to refinance the Hunts Point house under the following non-negotiable conditions:** 1. Mr. Jones receives the first \$140,000 in proceeds of the refinance; 2. Mr. Jones is taken off the \$2.8 million Countrywide loan and title to the property...” CP 177 (emph. added).

* Note: In this Brief, where a colon follows a CP or RP cite, the number after the colon indicates the line numbers on the page.

in one email to the Bankruptcy Trustee's attorney, he wrote:

It also gets me a whole lot of satisfaction that if she does have a side deal and I thwart it and she knows it's because of me, so go ahead and call it the Casey Jones clause. That, like the commercial says, would be priceless! CP 2152, Fullmer Decl.⁸

Jones' demand that he be paid cash out of the bankruptcy trustee's short sale stopped the sale.⁹ As a result of Jones' activities, Merceri was (and still is) unable to refinance or settle with the Lender or sell the Property. CP 85.

Jones also sent Merceri hostile and obscene text messages. On June 11, 2012, Merceri sought an Order of Protection (Harassment) against Jones. CP 37-38. Jones sent the following three text messages:

Well today is your birthday. I advise you enjoy it because after myself, Jim, the state, the FBI and god knows who else your next one will be in jail you f**king c**t. You have screwed those closest to you. You flat out lied and stole from all those around you. You couldn't even keep a boyfriend without buying him things like a Tag watch with our money. Even then he wouldn't take you around friends or family. You stole from me, my friends, and dead family. It's giving you the benefit of the doubt to call you a sociopath. At least then your sick and not a common thief and a criminal. You have no friends anymore. All those that were now hate you beyond words. You are a useless human being who only brings harm to others. Your a leach sucking off others, that's all you do. So enjoy your f**king birthday you whore. [CP 55]

“HELLO SLUT B**CH C**T WHORE” (photo of a bar coaster with the words written on it.) [CP 57]

⁸ See Fullmer Decl., Second Designation of Clerk's Papers, Sub 270, p.115 (Exh. 3).

⁹ See Fullmer Decl., Second Designation of Clerk's Papers, Sub 270, p. 87 (Exh. 3).

So if I would have just turned out the lights held my nose and banged you like Randy would you have then not ripped me off?
[CP 58]

Granting a 5-year No Contact Order, the court expressed its concern over Jones' behavior, his apparent lack of remorse, and his denial that the messages were violent or sexual in nature:

JUDGE: Mr. Jones. I want to talk to you. ...[W]hat the court's basically relying on are those things that you have no hesitancy admitting that you were part of. And those were the text messages or the message that you sent to Ms. Merceri which you may not find repugnant or offensive. The court finds them -- absolutely beyond comprehension that you would do this. You seem to be a well-reasoned man in many parts of your life. But there's an arrogance there that you just don't get it. And you don't get it. It's not okay. ... Because the court has no doubt that the recipient of those messages that you, of what I'm hearing you say were sweet nothings, they were quite the contrary. They were offensive, they were alarming, and they absolutely were sexual in nature. ... Those are not kind and benevolent words. And this court is astounded that you could sit there and minimize what these messages said and what your intent. I have no doubt sir what your intent was with those messages. And the messages, the intent of those messages was to annoy her or to harass her or to concern her. And the innuendo in those messages, from this court's point of view, was nothing but sexual and derogatory. ... I'm going to, I am going to issue this for five years...

CP 973-974. Jones' conduct set the stage for the bitter litigation that followed.

[Note: While her bankruptcy case remains open, Merceri was granted a discharge in Bankruptcy Court in May of 2011. CP 1654.]

C. THE COMPLAINT AND ANSWER

On January 14, 2013, Merceri, represented by Marc S. Stern and Susan Fullmer, brought suit against Jones. The Complaint generally averred the facts and claimed for slander of title and quiet title. CP 2. Plaintiff also sought “such further or different relief as may be just and/or equitable in the premises.” CP 3.

Jones answered that “Defendant is on title, and owns an interest in the property, because his credit and assets were used to qualify for the loan obtained to purchase the property. Without the bank’s consent to release Mr. Jones from all obligations under the loan that is still owed and that is still secured by the property, there is no basis for removing Mr. Jones from title.” CP 6.

D. THE LITIGATION

Due to the contemporaneous litigation of many related issues in other courts, the litigation of this matter was complex. The following provides a synopsis of the matters essential to this Appeal.

1. Merceri SJ motion. In March of 2013, Merceri moved for summary judgment against Jones, arguing that it was undisputed that “Jones was compensated for his contribution of credit, he was fully aware of the

Deed of Trust, and was owed nothing because of that obligation.” CP 72.¹⁰ Merceri argued that “the Court must enforce the contract, should rule that Mr. Jones has no interest in the Property, and should quiet title to the Property in Ms. Merceri’s favor, free and clear of any interest of Mr. Jones.” Id. Jones’ response alleged that the oral agreement provided that he would quitclaim his interest in the Property only after Merceri refinanced the mortgage debt and relieved him from liability on that loan. CP 97-98. In reply, Merceri alleged that it was Jones himself who had obstructed her attempts to refinance, and therefore made performance impossible. CP 138. The trial court denied Merceri’s motion. CP 265-66.

2. Merceri discovery motion. In September 2013, Merceri moved to compel Jones to respond to requests for production. CP 267-89. Jones resisted on grounds that certain documents, such as his tax returns and phone records, were not discoverable. CP 332-43. The trial court granted most of the relief requested by Merceri on October 18, 2013. CP 416-17.

3. Jones SJ motion On October 4, 2013, Jones moved for summary judgment, contending that Merceri’s slander of title allegation must be dismissed because his refusal to release his interest in the Property did not constitute slander of title. CP 303. He argued that Merceri’s proper cause

¹⁰ Merceri’s summary judgment, reply, and supporting declaration are at CP 8-86, 136-264. Jones’ response and supporting declarations are at CP 98-135.

of action was a partition under RCW Ch. 7.52. He made sure to mention that under that chapter, “the Court will be required ...to sell the Property.” CP 304.

In response, Merceri pointed out that her quiet title claim is an appropriate method for resolving competing claims of ownership. CP 431. She asserted that that her slander of title claim was supported by the fact that Jones had made false statements affecting title, including Jones’ allegation that Merceri had forged his signature on the Property’s mortgage note. CP 451-453.¹¹ According to witness real estate broker Matthew Steel, Jones’ fraud report thwarted a short sale of the Property. CP 422-423, 432-433, 530. In reply, Jones argued that the statute of limitations barred Merceri’s claims. Def’s Reply, pp. 2-3.¹²

On November 1, 2013, the trial court dismissed Merceri’s slander of title claim because Merceri failed to produce evidence of slander of title within the statute of limitations. CP 539; RP 11/1/13, 3:17-25. Importantly to this appeal, **the trial court did not dismiss Merceri’s quiet title claim.** CP 539. Rather, it ruled that issues relating to breach of contract and

¹¹ CP 451-453 is a letter sent by Mr. Jones’ attorneys to the Bank of America. At CP 452 and 453 “Fairweather Pl.” is referenced. That is the Hunts Point Property. See Complaint, CP 1 and CP 419 ¶2.1.

¹² See Defendant’s Reply to His Motion for Summary Judgment, supplied to the Court of Appeals with Appellant’s Third Designation of Clerk’s Papers.

partition could be litigated in that context. Judge Downing commented:

It's suggested that a partition action or a breach of contract action might have been more appropriate, and that may be so. But I think that the issues that will be raised in a partition or breach of contract action can be addressed in the context of the quiet title claim that will remain after dismissal of the slander claim today.

I do think that issues as to the scope of the agreements between the parties, modifications of those agreements along the way, and then the determination made as to what Mr. Jones' ownership interest is in the property, I think that those can all be addressed in the context of a quiet title action.

11/1/13 RP 20:10 –22.

4. Merceri sanctions motion. In December 2013, Merceri asserted that Jones had failed to comply with the October 18, 2013 Order compelling discovery. CP 540-560. Jones denied any violations. CP 562-705.

By now, tensions between the parties had reached high pitch. Merceri contended: “To Jones, the justice system is his personal playground and the courts his weapon to harass Ms. Merceri.” CP 540. Jones replied: “Desperate, greedy, and faced with looming foreclosure, [Merceri] has now filed this last-ditch attempt to get Jones off title.” CP 572. Both parties cited to events and allegations in the contemporaneous litigation of Merceri’s bankruptcy. Jones alleged that Merceri was “carry[ing] out a scam to defraud the lender, her creditors and/or the bankruptcy court...” CP 562, 572-73. Merceri countered that Jones was engaging in “pure speculation – he cites no law to support his wild allegations and no support for his ‘facts.’” CP 710.

In addition to the litany of charges and counter-charges, Merceri and Jones unloaded large amounts of information on the trial court relating to the bankruptcy litigation. Ultimately, the trial court denied Merceri's motion for sanctions without comment. CP 743-44.

5. Requests for Admission. In late 2013, Merceri was served with Defendant's Request for Admissions. CP 2076:17-20. Merceri never responded to the requests, and later admitted that the failure to respond was an oversight. CP 958, fn. 15. Merceri thought it unnecessary to respond to the Request because the slander of title claim had been dismissed by the trial court before her answer to the Request for Admissions was due. CP 2178:11-17.

6. Mediation attempt. In March of 2014, the parties agreed to mediate both this matter and issues related to the Property that were before the Bankruptcy Court. CP 754. Three weeks before mediation, Jones' attorney, Adamson, mailed Merceri's counsel a "draft" motion¹³ for sanctions against Fullmer, Stern and Merceri. CP 788-799. Unsurprisingly, the April 4, 2014 mediation was not successful. CP 754.

¹³ The draft motion for sanctions was based on claimed violations of FRCP 11 in the bankruptcy court. Fed. R. Bankr. P. 9011(c)(1)(A) requires the service a draft motion to allow the alleged wrongdoer an opportunity to withdraw an offending pleading. Merceri never withdrew her pleading, but Jones' draft FRCP 11 motion was never filed in the bankruptcy court.

7. Merceri disqualification motion. Trial was set for May 5, 2014.

In early April 2014, Merceri brought a motion seeking discovery related to Jones' attorney's communications with the bankruptcy trustee or to disqualify Jones' attorney. Motion to Disqualify.¹⁴ She asserted that information received from Jones in the bankruptcy proceedings indicated that Jones' attorney, Matt Adamson, was a material witness in the King County action because Adamson, on Jones' behalf, made allegations of bankruptcy fraud relating to the Property to the trustee. CP 802-03. Jones responded that any claimed misconduct by his attorney was not germane to Merceri's quiet title action. CP 827-38. The trial court denied Merceri's motion on April 18, 2015.

8. Jones' CR 11 motion. On the heels of Merceri's motion for continuance and disqualification, Jones sought \$6,000 in sanctions against Merceri's counsel. He alleged that the disqualification motion was based on knowingly false allegations and was legally frivolous. CP 979-989. Judge Downing's April 25, 2014 decision reflected the trial court's frustration with both parties:

Finally, the trial date in this case is fast approaching. At the 11th hour, the plaintiff brought a motion to disqualify opposing counsel and the Court denied it. Subsequently, at something past the 11th hour, that opposing counsel has sought sanctions in

¹⁴ See Motion to Disqualify, supplied to the Court of Appeals with Appellant's Second Designation of Clerk's Papers.

connection with the bringing of the motion and it has been proposed that the Court postpone any hearing on this request. It remains this Court's hope that these further wrinkles in the case might help to bring the parties at long last (the 11th hour and 59th minute?) to a point where they can entirely resolve their emotion-laden dispute. If not, the case will be assigned to a trial judge who will then, happily or not, become far more familiar with the personalities and motivations involved than is this Court. It is appropriate that, should trial occur, that judge should try to address all outstanding issues in this forum (as opposed to Bankruptcy Court or the WSBA). If the trial judge should be unable or unwilling to do so, this Court would say, somewhat regretfully, that the sanctions issue could be renewed in this department within two weeks after conclusion of the trial. CP 1020-21.

9. Pre-trial motions. Before trial, the parties filed several motions, several of which are briefly described here.

Merceri's Motion in Limine (CP 1069-1078): Merceri moved the court to exclude any evidence produced by Jones inconsistent with Jones' prior judicial position that the Property's closing documents were fraudulent. In December of 2010, Jones obtained a 3.4 million dollar default judgment against an escrow company based on the allegation that his signatures on the Property's closing documents were forgeries. CP 1107-1108. Two million dollars of the judgment related to Jones' claimed losses due to his liability on the Hunts Point loan. CP 1072-1073, CP 1093.

Based on those facts, Merceri argued that judicial estoppel applies: "Mr. Jones cannot now argue that he is a bona fide owner, is liable for the loan, or that he authorized the loan but the amount was changed." CP 1070.

Jones responded by asserting that his claims against, and judgment against, the escrow company were not inconsistent from his present allegation that Jones is still liable for the loans. CP 1189-1195.

Jones' Motion in Limine (CP 1038-1045): Jones sought to preclude Merceri from calling witnesses who were not disclosed until April 15, 2015. He also argued that Merceri's claims that Jones had harassed her should be excluded as irrelevant to a quiet title claim. Finally, he requested the court to exclude all evidence of monetary damages based upon assertions that Merceri had not amended her interrogatory answers to disclose those damages.

Merceri's Motion to Strike (CP 1158-1188): Merceri moved to strike portions of Jones' trial brief that implied that the bankruptcy court rejected Merceri's claim that Jones' interest in the Property was zero and that he had, at best, a lien interest. She also moved to strike Jones' unclean hands defense because it was raised for the first time in the trial brief.

Jones Motion to Dismiss (CP 1242-1253): Jones sought dismissal of Merceri's case under CR 41(b)(3) based upon Merceri's failure to answer requests for admissions. Her failure to answer those admissions, he argued, required the court to dismiss her quiet title claim because she 'admitted' that he is on title, that he is a co-borrower, that they had no enforceable contracts between them, and that he never interfered with any sale or refinance of the

property. CP 1244. He again argued that there is no basis to quiet title to Merceri because Jones is on title, contending: “Being able to control disposition of the property until the loan is discharged is a valuable right.” CP 1246. Merceri responded by pointing out that “[t]he issue of the parties’ respective contributions and whether this Court can quiet title to Ms. Merceri remains an issue for this Court.” CP 1260. Jones withdrew his motion to dismiss at trial. CP 2299.

E. THE TRIAL

Trial was held on May 6 and 7, 2014 before the Honorable Helen Halpert. CP 1254-57. The court elected to not rule on the various motions *in limine* before the trial. CP 2001-2002.

Two witnesses were called, Jones and Merceri. CP 2017-60 (Jones); CP 2162-2298 (Merceri). Their testimony established that:

1. Merceri and Jones are both on title for the Property. CP 2136; 2208.
2. Merceri and Jones are both borrowers on the \$2.8m loan to purchase the Property. CP 2128-2129; 2218.
3. Jones agreed he would be paid \$15,000 to co-sign the loan and did receive that payment. CP 2074-75; 2185.
4. Jones is not entitled to any equity from the Property (unless he were to pay some or all of the loan). CP 2074-76.

CP 1333-34 (Preliminary Post-Trial Order). Their testimony presented conflicting views on whether or not Jones had interfered with Merceri’s

attempts to refinance or sell the home. CP 2144:18-20; 2179-2180.

The trial, and attorney argument at trial, reinforced the point that both parties were (and are) in a bind. Merceri was (and is) unable to refinance or sell her home without the cooperation of Jones, because Jones is on title. CP 2004. Jones, however, demands to stay on title because he fears that if he were removed from title, the lender could sell the Property in a short sale and hold him responsible for any deficiency. CP 2010. As noted mid-trial by Judge Halpert:

Not having a lot of involvement in this case, I will tell you it seems as though there is a real conundrum. 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, which is going to be very hard for me to figure out... CP 2122.

Because "most of the key facts [were] completely undisputed," CP 2325, a primary controversy at trial was what the Court should do to remedy the situation. Merceri asked the trial court to require Jones to sign a quitclaim deed which would be held by the court pending the refinance of the loan (or sale of the Property) by Merceri. At closing of the loan or sale, this 'springing quitclaim' would be released to the escrow officer for filing. CP 2306-07; 2309. Jones argued that the Court did not have the power, in a quiet title action, to compel the remedy suggested by Merceri. CP 2323. He asserted that Merceri's case should simply be dismissed. CP 2330.

At the close of trial, the court ordered the parties back to alternative dispute resolution. "...I would prefer to leave it to the parties to see if there is some way you all can agree or I will iss—or I will either wind up dismissing this case, which is one option, or imposing what I think will work after I determine the scope of my authority." CP 2326-27.

F. POST-TRIAL ORDERS AND MOTIONS

1. Findings of Fact and Conclusions of Law. The Findings of Fact and Conclusions of Law were entered by the court on June 6, 2015. CP 1358-63. Facts found by the court include that Merceri and Jones had entered a number of property transactions, they had been close friends and business partners, and that they are no longer speaking and have a deep distrust of each other. CP 1359.

With respect to the transaction at issue, Merceri and Jones agreed that Jones would co-sign the mortgage loan and be on title for the Hunts Point Property in exchange for the \$15,000 payment, and that upon refinancing or sale, Jones would quitclaim his interest to Merceri or a buyer. CP 1359. The court also found that Merceri lives in the Property, remodeled the Property, took an additional loan out against the Property, and paid the mortgage until 2008. CP 1360.

Jones did not contribute financially to the Property and he is not entitled to any equity gained in the Property. CP 1359. Jones, however,

remains liable on the loan. CP 1359-60, 1362. The court noted that Jones and Merceri have been involved in litigation since 2008 and that “efforts to resolve this issue have been unsuccessful.” CP 1361.

Based on Merceri’s failure to answer the requests for admission, the court found that Merceri “admitted” Jones never caused the failure of any refinance or sale of the Property. CP 1361. Curiously, however, the court also found that Jones had agreed to quit claim his interest upon payment of \$140,000 from Merceri—a claimed debt that did not relate to the agreement relating to the Property. CP 1361. The original deal only required Merceri to pay Jones \$15,000, which she did. CP 1359; 2074-75.

Because “Jones has a legitimate interest in staying on title until the Loan is repaid in full or until Jones is otherwise released from liability,” the court concluded that “Merceri cannot remove Jones from title until the loan is repaid or Jones’ liability for the loan is otherwise discharged.” The court held that the ‘springing quitclaim’ proposal by Merceri was not within the court’s power to impose. *Id.* Finally, the court dismissed all of Merceri’s claims with prejudice and ruled that as the prevailing party, Jones could move for an award of fees and costs. CP 1363.

2. Motion for Reconsideration. On June 16, 2014, Merceri filed a motion for reconsideration pursuant to CR 59. CP 1366-92. She argued that the court’s dismissal left the parties in the same distressing situation

that they had been in for years. Merceri renewed her request that the court order the springing quitclaim procedure or require Jones to “execute and record a contingent quitclaim deed which accurately memorializes the nature of Jones’ interest in the property (of remaining on title only as long as he is liable for the loan), i.e. a quitclaim deed that states on its face that it is only effective when Mr. Jones is removed from liability on the loan.” CP 1369-70; 1378. The motion was summarily denied. CP 1393.

3. Motion for Fees and Sanctions. On July 7, 2014, thirty-one days after the trial court issued its Findings of Fact and Conclusions of Law, Jones followed up with a motion for fees and costs. CP 1395-1408. He sought \$53,793 in fees and costs pursuant to RCW 4.84.185¹⁵ and CR 11, asserting that the lawsuit was filed or continued in bad faith, vexatious, and frivolous. Jones claimed that he had been cooperative with Merceri’s efforts to refinance the Property. CP 1397-1400. According to Jones, “Merceri never provided any cognizable claim, plausible or implausible, and there is none.” CP 1404.

In her response, Merceri pointed out a number of occasions in which Jones had asserted a possessory interest in the Property, and therefore the action was founded on a title dispute. CP 1464-80. She also argued that the

¹⁵ RCW 4.84.185 provides for the payment of the prevailing party’s reasonable expenses and fees where an action is found to be frivolous and advanced without reasonable cause.

motion was untimely. CP 1479.

On August 14, 2014, the court entered its Findings of Fact, Conclusions of Law, and Order on Defendant's Motion for Fees and Sanctions. CP 1832-36. The court concluded that Merceri's slander of title action was legally and factually baseless and that the quiet title action was legally baseless. CP 1834. According to the trial court:

[Merceri] had no plausible legal argument as to why a party can ask another to co-sign a loan and be on title and then sue to remove them from title while the loan is outstanding. On the other hand, Jones bears some responsibility for creating the situation as he signed a lending document falsely claiming he intended to live in the home. ...[A]n award for the entire amount of fees incurred is not appropriate because some fees were incurred in the satellite bankruptcy litigation and a substantial number of hours were expended in an attempt to resolve the legal issue between the parties through mediation and settlement talks. That is, both parties created the need to undo an untenable legal relationship, which certainly would have resulted in the expenditure of some attorneys' fees. Even though this litigation, itself, was baseless, given the rationale for the court in awarding fee, an award of partial fees is appropriate. CP 1834-35.

The trial court held counsel and Merceri jointly and severally liable for \$16,000 in fees and \$4,338 in costs and expenses to Jones pursuant to RCW 4.84.185. CP 1835. Merceri's attorneys were sanctioned \$4,000 under CR 11 for filing the motion to disqualify.¹⁶ CP 1835-36.

¹⁶ Merceri's Motion to Disqualify is supplied to the Court with Appellants 2d Designation of Clerk's Papers.

4. Motion for Reconsideration/Sanctions. Merceri brought a motion for reconsideration of the Order granting fees and sanctions. CP 1878-1890. Several supporting declarations indicate that Jones perjured himself during the proceedings and at trial. CP 1891-1918; 1934-41; 2404-58. This motion, too, was denied. CP 1977-78.

IV. ARGUMENT

A. STANDARD OF REVIEW

This appeal primarily involves the refusal of the trial court to order equitable relief in order to resolve the ongoing difficulties caused by having both Jones and Merceri on title to a property in which Merceri lives and Jones does not claim any interest other than a need to remain on title until the loan is satisfied. The court's legal conclusion that it did not have the power to grant equitable relief is a question of law which this Court reviews de novo. See King Cnty. Dep't of Dev. & Envtl. Servs. v. King Cnty., 177 Wn.2d 636, 643, 305 P.3d 240 (2013)

A second issue in this appeal is the trial court's failure to apply the doctrine of judicial estoppel to preclude some of Jones' defenses. The application of judicial estoppel is reviewed for abuse of discretion. Arkison v. Ethan Allen, Inc., 160 Wn.2d 535, 538, 160 P.3d 13 (2007). The simple failure to understand the issue (as occurred here) is a question of law.

The third issue in this appeal is the question whether the trial court

erred when it imposed sanctions on Merceri and her counsel under CR 11 and RCW 4.84.185. A trial court's award under both is reviewed for an abuse of discretion. Hous. Auth. of City of Everett v. Kirby, 154 Wn. App. 842, 849-850, 226 P.3d 222 (Div. I, 2010). "A trial court abuses its discretion when it bases its denial on untenable grounds or reasons." Emmerson v. Weilep, 126 Wn. App. 930, 940; 110 P.3d 214 (2005).

Challenged findings of fact are reviewed under a substantial evidence standard, defined as a quantum of evidence sufficient to persuade a rational person the premise is true. Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wn.2d 169, 176; 4 P.3d 123 (2000).

B. THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT CONCLUDED THAT IT DID NOT HAVE THE POWER TO ORDER EQUITABLE RELIEF AND DISMISSED THE CASE.

From the outset of the case, Merceri requested equitable relief in order to ensure that the mutually destructive relationship between the parties could be severed. CP 3. At trial, Merceri moved the trial court to require Jones to execute a quitclaim deed which would be held in escrow (or by the court) pending the refinance of the loan by Merceri. Upon the closing of the loan and the release of Jones' liability on the debt, the springing quitclaim would be released from escrow for recording. CP 2306-07; 2309.

Merceri's proposal protected both parties by ensuring that the

relative rights of each in the Property would be determined and protected. Jones would not be removed from title unless and until any obligation he has to the lender is extinguished. At the same time, Merceri would be able to proceed with a refinance or sale without being subject to any interference by Jones, because the prospective lender or buyer would be aware that Jones would be off the title as soon as he was released from liability on the loan. The disastrous yoke joining the two parties would be severed.

Unfortunately, the trial court rejected this approach. It concluded that it did not have the power to impose the relief, and even if it did, such a remedy would not be appropriate. CP 1362. Focusing on Jones' claimed legal right to remain on title, the court dismissed Merceri's suit **with prejudice**, leaving the parties at the same agonizing impasse that brought them to court.

1. The trial court had the power to impose an equitable remedy.

The trial court incorrectly concluded that it did not have the power to impose Merceri's requested solution because such relief "had not been formally requested in the pleadings..." CP 1362. However, Merceri invoked the equity jurisdiction of the court, both by bringing a quiet title claim and requesting, in her Complaint, "such further or different relief as may be just and/or equitable in the premises." CP 3. And once a court of

equity has acquired jurisdiction over a controversy, it may grant whatever relief the facts warrant. Zastrow v. W. G. Platts, 57 Wn.2d 347, 350; 357 P.2d 162 (1960). “The obvious purpose of this rule is to avoid a needless multiplicity of litigation.” Id.

It is apparent that the trial court accepted Jones’ argument that if quiet title is demanded in the complaint, the court may not effect that result except by cleanly removing the defendant from title. CP 2317, 2320, 2323. This is an incorrect view of the law. Alternate remedies may be raised at trial and ordered by a court in equity:

As to the authority of an equity court to award damages, this question is well settled. The rule is this -- once a court of equity has properly acquired jurisdiction over a controversy, such a court can and will grant whatever relief the facts warrant, including the granting of legal remedies. See 49 Am. Jur. 192; 81 C. J. S. 778; ... In the case at bar, respondents' prayer for relief, quoted above, not only requested specific performance, but also "such other and further relief as to the court seems meet and proper." ...

Zastrow, 57 Wn.2d at 350.¹⁷ Zastrow affirms a trial court decision granting monetary damages despite the complaint’s demand for specific performance. However, a court when confronted with an action seeking one type of equitable remedy may grant a different equitable remedy.¹⁸

¹⁷ The excerpt from Zastrow also cites to Twohy v. Slate Creek Mining Co., 31 Wn.2d 668, 198 P.2d 832 (1948), Hubbell v. Ward, 40 Wn.2d 779, 246 P.2d 468 (1952) and Biggs v. Gilbert-Tilbury Co., 106 Wash. 271, 179 Pac. 839 (1919).

¹⁸ Jones suggested that Merceri should have brought a partition action rather than a quiet title. See, e.g., CP 1288. But the forced sale of a property that Merceri lives in, has

See, e.g., Cummings v. Anderson, 94 Wn.2d 135, 137-138; 614 P.2d 1283 (1980)(partition claim brought; quiet title granted).

This is not to suggest that the solution offered by Merceri was a substantial departure from the relief she requested in her complaint. The point of the springing quitclaim was to achieve exactly the result originally sought by Merceri: the quieting of title in her name. After all, Jones' only interest in the property was to remain on title until his obligation under the loan was extinguished. CP 1359. The additional step—a quit claim that would be effective upon the satisfaction of the loan—was simply a method to allow Merceri to sell or refinance while protecting Jones from being saddled with debt that is not backed up with equity. Such an order is not foreign to our jurisprudence. There are even statutes that contemplate the placement of money or personal property into escrow or into the registry of the court in order to ensure that all parties are protected. *See, e.g.*, RCW 4.08.170 and RCW 4.44.480, both providing for deposits in court.

In short, there is no legal principle supporting the trial court's notion that its hands were tied because the particular path that Merceri offered out of the title/loan problem was not set forth in her Complaint. After all, the

remodeled, and has paid taxes and at least some mortgage payments on, is not an equitable resolution, particularly where the parties agreed that Jones' only contribution would be as a compensated guarantor and Merceri's sole obligation was to remove him from title.

court's "tremendous discretion" to do justice when fashioning an equitable remedy "is the essence of the court's equity power, which is inherently flexible and fact-specific." Proctor v. Huntington, 169 Wn.2d 491, 503, 238 P.3d 1117 (2010) (citing Young v. Young, 164 Wn.2d 477, 488; 191 P.3d 1258 (2008)).

Many Washington cases illustrate the power and flexibility of the court to resolve problems which cannot be addressed through such standard remedies as the award of damages or the granting of unencumbered title. Under proper circumstances, a court can equitably subrogate a lender to advance to first-priority lien status despite the lender's actual knowledge of junior lienholders. Bank of Am., NA v. Prestance Corp., 160 Wn.2d 560, 562; 160 P.3d 17(2007). It may grant an equitable grace period to the holder of an option to purchase property even where the contract deadline has passed. Cornish Coll. of the Arts v. 1000 Va. Ltd. P'ship, 158 Wn. App. 203; 210, 242 P.3d 1 (2010). A court can allow a charity to sell property granted to it in a trust which prohibits the alienation of the property, thus partially rewriting the trust. Niemann v. Vaughn Cmty. Church, 154 Wn.2d 365, 369; 113 P.3d 463 (2005). It may rescind a real estate contract where both parties contributed to the impossibility of the contract's objective. Hornback v. Wentworth, 132 Wn. App. 504, 511; 132 P.3d 778 (2006). The court can exercise its equitable powers to recognize the 'co-parentage'

of a same sex partner and allow that person parenting rights. In re Parentage of L.B., 155 Wn.2d 679, 682; 122 P.3d 161 (2005). It can consider the relative contributions of the parties to prioritize partial interests on a parcel of property. Carbon v. Spokane Closing & Escrow, 135 Wn. App. 870, 878; 147 P.3d 605 (2006).

This, of course, is only a partial list of equitable actions taken by courts. The many cases, and the remedies applied, are too numerous and varied to be set out here. The point is made that a trial court, sitting in equity, will grant equitable relief when there is a showing that a party is entitled to a remedy and the remedy at law is inadequate. Orwick v. City of Seattle, 103 Wn.2d 249, 252; 692 P.2d 793 (1984). The decision in this case, however, simply left the parties to their conflict. As Merceri's counsel remarked, it is reminiscent of "two cats in a cartoon choking each other as they fall down the cliff, and that's -- that's where the Court leaves us." CP 2314.

2. The 'springing quitclaim' remedy was appropriate

As noted above, the trial court also concluded that even if it did have the power to order the springing quitclaim proposed by Merceri, "such a remedy would not be appropriate." CP 1362. Nowhere does the trial court clearly describe why such a resolution would be inappropriate. The closest explanation appears to be in Conclusion of Law 2, CP 1362, where the court

states that “such an order would be inequitable,” citing to Walker v Quality Loan Services, 176 Wn.App 294, 322; 308 P.3d 716 (2013).

Walker affirms the dismissal of a quiet title action where the plaintiff sought to quiet title in himself due to chain of title irregularities. The case holds that a defect in a deed of trust, standing alone, does not render it void—particularly where the plaintiff does not allege discharge of his loan obligations. Id. at 321-322. Walker has no applicability to this case, in which the court was well apprised of the relative interests in title of the two parties before it and Merceri stood ready to accept responsibility for the loan. CP 2233. Merceri sought the court’s clarification of the interests and the responsibilities of the parties in order to proceed with a sale or refinance that could extinguish the loan.

The trial court had a clear view of the difficult situation confronting both parties:

THE COURT: ... But I would like a practical solution with this, because I think it’s -- but 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 -- he’s -- ... free from this liability. CP 2311:5-11.

... I mean I would -- there is no way I 'm -- that this is going to come out of here with the plaintiff owning the home and your client owning the debt. I mean I want -- that just is not fair. But 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.

At trial, Jones himself admitted that he agreed with the general concept of the springing quitclaim:

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. CP 2318:1-7.

Jones' objection to the proposed remedy was not that it was unfair, but that such an order was not requested in the Complaint. CP 2319:24 –2320:4.

Besides, according to Jones, it was an order to do something that he claimed he was already willing to do. CP 2318:1-7; 22-25.

The trial court was skeptical of Jones' assurances:

THE COURT: Mr. Jones didn't – help himself by using some of the foulest, crudest language I've ever seen.

MR ADAMSON: I wholeheartedly agree with you. And that was certainly wrong and something –

THE COURT: And he was smirking on the stand, maybe from embarrassment, but his demeanor on the stand going through that exhibit was of concern to the Court.

MR ADAMSON: I agree with that, your Honor. ... [But an injunction is] ... not what this case is about. That's not what it was brought for. It was brought to remove Jones from title. He's absolutely willing. I will absolutely help him to cooperate to – and as you said, it's in his interest to do it. He doesn't want a foreclosure on this record. He doesn't want this loan on his title – or on his credit. He wants off of it, too.

THE COURT: But he 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 – I mean your client also – there is so little

trust, that's I suppose what I'm responding to. CP 2319:13 – 2320:16.

As illustrated by the colloquy above, the trial court recognized that reliance on the 'cooperation' of the parties was unlikely to resolve the issues. As noted by Mr. Stern, "to say, 'Oh, you're going to go play nice and Mr. Adamson is going to now be able to help you play nice,' is just ignoring the facts." CP 2324. That is why Merceri provided the potential solution of a springing quitclaim.

Even if the trial court believed the springing quitclaim resolution would not work, the court could have, and should have, considered other equitable alternatives, as requested by Merceri. CP 2312:11-5; 1378. The court failed to do so because it made an error of law when it concluded that it did not have the "power" to do anything other than to quiet title immediately in Merceri's name or dismiss the case. It failed to appreciate that "a court's equity power transcends the mechanical application of property rules." Proctor v. Huntington, 169 Wn.2d at 501.

When sitting in equity, it is the duty of the court to exercise its equity power and grant the necessary relief upon a clear showing of necessity. Blanchard v. Golden Age Brewing Co., 188 Wash. 396, 416; 63 P.2d 397 (1936). This is particularly true in quiet title actions, because under RCW 7.28.010 the court may "**do any other act to carry into effect the judgment or the decree of the court.**" (emph. added). In this case,

the trial court understood that the litigants were in a difficult situation, that Jones' credit was affected, that Merceri's ability to control the outcome of her own home and finances were hobbled, that the two parties do not trust each other (one is even subject to an order of protection) and had been unable to cooperate for years—yet it simply did nothing.

3. The trial court erred when it dismissed Merceri's claims.

For the reasons set forth above, the trial court erred when it dismissed Merceri's action without considering a suitable equitable remedy. Making the situation even more difficult is the fact that the trial court dismissed all of Merceri's claims "with prejudice." CP 1363.

It is generally held that dismissal "with prejudice" should follow an adjudication on the merits, while a dismissal "without prejudice" means that the existing rights of the parties are not affected by the dismissal but are as open to legal controversy as if no judgment or dismissal had been entered. Parker v. Theubet, 1 Wn. App. 285, 291; 461 P.2d 9 (1969) (citing Maib v. Maryland Cas. Co., 17 Wn.2d 47, 135 P.2d 71 (1943); Bates v. Drake, 28 Wash. 447, 68 P. 961 (1902)).

The application of these rules to this case is troubling because Merceri and Jones remain in the same unmanageable situation that they were in before judgment. Merceri brought a slander of title claim and a quiet title claim, but she also asked for just and equitable relief. There are

a number of other claims that she could potentially bring to extricate herself from the present situation, including partition and breach of fiduciary duty. These claims, too, sound in equity. The dismissal of all her claims “with prejudice” may inhibit her ability to resolve the matter in the future. The findings of fact, and the litigation of disputes beyond slander of title and quiet title, may preclude her from raising those matters again under *res judicata* or estoppel theories.

At a minimum, the dismissal with prejudice should have been limited to the quiet title and slander of title claims. In the event that this court affirms the trial court, it should clarify that Merceri retains the right to bring other and different claims against Jones, even if those claims sound in equity. Regrettably, the failure of the trial court to resolve the issues requires Merceri to extricate herself from the situation, most probably with further litigation.

C. THE TRIAL COURT ERRED WHEN IT FAILED TO APPLY JUDICIAL ESTOPPEL TO BAR JONES’ DEFENSE.

In her Motion in Limine, Merceri moved the court to prohibit Jones from introducing evidence or making arguments, that were inconsistent with his previous judicial statements in Jones v. Avista Escrow Services (Pierce County No. 10-2-08883-6). CP 1069-1078. In Avista, Jones complained that his signatures on the closing documents on various

transactions (including the Property) were forged and that he had been defrauded. CP 1084, ¶¶ 15, 16. He alleged that his damages for his potential liability on the Property's loan were \$2,044,171. CP 1093. Jones obtained a default judgment for his entire claim, including over two million dollars for the Hunts Point transaction for amounts he asserted he is liable for under the Property's loan documents. CP 1107-1108.

Merceri's motion makes it clear that Jones has gamed the system: His position in Avista conflicted with his assertions in this case that he owns an interest in the Property and that he agreed to sign off on the loan documents with Merceri. CP 6; 89; 98. After all, a forged signature cannot create a valid or enforceable obligation against its purported maker. Fidelity & Deposit Co. of Maryland v. Tigor Title Ins. Co., 88 Wn.App. 64, 69; 943 P.2d 710 (1997). In contrast, in this case Jones admits he jointly purchased the Property with Merceri and therefore he is entitled to remain on title to protect himself from the **same losses** that are covered by the Avista judgment.

"Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position." Bartley-Williams v. Kendall, 134 Wn.App. 95, 98, 138 P.3d 1103 (2006). In applying the doctrine, a trial court is to consider three core factors:

(1) whether “a party's later position” is “clearly inconsistent” with its earlier position”; (2) whether “judicial acceptance of an inconsistent position in a later proceeding would create ‘the perception that either the first or the second court was misled’”; and (3) “whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.”

Arkison v. Ethan Allen, Inc., 160 Wn.2d 535, 538-539; 160 P.3d 13 (2007) (citing New Hampshire v. Maine, 532 U.S. 742, 750-51 (2001)). Judicial estoppel 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).

Jones responded to Merceri’s judicial estoppel argument by asserting that his positions in Avista and in the instant case are not inconsistent. According to Jones, the Avista action:

...was not a lawsuit to eliminate his liability for the loans, nor did he claim in the lawsuit that he was not liable for the loans. The claim was just the opposite. In this lawsuit, Jones’ position is the same, i.e., that he is still liable for the loans. CP 1189.

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.

Jones also asserted:

The warranty deed, which is a document that is only signed by the seller, and which conveyed title to Mr. Jones and Mrs. Merceri, was not forged. No one has ever alleged that it was.

Thus there can be no colorable argument that Jones's current position that he is an owner is inconsistent with any prior position. CP 1192 (emph. in original).

This explanation also makes little sense. In the Avista case, Jones asserted that he was entitled to two million dollars because the notary negligently ascribed his forged signature on the loan documents for the Property. In this case, he takes the position that he voluntarily entered the agreement with Merceri and either signed himself or authorized his signature. CP 89-90; 2318.

Jones' positions are inconsistent because if he had admitted that he had signed off on the documents in the Avista action, the Avista court would not have granted him relief on a forged signature claim. Similarly, if he had asserted the same position in this case as he did in Avista, the trial court could have granted Merceri quiet title. Why? Because the trial court found that Jones' **only** interest in the Property was to protect himself from liability on the loan, and Jones would have no liability on the loan if it were secured by a forged signature without authorization. CP 1134 ¶2; 1369 ¶3; 1362 ¶2; Fidelity, 88 Wn.App. at 69.

In sum, Jones alleged fraud and forgery to obtain a multi-million dollar judgment in Avista, while in this case he rebutted Merceri's quiet title claim by asserting that he authorized the loan documents. CP 2138. "Judicial estoppel precludes a party from gaining an advantage by taking

one position and then seeking a second advantage by taking an incompatible position in a subsequent action.” Johnson, 107 Wn. App. at 906. Jones either intended to be on title or he did not. He should not be able to tell different stories to different courts.

The trial court, however, did not estop Jones from carrying on with the charade. The trial judge commented “...I was so puzzled by this judicial estoppel thing, because I couldn’t figure out what we were trying to estop.” CP 2329:9-11. And yet, Merceri’s motion was clear: “[T]he Court should exclude any evidence or argument from Mr. Jones that he is an owner, that he is liable for the note, and any other testimony that conflicts with his testimony in” Avista. CP 1077. So now Jones has a multi-million dollar judgment for his losses on the loan and at the same time is permitted to stay on title to protect him from those same losses.

Jones failed to produce evidence to rebut the inconsistent positions pointed out by Merceri. The trial court then abused its discretion by not estopping Jones from whipsawing the legal system with his contradictory stances. The trial court’s professed inability to understand Merceri’s motion and failure to act upon it was manifestly unreasonable and exercised on untenable grounds, or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

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

As explained above, the trial court dismissed all of Merceri's claims with prejudice, leaving her and Jones in the same positions as they had before the litigation. This, apparently, was not punishment enough. The trial court found that Merceri and her lawyers were liable to Jones for almost \$25,000 in fees and costs.¹⁹

1. The trial court erred when it permitted Jones to move for an award of fees and costs as the 'prevailing party'.

In its Findings and Conclusions of Law, the trial court held that "Jones is the prevailing party. Jones may move for an award of fees and costs." CP 1363. This conclusion is, in itself, an error of law. Absent a statutory, contractual, or equitable ground, attorneys' fees and costs are not awarded to a prevailing party in a lawsuit. Bowles v. Dep't of Ret. Sys., 121 Wn.2d 52, 70; 847 P.2d 440 (1993). Nor are attorneys' fees available in either quiet title actions or for the successful defense of slander of title actions. King County v. Squire Inv. Co., 59 Wn. App. 888, 896; 801 P.2d 1022 (1990); Rorvig v. Douglas, 123 Wn.2d 854, 856; 873 P.2d 492 (1994).

Whether or not the trial court considered its erroneous "prevailing

¹⁹ Certain findings of fact relating to the awards of fees and costs have been challenged, as set forth in the Assignments of Error. Other findings of fact are critical of Merceri and counsel. However, these findings do not appear to be the basis of the fee and costs awards. In the event this Court finds them to be relevant, Merceri challenges these additional findings: CP 1832 ¶1.b; 1833 ¶2, 3.

party” analysis when assessing Jones’ request for fees is not known. It is probably fair to say that the court’s analysis did not help.

2. The trial court erred when it awarded fees under RCW 4.84.185.

Jones RSVP’d the trial court’s invitation by requesting \$53,793 in fees and costs. He based his fee request on a combination of 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. CP 1835.

RCW 4.84.185 provides:

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. ...

Merceri respectfully disagrees with the trial court’s findings that her slander of title cause of action was “legally and factually baseless” and that her quiet title action was “legally baseless,” thus meriting an award of fees under this statute. CP 1834, ¶¶ 1-3.

The elements of slander of title are (1) false words; (2) maliciously published; (3) with reference to some pending sale or purchase of property; (4) which go to defeat plaintiff’s title; and (5) result in plaintiff’s pecuniary

loss. Brown v. Safeway Stores, Inc., 94 Wn.2d 359, 375, 617 P.2d 704 (1980). Merceri and her counsel were aware that (1) Jones filed claims that his signatures on “all documents” relating to the purchase of the Property had been “forged,” CP 18-20²⁰; (2) That the words were malicious because Jones knew that he had authorized Merceri to sign documents for him as he admitted at trial, (CP 89-90, 2073; 2096; 2100); (3) That a sale of the Property was actually stymied by Jones’ forgery claim, CP 530 (Steel Decl.); (4) Jones’ disparagement cast doubt upon the vendibility or value²¹ of the Property, CP 530; and (5) resulted in Merceri’s pecuniary loss because she was unable to unburden herself of the mortgage. CP 84-85.

Ultimately, the slander of title claim was dismissed because Merceri failed to establish that the slander occurred within the period allowed by the statute of limitations.²² RP 11/1/13, 3:17-25. However, the court denied Jones’ motion to dismiss with prejudice, leaving open the possibility of reviving the claim if additional evidence established slander of title within the limitations period. RP 11/1/13, 21:12-22:5.

²⁰ The Fairweather Place property listed on CP 18-20 is the Hunts Point Property at issue.

²¹ Casting doubt upon the vendibility or value of the property satisfies the ‘defeat title’ element. See, Rorvig v. Douglas, 123 Wn.2d 854, 863; 873 P.2d 492 (1994) (citing Restatement (Second) of Torts § 633).

²² It appears that the trial court assumed that RCW 4.16.100 applied, for a two year statute of limitations. RP 11/1/13, 8:14-19. However, that provision applies to libel and slander. In all likelihood, the catch-all three year statute for injury to property applies, RCW 4.16.080(2). In any event, the 2009 incident appears to be barred because this lawsuit was filed in 2013.

With respect to the quiet title claim, Merceri and her attorneys were aware that Jones had asserted that he was an owner, and/or a co-owner of the property. CP 180; 231; 2150-51. Despite the fact that his and Merceri's agreement gave him no equity in the home, Jones was using his bare existence on title to make various demands—from the collection of \$140,000 from Merceri to the requirement that Merceri move out of the home before sale. CP 177; 180-181; 185; 2146-47; 2228-2229. He was open about trying to make life difficult for her by leveraging his nominal ownership. CP 2152, Fullmer Decl.²³ Even in this litigation itself, Jones asserted co-ownership and admitted that he considers that “[b]eing able to control disposition of the property until the loan is discharged is a valuable right.” CP 303:8; 1246 (emph. added). Though Jones was no more than a compensated guarantor, he sought the right to determine when and how Merceri would sell or refinance the Property.

Quiet title is “designed to resolve competing claims of ownership.” Kobza v. Tripp, 105 Wn. App. 90, 95; 18 P.3d 621 (2001). It “authorize[s] proceedings ‘for the purpose of stopping the mouth of a person who has asserted or who is asserting a claim to the plaintiff's property. It is not aimed at a particular piece of evidence, but at the pretensions of the

²³ See Fullmer Decl., Second Designation of Clerk's Papers, Sub 270, p. 115 (Exh. 3).

individual'" Watson v. Glover, 21 Wash. 677, 681; 59 P. 516 (1899).²⁴ In pursuing the claim, "[i]t is sufficient that the party in possession is incommoded or damnified by the assertion of some claim or interest in the property adverse to him." McGuinness v. Hargiss, 56 Wash. 162, 164; 105 P. 233(1909).²⁵

The quiet title action was hard fought throughout the litigation. Jones brought a summary judgment to have the quiet title action dismissed, and it was denied by Judge Downing. CP 539. The court, at that time, noted that "the determination made as to what Mr. Jones' ownership interest is in the property, I think that those can all be addressed in the context of a quiet title action." RP 11/1/13, 20:19-22. Jones brought another motion to dismiss and voluntarily withdrew that motion at trial. CP 1242-1253; 2299.

An action is frivolous for purposes of RCW 4.84.185 if it cannot be supported "by any rational argument on the law or facts." Jeckle v. Crotty, 120 Wn. App. 374, 387; 85 P.3d 931 (2004). Under that standard, neither the slander of title claim nor the quiet title claim was frivolous. Merceri and her attorneys brought causes of action that were largely confirmed by Jones himself, third parties, and documents showing both Jones' claims of "co-ownership" and his attempts to control the disposition of the property.

²⁴ Citing Castro v. Barry, 79 Cal. 443, 21 Pac. 946 (1889).

²⁵ Citing Teal v. Collins, 9 Ore. 89 (1881).

Counsel were aware that their client was locked in a dispute regarding her own home with an opponent so hostile that he texted her frighteningly obscene messages. CP 55-58. Even the trial court recognized, on multiple occasions, the difficult problems confronting the parties. RP 11/1/13, 19:2-4, 21-23; CP 2122; 2311; 2317. In addition, as discussed in this Brief, the trial court erred when it failed to provide equitable relief to Merceri.

It must also be noted the trial court did clarify the respective rights and obligations of the property, finding that Jones' interest in the property is limited to remaining on title unless and until Merceri refinances or sells. CP 1359; 1362. As Merceri pointed out to the trial court:

The record here, as well as the record in bankruptcy court, is replete with Jones' contentions that he is entitled to money for his interest in the Property, i.e. a hostile claim to an interest in the Property. Indeed, if one angle does not work (e.g. baldly asserting to the trustee that he is half owner and entitled to money [CP 231:25; Fullmer Decl.²⁶]), Mr. Jones will try another angle (e.g. asserting after the fact for the first time in years that funds for a hard-money loan to a third party were used for remodeling, and therefore he contributed to the Property. [CP 326 ¶4] Ms. Merceri has a statutory right to a decree stopping him from doing so. The Court did issue such a decree, finding that Mr. Jones has no right to equity or proceeds, contrary to claims he made in 2011 and 2012 in the bankruptcy and those he made earlier in this quiet title action, which prevents him from falsely asserting such a right in the future.

It is undisputed that Merceri has possession of the property and all the other "sticks" that make up the bundle of property rights. It is undisputed that Jones attempted to assert a possessory

²⁶ See Fullmer Decl., Second Designation of Clerk's Papers, Sub. 270, p. 102 (Exh. 3).

interest. See e.g. [Fullmer Decl.²⁷] (“can’t a sheriff escort her out”); [CP 491] (demanding Ms. Merceri move out to “stage” the property for what is ordinarily a very long short sale process). Merceri exercised her statutory rights to stop Mr. Jones’ numerous attempts, past and present, to hold the property hostage for his financial gain and to eject her. The Court issued such a decree. Therefore, the lawsuit was not frivolous in its entirety (or even a little bit), nor was it advanced without reasonable cause. [CP 1477-78]

In other words, while Merceri received far less relief than she was entitled to, she did receive some relief. Her case, therefore, was advanced with reasonable cause. “[B]efore awarding attorney fees under RCW 4.84.185, the court must make written findings that the lawsuit **in its entirety** is frivolous and advanced without reasonable cause.” North Coast Elec. Co. v. Selig, 151 136 Wn.App. 636, 650, 151 P.3d 211 (2007)(emph. added).

The trial court found that Merceri advanced “no plausible legal argument as to why a party can ask another to co-sign a loan and be on title and then sue to remove them from title while the loan is outstanding.” CP 1834. Its conclusion flouts a record which demonstrates that Jones contended that he was a co-owner with rights to control the disposition of Merceri’s home. It is at odds with the trial court’s own observations that the parties are trapped in an intractable conflict and that “both parties created the need to undo an untenable legal relationship.” CP 1835. And it

²⁷ See Fullmer Decl., Second Designation of Clerk’s Papers, Sub 270, p. 69 (Exh. 3).

is inconsistent with the fact that Merceri received some relief.

Procedurally, as well, the RCW 4.84.185 claim should have been summarily rejected. Jones brought the claim thirty-one days after the trial court issued its findings of fact and conclusions of law. The statute, however, states that “[i]n no event may such motion be filed more than thirty days after entry of the order” that terminates the action.”²⁸ See, e.g., Piper v. Dep't of Labor & Indus., 120 Wn. App. 886, 891, 86 P.3d 1231, (2004). The award of \$20,338 based on RCW 4.84.185 must be reversed.

3. The trial court erred when it sanctioned counsel for claimed violations of CR 11.

The trial court also sanctioned Merceri’s attorneys in the amount of \$4000 for alleged violations of CR 11 for the filing of the Motion to Disqualify or Continue. CP 1835. In the context of this bitter battle, Merceri’s attorneys had a basis to be concerned about Adamson’s conduct and his potential status as a witness. They had recently learned that Adamson had contacted Merceri’s Bankruptcy Trustee and the foreclosure trustee regarding the Property, and Adamson’s attempts to “undo” the Bankruptcy’s abandonment order so that Jones could engineer the

²⁸ It appears that Merceri, at the trial court level, did not object to the imposition of terms based upon the untimeliness of Jones’ motion. However, under Batten v. Abrams, 28 Wn. App. 737, 742, 626 P.2d 984 (1981) it is noted: “Respondents contend the trial court’s failure to observe the rule cannot properly be raised for the first time on appeal. They are mistaken... ‘It is the general rule that public statutes of Washington State will be judicially noticed by all courts of this state’” (citing Gross v. Lynnwood, 90 Wn.2d 395, 397 and 400, 583 P.2d 1197 (1978)).

foreclosure of the Property. CP 754-55.

Given that Jones' interference with the Property was a key issue in the proceedings, the motion to disqualify (or, in the alternative, to continue the trial date so that the matters could be investigated) was not without basis. The record fails to establish that counsel filed a pleading without conducting a reasonable inquiry into the factual and legal basis for the claims. Bryant v. Joseph Tree, Inc. 119 Wn.2d 210, 220; 829 P.2d 1099 (1992).

E. THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT THE MOTIONS FOR RECONSIDERATION.

Merceri filed two motions for reconsideration, one after the trial and one after the ruling in Jones' favor for fees and costs. CP 1366-92; 1878-90. For all the reasons set forth in this Brief, the trial court erred by not granting the motions.

In particular, the trial court should have considered the new evidence establishing that the real estate industry recognizes the concept of a "contingent quitclaim deed" which memorializes the nature of the interest of a person on title who does not enjoy the full complement of property rights. CP 1369-70.

With respect to the motion for reconsideration relating to fees and sanctions, the court should have considered the new evidence indicating

that Jones perjured himself in court on multiple occasions. CP 1882-83; 1891-1918; 1934-41; 2404-58. His inconsistent statements provided ample basis to question the credibility of all of his testimony, including his claims that he was or will be cooperative with respect to a sale or a refinance. In addition, his varying stories support the judicial estoppel theory which was incorrectly disregarded by the trial court.

V. CONCLUSION

The trial court erred by failing to employ its powers in equity to relieve Merceri and Jones from what it fairly noted is an “untenable legal relationship.” This Court has the authority and the duty to either order Jones to execute a springing or contingent quitclaim or to remand the matter to the trial court with instructions to resolve the matter. Otherwise, the parties are left to their dispute. Inevitably, more litigation will follow.

Furthermore, this Court should reverse the trial court’s failure to apply judicial estoppel, which should have prevented Jones from offering two different legal and factual scenarios to two different courts—and benefitting from both. Jones’ varying stories cast doubt upon his respect for the judicial system. He should not be permitted to employ such tactics.

Finally, the award of sanctions was an abuse of the trial court’s discretion. The unfortunate position of the parties is, as found below, a consequence of the decisions of both parties. The trial court must not be

permitted to subvert the 'American Rule' by awarding sanctions against only one of the parties, particularly in this difficult situation.

RESPECTFULLY SUBMITTED this 30th day of June, 2015.

By: /s/ Elena Garella
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Certificate of Service

I, the undersigned, certify that on the 30th day of June, 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):

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