

No. 47988-5-II

Court of Appeals, Div. II,
of the State of Washington

Patrick Cuzdey,

Appellant,

v.

Patricia Landes, et al.,

Respondents.

Reply Brief of Appellant

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1. Introduction

Patrick Cuzdey entered into an oral agreement with his in-laws (Benny and Patricia Landes) to purchase from them a five-acre parcel of land and a mobile home to live in with his wife (Landes' daughter, Karla Wallen¹) and their children. Cuzdey immediately moved in and began improving the land. Over the next 12 years, Cuzdey paid off the agreed purchase price through a combination of cash payments and labor on behalf of Landes.

With Cuzdey's permission, Landes retained paper title to the property, at least in part to enable them to obtain financing for a second mobile home, which was installed on the property as a residence for Landes, enabling them to be closer to the family. These informal arrangements between family members worked fine for many years, until Wallen divorced Cuzdey in 2014. Suddenly, Cuzdey was an outsider. Landes refused to acknowledge any obligations to Cuzdey. Landes initiated eviction proceedings. In order to protect the property he believed to be his, Cuzdey filed this quiet title action.

The proceedings in this action have been contentious and confusing, even, it seems, to the trial court judge. After a series of amended summary judgment motions, supported by over 500 pages of unauthenticated documents without any foundational testimony, the trial court dismissed all of Cuzdey's claims. Cuzdey appeals. Material facts remain in dispute.

¹ Ms. Wallen was born Karla Landes. She was known as Karla Cuzdey while married to Patrick Cuzdey. She has since remarried and is known as Karla Wallen. To avoid confusion, this brief will refer to her throughout by her current name.

2. Reply to Landes' Statements of Fact

The Brief of Respondent separates its statements of fact to correspond to the discrete issues it identifies. To the extent rebuttal is necessary, Cuzdey addresses Landes' assertions of fact in this section.

In connection with Landes' Issue #2, she provides a detailed account of her version of the facts relating to the real property and the NOVA mobile home, based largely on the unauthenticated documents that accompanied her summary judgment motions. Br. of Resp. at 6-12. Like the fact statements provided by Landes in her first and second amended summary judgment motions, this statement is full of explanations and commentary that go beyond the information on the face of the documents. Other than the declarations of Landes and Wallen that were filed with the original summary judgment motion, there is no admissible testimony from any competent witness to support Landes' explanation of the documents. Instead, Landes attempts to testify through counsel, knowing that testifying herself would waive the deadman's statute. If Landes wants the benefit of her testimony through counsel, she must also accept the consequence: the deadman's statute has been waived.

Landes also mischaracterizes the petition and decree of dissolution. Br. of Resp. at 11-12. Neither the petition nor the decree states that Cuzdey and Wallen did not own real property. *See* CP 308-314. Rather, the documents state "N/A" and "Does not apply," with reference to division of property *Id.* This is because Cuzdey and Wallen handled division of property on their own and did not seek the court's involvement in that issue. CP 82, 202. There

is no evidence in the record to support Landes' mischaracterization of the documents.

3. Reply Argument

The Brief of Respondent redefines the issues and argues them in a different order than Cuzdey's brief. For the convenience of the Court in lining up Cuzdey's rebuttal with Landes' arguments, this Reply Brief will generally follow the order of arguments presented in Landes' brief.

3.1 This Court should reverse the trial court's grant of summary judgment in its entirety, restoring all of Cuzdey's claims.

Landes argues that Cuzdey has waived any challenge to dismissal of any claims other than quiet title, by failing to assign error or present argument. Brief of Respondent at 4-6. However, Cuzdey did, in fact, assign error to dismissal of all claims and present argument addressing the trial court's reasons for dismissing the action as a whole.

In this appeal, Cuzdey assigned error to the trial court's summary judgment dismissal of his "quiet title **action**," not just his quiet title **claim**. Brief of Appellant at 2 (emphasis added). Other portions of the brief refer alternatively to the "action" as a whole or to "Cuzdey's claims" (plural) as having been erroneously dismissed. *E.g.*, Br. of App. at 10 ("dismissed Cuzdey's claims ... held that Cuzdey's action was frivolous ... erred in dismissing Cuzdey's claims"). As Landes acknowledges elsewhere, "The trial court held that Mr. Cuzdey's **entire action** was barred by operation of the statute of frauds and operation of the Deadman's Statute," or, in the

alternative, under the statute of limitations, laches, or estoppel. Br. of Resp. at 2 n. 1 (emphasis added); RP 63-65. The trial court did not analyze the merits of Cuzdey's other claims; it dismissed the entire case on the basis of these defenses.

Cuzdey's opening brief contains arguments addressing all of the grounds identified by the trial court for its decision on summary judgment. Br. of App. at 12-17 (deadman's statute), 18-20 (statute of frauds), 20-21 (statute of limitations and laches), 25-27 (estoppel). In reviewing the trial court's decision, this Court is entitled to paint with just as broad a brush as the trial court. The trial court dismissed the entire action on the basis of Landes' defenses. If the trial court erred in applying the defenses, this Court should reverse the grant of summary judgment in its entirety and restore Cuzdey's entire action.

3.2 Cuzdey's claims are not barred by the doctrine of laches.

Landes contends that Cuzdey unreasonably delayed bringing his claims, but fails to establish the elements of the defense of laches. As an equitable matter, a court can apply the doctrine of laches when three elements are satisfied: 1) knowledge or reasonable opportunity to discover that plaintiff has a cause of action; 2) unreasonable delay in commencing that cause of action; and 3) damage to the defendant resulting from the delay. *Carlson v. Gibraltar Sav. of Wash.*, 50 Wn. App. 424, 429, 749 P.2d 697 (1988).

Landes does not indicate when Cuzdey was supposed to have obtained knowledge or a reasonable opportunity to discover that Landes no

longer intended to follow through on their promise to deliver title to Cuzdey. Landes asked on multiple occasions to stay on title for a while longer, always assuring Cuzdey that they would deliver title eventually. CP 197. Cuzdey never had any reason to doubt the promises of his in-laws to perform their part of the agreement. *Id.* The first indication Cuzdey had that Landes was breaching the agreement by claiming full ownership of the property was when Cuzdey received an eviction notice after the divorce. *Id.* The eviction notice was served June 11, 2014 (CP 155); Cuzdey filed this action less than 60 days later, on August 1, 2014 (CP 1). Because Cuzdey did not unreasonably delay initiating this action, laches does not apply.

Landes argues that Cuzdey delayed over 30 years. A 30-year delay would have to refer to the time of the original agreement, but Cuzdey did not have a cause of action at that time because Landes' performance (delivering title) had not yet come due and Cuzdey had no notice of any adverse claim to the property.

Landes notes that Cuzdey brought this action 13 years after the death of Benny Landes. Cuzdey's agreement, however, was with both **Benny and Patricia** Landes. *See* CP 191, 197. Patricia Landes is not prejudiced by the absence of her late-husband, particularly where it was Patricia herself who finally breached the agreement by claiming full ownership adverse to Cuzdey.

Landes claims that Cuzdey unreasonably relied on assurances from "others," arguing by analogy to *Carlson*. However, the facts of *Carlson* are very different. In *Carlson*, the plaintiffs, with knowledge of their claims, waited while another party with a similar claim sued, settled, and then failed to take

advantage of the settlement. *Carlson*, 50 Wn. App. at 431-32. In contrast, Cuzdey relied on the promises of trusted (at the time) family members who had not yet breached the agreement. Cuzdey's reliance was reasonable under the circumstances.

Landes argues that Cuzdey should not be able to re-litigate the dissolution decree. As will be discussed further below, the dissolution decree was never litigated in the first place (*see* CP 202 (it was an uncontested divorce)), and it did not settle the issue of ownership of the property, least of all any claim of ownership by Landes (*see* CP 308-314).

Landes fails to establish any of the elements of laches. To the extent any of the material facts are in dispute, summary judgment on this issue is improper, and Cuzdey's claims cannot be dismissed on this basis. This Court should reverse dismissal.

3.3 Cuzdey's claims are not barred by the statute of frauds.

Landes argues that Cuzdey has not established part performance and that, even if he has, part performance does not save an oral contract that is not to be performed within one year. Br. of Resp. 15-16. Cuzdey has already demonstrated evidence in the record to support part performance by taking actual and exclusive possession of the property from 1984 to 1996, paying consideration, and making substantial valuable improvements for his own benefit. Br. of App. at 18-19. Landes' alternative "over one year" argument was not raised in any of her summary judgment motions and should be

disregarded. *See* CP 96-97 (first amended motion), 410-411 (second amended motion).

Landes argues that Cuzdey's assertions of possession, paying taxes, and making substantial improvements are "false," citing to some of her unauthenticated documents. Because this is an appeal of a summary judgment ruling, nothing has been proven false. The only question is whether material facts are in dispute, which they are. Cuzdey's evidence of part performance is competent and admissible. *See* Br. of App. at 19 (outside the reach of the deadman's statute). Cuzdey had exclusive possession of the property from 1984 to about 1996, when Landes moved the Goldenwest onto the property. CP 201. Landes' evidence can do nothing more than establish a dispute of material fact, precluding summary judgment dismissal under the statute of frauds.

Landes' new "over one year" argument is based on the statute of frauds for contracts, rather than the statute of frauds for conveyances of land. This argument was not called to the attention of the trial court and should be disregarded. RAP 9.12. In any event, the statute of frauds for contracts does not bar Cuzdey's quiet title action.

The statute of frauds for contracts bars an action for enforcement of any agreement that is not to be performed within one year. *Trethewey v. Bancroft-Whitney Co.*, 13 Wn. App. 353, 359-60, 534 P.2d 1382 (1975). However, *Trethewey* involved a contract for goods and/or services (upkeep of the volumes in a law library) and has no direct application to this case, where the contract is for conveyance of real property. A more analogous case is

Miller v. McCamish, 78 Wn.2d 821, 479 P.2d 919 (1971), in which the court held that evidence of part performance barred the operation of **both** statutes of frauds.

The oral agreement in *Miller*, as here, was one for the conveyance of real property, with some terms that would be performed more than one year after the date of the agreement. *Miller*, 78 Wn.2d at 823; accord *French v. Sabey Corp.*, 134 Wn.2d 547, 555-57, 951 P.2d 260 (1998) (approving of the result in *Miller* because *Miller* was “a real estate case”). The *Miller* court observed that such an agreement falls, “at least initially,” under both statutes. *Id.* at 824. The court explained that the purpose of the doctrine of part performance is to demonstrate, through a sufficient quantum of evidence, the existence of the contract. *Id.* at 828-29. Thus, in cases where the requirements of part performance were met, application of either statute would “defeat the clear and unambiguous intent of the legislature” in enacting the statutes. *Id.* “The purpose and intent of the statute of frauds is to prevent fraud, and not to aid in its perpetration ... the courts will endeavor in every proper way to prevent the use of the statute of frauds as an instrument of fraud or as a shield for a dishonest and unscrupulous person.” *Id.* at 825.

If there was, in fact, an agreement—and Cuzdey has presented evidence that there was—application of the statute of frauds could only have the effect of assisting Landes in defrauding Cuzdey of the property she promised to convey to him. This is a result the courts cannot allow. Cuzdey’s evidence of part performance raises a material issue of fact, precluding

summary judgment dismissal of his claims under either statute of frauds.

This Court should reverse.

3.4 Cuzdey's claims are not barred by the statute of limitations.

3.4.1 No statute of limitations applies to quiet title actions.

Cuzdey's brief pointed out that quiet title actions are not subject to any statute of limitations, even when there is an underlying legal theory that might be subject to a statute of limitations if it were a separate claim for damages. Br. of App. at 20 (citing *Petersen v. Schafer*, 42 Wn. App. 281, 284, 709 P.2d 813 (1985)). Nevertheless, Landes argues that Cuzdey's quiet title claims should be barred by the statutes of limitations applicable to "underlying claims" such as breach of contract or fraud.

Landes argues that *Petersen* actually supports her argument. It does not. In *Petersen*, Schafer and Gaffner entered into a joint venture agreement that purported to convey to Schafer a one-half interest in certain real property. *Petersen*, 42 Wn. App. at 282. After Petersen acquired Gaffner's interests, Petersen brought suit to quiet title, seeking to extinguish Schafer's interest. *Id.* at 283-84. Schafer argued that the action was based on a claim of fraud and therefore subject to a three-year statute of limitations. *Id.* at 284. The Court of Appeals held that no statute of limitations applied to an action to quiet title, "even though fraud is practiced in creating the cloud." *Id.*

Here, Landes, like Schafer, argues that Cuzdey's claims are actually based on fraud and that the statute of limitations for fraud or for breach of

an oral contract should apply. Landes, like Schafer, is wrong. No statute of limitations applies to a quiet title action, even though fraud is practiced in creating the cloud. Cuzdey has had possession of the property for over 30 years. He paid the price for it. He has made substantial improvements for his own benefit. He now seeks to clear the cloud created by Landes' refusal to deliver, on paper, the title she has already sold to him. The gravamen of the action is to quiet title; no statute of limitations applies.

The additional cases Landes cites (*Kobza v. Tripp*, 105 Wn. App. 90, 18 P.3d 621 (2001); *Walker v. Benson & McLaughlin, P.S.*, 79 Wn. App. 739, 904 P.2d 1176 (1995); *Turpen v. Johnson*, 26 Wn.2d 716, 175 P.2d 495 (1946); and *Cushing v. Spokane*, 45 Wash. 193, 87 P. 1121 (1906)) do not support her argument, either. *Kobza*, for example, says nothing at all about statutes of limitations or “underlying claims” for a quiet title action. *Kobza*, 105 Wn. App. at 95-97.

Walker does not bar a quiet title action on the basis of an underlying statute of limitations. Quite the opposite: the quiet title plaintiff prevailed because the cloud on title was a security interest that could not be enforced because the underlying legal action for damages was barred by the statute of limitations. In *Walker*, the Walkers, owners of real property, had executed a deed of trust in favor of Benson and McLaughlin, P.S. to secure a promissory note. *Walker*, 79 Wn. App. at 741. More than six years after execution of the note, Benson initiated a judicial foreclosure action. *Id.* Walkers responded with their own action to quiet title, arguing the foreclosure was barred by the statute of limitations. *Id.* The trial court

dismissed Walckers quiet title action on summary judgment, holding that the statute of limitations did not bar foreclosure. *Id.* The Court of Appeals reversed, holding that the running of the statute of limitations on the underlying debt was a defense to foreclosure of a deed of trust. *Id.* at 746.

Cushing is analytically parallel to *Walcker*. The City held certain liens on Cushing's property, which it could not enforce because the applicable statute of limitations had expired. *Cushing*, 45 Wash. at 194. The court held that Cushings were entitled to have the liens removed. *Id.* at 195. Neither *Walcker* nor *Cushing* barred the quiet title action on the basis of any statute of limitations.

Landes tries to bring herself within these cases by imagining a hypothetical in which she had brought the quiet title action against Cuzdey. She argues that in this hypothetical, Cuzdey's "defense" would be barred by the statute of limitations. First of all, that is not the case that is before this Court. But even if it were, it is different from *Walcker* and *Cushing* because Cuzdey has not clouded title with an invalid security interest, and he is not making a legal claim for damages that would be barred by a statute of limitations. Cuzdey's claim is that he is the true owner. That claim is not subject to a statute of limitations.

Landes also seeks support from *Turpen v. Johnson*, but *Turpen* was unique in that it involved a special statute of limitations specifically designed to bar quiet title actions that challenge the validity of a tax deed. In *Turpen*, the Turpens claimed title to property by way of a 1944 deed and brought an action to quiet title. *Turpen*, 26 Wn.2d at 717. However, Turpens' grantor had

previously lost the property in a tax foreclosure. *Id.* at 717-18. In order for Turpens' title to prevail, the tax deed would have had to have been invalid, but a special statute of limitations barred any challenge to the validity of a tax deed that was not brought within three years. *Id.* at 719. The court held that this special statute of limitations barred the quiet title action. *Id.* at 721. Here there is no special statute of limitations barring Cuzdey's quiet title claims. Cuzdey's quiet title action is not barred by the statute of limitations.

3.4.2 Even if an “underlying” statute of limitations could apply, Cuzdey’s action was timely.

Even if the statute of limitations for oral contracts could apply, it would not bar Cuzdey's action because Cuzdey's claims under the agreement did not accrue until Landes breached the agreement in 2014. Landes argues that Cuzdey's claims accrued when Cuzdey completed payment and title was not immediately transferred. But after Cuzdey paid off the property, Landes requested an extension of time to deliver paper title, which Cuzdey granted. CP 197 (P. Cuzdey), 207 (J. Cuzdey). There was no breach until Landes instituted eviction proceedings in 2014 after Cuzdey's divorce, making it clear that Landes was claiming ownership for herself, in breach of her promise to deliver title at a future time. Cuzdey brought this action immediately after this breach. Prior to Landes' breach, Cuzdey had no reason to believe that Landes claimed full ownership of the property and had no intention of delivering title as she had promised. CP 197.

Landes argues in the alternative that Cuzdey's claims accrued when Benny Landes died, or when Patricia Landes recorded her community

property agreement the following year. Landes claims that this recording was notice to the world that repudiated Landes' promise that she would still deliver title to Cuzdey. However, there is no evidence in the record to support this argument. The death of Benny Landes could only operate to transfer to Patricia Landes whatever interest Benny Landes had at the time of his death: the remnant paper title to property that Benny and Patricia Landes had already sold to Cuzdey. This transfer would not have caused any breach or repudiation, particularly where Patricia Landes continued to say she would transfer title to Cuzdey. CP 197.

Similarly, recording of the community property agreement was simply notice of the transfer that occurred at Benny Landes' death. Patricia Landes received Benny Landes' half of the empty paper title to the property they had sold to Cuzdey so many years before, together with the obligation, which Patricia Landes acknowledged, to transfer that paper title to Cuzdey. The community property agreement was recorded, but not with reference to the property at issue, so it could not serve as notice of repudiation of the obligation or of a claim of ownership adverse to Cuzdey. CP 914.

Even if Cuzdey's claims under the agreement accrued as early as the time Cuzdey completed payment for the property—that is, even if Landes' request for an extension of time and promise to deliver title at a later date was not a valid modification of the agreement—Landes is estopped from asserting the statute of limitations because Cuzdey reasonably relied on Landes' promise that she would deliver title. Courts allow equitable tolling of a statute of limitations when justice requires. *Millay v. Cam*, 135 Wn.2d 193,

206, 955 P.2d 791 (1998). Equitable tolling is appropriate when there is bad faith, deception, or false assurances by the defendant and the exercise of diligence by the plaintiff. *Id.* Here, Landes gave Cuzdey false assurances that they would deliver title to Cuzdey, from the time Cuzdey completed payment up until just before the divorce in 2014. CP 197. Cuzdey reasonably relied on those assurances and did not sue, trusting that his in-laws would be true to their word. Landes cannot hide under the statute of limitations when her own actions falsely induced Cuzdey not to bring his action sooner.

Finally, Cuzdey's alternate legal theory of adverse possession is not subject to any statute of limitations. Even if he is barred from asserting Landes' breach of the oral agreement, he cannot be barred from asserting adverse possession under any statute of limitations.

The trial court erred in finding the statute of limitations to be an alternate basis for dismissal of Cuzdey's action. This Court should reverse.

3.5 Cuzdey's claims are not barred by collateral estoppel.

Landes misreads the divorce petition and decree in order to argue that Cuzdey is estopped from claiming ownership of the property. This argument fails because Landes cannot establish the elements of collateral estoppel. "Collateral estoppel, or issue preclusion, bars relitigation of an issue in a subsequent proceeding involving the same parties." *Christensen v. Grant Cty. Hosp.*, 152 Wn.2d 299, 306, 96 P.3d 957 (2004). Collateral estoppel only bars issues "that have actually been litigated and necessarily and finally determined in the earlier proceeding." *Id.*

The issue of ownership of the property was never raised or litigated in the divorce. The divorce was uncontested. CP 202. Neither the petition nor the decree states that Cuzdey and Wallen did not own real property. *See* CP 308-314. Rather, the documents state “N/A” and “Does not apply,” with reference to division of property *Id.* This is because Cuzdey and Wallen handled division of property on their own and did not seek the court’s involvement in that issue. CP 82, 202.

Landes cannot establish an identity of issues because ownership of the property was never placed at issue in the divorce. Landes cannot establish final judgment on the merits of this issue because the court never addressed the issue of property ownership. Even if it had, the court would only have resolved ownership as between Cuzdey and Wallen; it would not have addressed any claim of ownership by Landes because Landes was not a party to the divorce. Cuzdey is not barred from claiming ownership of the property. This Court should reverse dismissal of Cuzdey’s claims.

3.6 Cuzdey presented sufficient evidence to raise material issues of fact.

Landes’ Issue #6 asks whether Landes made a prima facie case for summary judgment, but her argument focuses instead on authentication of her documents and the trial court’s denial of Cuzdey’s final motion for continuance under CR 56(f). Cuzdey has not raised the issues of authentication or continuance in this appeal. The Court can safely disregard Parts 9.1, 9.2, and 9.3.1 of Brief of Respondent, on pages 26-31.

In Part 9.3.2, Landes attempts to show that her documents demonstrate that “Cuzdey’s claims could not stand.” However, other than the testimony of Landes’ counsel in the first and second amended motions for summary judgment, there is no evidence from Landes to explain what the documents mean or how they came to be. If Landes wants the benefit of her counsel’s testimonial explanations, she will have to accept the consequence: waiver of the deadman’s statute. Either way, Cuzdey has explained how the documents are consistent with his position, raising genuine issues of material fact as to the elements of his claims.

3.6.1 There are material issues of fact as to the existence of the oral agreement.

Landes argues that Cuzdey fails to prove material terms of the agreement, but fails to identify what material terms, if any, are missing. Patrick Cuzdey’s declaration sets forth the five material terms required by *Becker v. Wash. State Univ.*, 165 Wn. App. 235, 246, 266 P.3d 893 (2011). *See, generally*, CP 189-98. The subject matter of the agreement is the real property and the NOVA mobile home. The parties were Cuzdeys as purchasers and Landes as sellers. The promises were that Landes would sell Cuzdeys the real property and the NOVA and that Cuzdey would pay for the property through a combination of cash payments and labor performed on behalf of Landes. Consideration for the property was \$9,000 or \$10,000 for the land and \$14,660.80 for the NOVA, plus interest on Landes’ loans and property taxes due on the property. Other terms and conditions included Landes keeping paper title until the loans were paid off. Additionally, Cuzdey’s

evidence of part performance supplies proof of the existence of the contract. *Miller*, 78 Wn.2d at 828-29.

Landes argues that her checks, receipts, permits, and other records demonstrate that Landes was always the true owner. However, Cuzdey has testified that Landes applied for permits because they were the ones on title; that Landes often paid up-front for materials for improvements, for which Cuzdey later repaid them in cash and labor; that Cuzdey paid cash for other materials; that Cuzdey performed the labor to install improvements; and that many of the receipts relate to materials that were actually used on Landes' other property, in Lacey. CP 189-90, 194, 196, 198.

Cuzdey's evidence creates genuine issues of material fact, precluding summary judgment dismissal.

3.6.2 There are material issues of fact as to adverse possession.

Landes argues that Cuzdey's possession of the property was not exclusive or hostile. Landes misreads the record to claim that Cuzdey has admitted that Landes "occupied, controlled, and/or possessed" the property. Landes cites the divorce petition and decree, which, as shown above, make no statements about ownership of the property. *See* CP 954-61. Landes also cites various documents in which Cuzdey admits that Landes has lived on the property since about 1997. *See* CP 981-93. However, this admission cannot defeat Cuzdey's claim of adverse possession because Cuzdey had **exclusive** possession of the property from 1984 to 1996, a period of more than ten years. CP 201 ("I was given full control of the property from the beginning

of the agreement with the Landes to purchase the property from them, and lived there exclusively with my family for 13 years before the Landes moved their mobile home.”).

Landes argues that Cuzdey’s possession could not be hostile because it was by permission. However, possession on the basis of a claim of ownership, such as Cuzdey’s claim to have purchased the property from Landes, **is hostile** for purposes of a claim of adverse possession. *See LeBleu v. Aalgaard*, 193 Wn. App. 66, 73-74 (2016). While possession under an agreement to a revocable license would be merely permissive, possession under an agreement that amounts to a grant (even if it later proves unenforceable) is adverse. *Id.*

Cuzdey’s evidence creates genuine issues of material fact on the issues of exclusivity and hostility, precluding summary judgment dismissal of the adverse possession claim.

3.6.3 There are material issues of fact as to quantum meruit.

Landes argues that work performed by family members is presumed to be gratuitous. Cuzdey has rebutted this presumption by his testimony that the work he performed on behalf of Landes was in payment for the property. It becomes a fact issue for a jury.

Landes claims that Wallen was paid by Landes for work on the property, citing to a check from Landes to Wallen that says “Barn Move.” There is no testimony in the record explaining this check, so it is unclear how it is material to the issue of quantum meruit.

Cuzdey's quantum meruit claim is a claim in the alternative: if Cuzdey does not prevail on his quiet title claim, he is entitled to recover the value of the improvements he made to the property over the years. This is true regardless of any agreement; in fact, it assumes that there was no agreement. The fact remains that Cuzdey made many valuable improvements to the land for his own benefit, not for family members. If he does not have title to the land, he is entitled to compensation for those improvements.

Cuzdey's evidence creates genuine issues of material fact, precluding summary judgment dismissal of the quantum meruit claim.

3.6.4 There are material issues of fact as to constructive trust.

Landes notes, "When property has been acquired in such circumstances that the holder of legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee." Br. of Resp. at 36 (quoting *Pitzer v. Union Bank of California*, 141 Wn.2d 539, 548-49, 9 P.3d 805 (2000)). Landes holds paper title, but only because they took advantage of Cuzdey's trust and family relation to convince him to allow them to retain it even though they had agreed in 1984 to sell Cuzdey the property; watched as he exclusively possessed it and made valuable improvements from 1984 to 1996; and acknowledged in about 1996 that Cuzdey had paid in full. If Cuzdey's version of events is found to be true, Landes cannot in good conscience retain the beneficial interest in the property. As an alternative to quieting title in Cuzdey, the court could appropriately declare Landes a trustee.

Cuzdey's evidence creates genuine issues of material fact, precluding summary judgment dismissal of the constructive trust claim.

3.6.5 There are material issues of fact as to conversion.

Landes argues that she is justified because she has title to all of the property in this suit. Landes misunderstands Cuzdey's conversion claim. The Second Amended Complaint alleges, "Landes and Wallen have taken or caused to be taken personal property of plaintiff." CP 168. Cuzdey still has possession of the real property and the NOVA mobile home, so those cannot be the basis of his conversion claim. Cuzdey clarifies in his declaration that Landes has claimed ownership of items of personal property that belong to Cuzdey, for example a tool box and a rebuilt tractor. CP 194. The property that forms the basis of Cuzdey's conversion claim is entirely separate from the property that forms the basis of Cuzdey's quiet title claim.

Cuzdey's evidence creates genuine issues of material fact, precluding summary judgment dismissal of the conversion claim.

3.6.6 Cuzdey did not make a separate claim for unjust enrichment.

Cuzdey did not assert a separate claim for unjust enrichment. CP 167-70. Nevertheless, Landes argues Cuzdey cannot make such a claim because his "claims of labor and such are false." Br. of Resp. at 38-39. Landes once again misunderstands summary judgment; at this stage, no factual assertions have been, or can be, proven false. The only question is

whether the material facts are disputed. They are. The trial court erred in dismissing Cuzdey's claims on summary judgment.

3.7 Cuzdey's evidence is not barred by the Deadman's Statute.

3.7.1 Landes waived the deadman's statute by filing her declaration in connection with the original summary judgment motion.

In his opening brief, Cuzdey argued that Landes had waived the deadman's statute because she testified about transactions with Benny Landes by way of her declaration submitted in connection with her original summary judgment motion. Br. of App. at 13-15. Landes responds that the declaration was eliminated by the first amended summary judgment motion, relying on *Herr v. Herr*, 35 Wn.2d 164, 211 P.2d 710 (1949). However, *Herr* did not address the issue of an amended motion or the affect of an amended motion on declarations filed in support of the original motion. *Herr* addressed amendment of a **complaint**. *Herr* speaks in terms of **pleadings**, not motions, declarations, or affidavits. Under the Civil Rules, a "pleading" refers only to a complaint, answer, reply to counterclaim, answer to cross claim, third party complaint, or third party answer. CR 7. Motions and declarations are referred to as "other papers." *E.g.*, CR 7; CR 10.

A declaration is significantly different from a pleading or a motion. A declaration is not part of a motion for summary judgment. It is sworn testimony, under penalty of perjury, filed with the court to support the motion. A declaration is a separate document, not a part of the motion itself.

Once filed and made part of the public record, such sworn testimony should not be ignored by the court unless it is stricken from the record. Landes did not move to strike the declarations, and the court did not strike them. Landes should not be able to escape the effect of her declaration simply because her attorney filed it as an attachment to the motion rather than as a separate document. Such a result would unjustly elevate form over substance.

Landes argues that Cuzdey did not raise the issue below. In response to the motion for summary judgment, Cuzdey argued, “Defendant Landes waived the protections afforded by the dead-man’s statute by introducing evidence concerning a transaction . . . with the deceased.” CP 224. While this does not specifically call out the declaration, the declaration is **evidence** introduced by Landes. This Court should hold that Landes waived the deadman’s statute by filing and not striking her declaration.

3.7.2 Landes waived the deadman’s statute by presenting testimony through counsel in the first and second amended summary judgment motions.

In his opening brief, Cuzdey argued that Landes had waived the deadman’s statute because the statements of facts in her first and second amended motions contained testimonial statements by counsel that were not supported by the documentary evidence or any other testimony (unless it was the testimony of Landes and Wallen in their original declarations). Br. of App. at 15-17. Landes argues that factual statements by an attorney are not testimony and therefore cannot waive the deadman’s statute. However, such a result would entirely undermine the deadman’s statute, in that it would allow

counsel to inject facts into the record that, if the client testified, would waive the statute.

Counsel's statements of fact cannot be considered merely argument, because they state facts that are not otherwise in evidence. They include information that counsel gleaned from his client but was afraid to put into a declaration because he knew it would waive the deadman's statute. This Court cannot allow counsel to do himself what his client cannot do, without facing the consequence: the deadman's statute has been waived.

3.7.3 Landes fails to demonstrate that Patrick Cuzdey's declaration is inadmissible on other grounds.

Landes states a list of objections to Patrick Cuzdey's declaration, without providing any supporting argument. Br. of Resp. at 45-46. Ordinarily this Court will not address an issue for which no argument is provided in the brief. RAP 12.1(a); *State v. Mayes*, 20 Wn. App. 184, 194, 579 P.2d 999 (1978). Nothing in the trial court's oral ruling indicates that the court sustained the objections or excluded the evidence on any of these grounds. RP 62-70. Landes did not assign error to the trial court's failure to rule on her objections. This Court should decline to address this issue.

3.8 Jacob Cuzdey's declaration is admissible.

Landes' evidentiary objections to Jacob Cuzdey's declaration should be disregarded for the same reasons as her objections to Patrick Cuzdey's declaration. It is of note that Landes admits that Jacob Cuzdey's declaration is not barred by the deadman's statute. Br. of Resp. at 49.

3.9 Cuzdey's action was not frivolous.

In his opening brief, Cuzdey argued that his action was not frivolous as a whole, and therefore the trial court abused its discretion in awarding attorney's fees under RCW 4.84.185. Br. of App. at 24-27. Landes does not respond to any of Cuzdey's arguments. Because at least some of Cuzdey's claims have merit, and because Landes has failed to sufficiently brief this issue (RAP 12.1(a)), this Court should reverse the trial court's award of attorney fees.

3.10 This Court should deny Landes' request for attorney fees on appeal because Landes failed to provide any argument to support the request.

In requesting an award of attorney fees on appeal, a party must devote a section of its brief to the request. RAP 18.1. A bald request for fees, without argument, is insufficient. *Gardner v. First Heritage Bank*, 175 Wn. App. 650, 677, 303 P.3d 1065 (2013). Similarly, to the extent Landes' request invokes RAP 18.9, this Court should deny her request for fees for a frivolous appeal because she has not provided any supporting argument. RAP 12.1(a). Cuzdey's appeal is not frivolous, even if he does not prevail.

4. Conclusion

The trial court erred in dismissing Cuzdey's claims on summary judgment. Landes waived the protections of the Deadman's Statute. Cuzdey presented sufficient admissible evidence to remove the oral agreement from the Statute of Frauds and to establish his superior claim of title to the real property and the NOVA mobile home. There are genuine issues of material

fact that preclude summary judgment dismissal. This Court should reverse the trial court's summary judgment order, vacate the judgment, and remand for further proceedings.

The trial court abused its discretion in awarding attorney fees under RCW 4.84.185. Cuzdey's action could not be frivolous as a whole because the undisputed evidence established that Cuzdey had paid in full for the NOVA. The trial court's decision rested on untenable grounds because Cuzdey never stated that he owned no property. This Court should reverse the trial court's award of fees under RCW 4.84.185, vacate the judgment, and remand for further proceedings on any remaining claims.

This Court should deny Landes' request for attorney fees on appeal.

Respectfully submitted this 2nd day of June, 2016.

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on June 2, 2016, I caused the original of the foregoing document, and a copy thereof, to be filed and served by the method indicated below, and addressed to each of the following:

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DATED this 2nd day of June, 2016.

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