

NO. 67395-5-1

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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DENNIS BALE and CLARANCE ALLEN BALE,

Respondents,

v.

GARRY L. ALLISON, individually and as the Personal  
Representative of the ESTATE OF ROBERT E. FLETCHER,

Defendants,

JOHN F. FLETCHER, and ROBERT G. FLETCHER,

Appellants.

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**REPLY/RESPONSE TO CROSS-APPEAL**

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## INTRODUCTION

Robert E. Fletcher (“Uncle Bob”) used a quitclaim deed to gift his Winthrop cabin to his two nephews, John and Robert G. Fletcher. The deed met all statutory requirements – it was signed, notarized and included an accurate legal description. Consistent with Uncle Bob’s intent to gift the property, the deed recited no consideration. Although no recital is required, the trial court erroneously invalidated the deed.

The Bales largely do not respond to John and Robert’s appeal. They instead rely on their cross-appeal from the trial court’s ruling that the Bales failed to prove by clear, cogent, and convincing evidence that Uncle Bob orally contracted to give them the Winthrop property.

The Bales’ cross-appeal is untimely, so should be dismissed. The Bales waived their primary argument – that a lower evidentiary burden applies – and fail to support that argument in any event. Our courts have long held that oral contracts to devise are regarded with suspicion and must be proved by highly probable evidence.

This Court should reverse, remand for reconsideration of fees, and award fees on appeal.

## REPLY STATEMENT OF THE CASE

- A. John and Robert have always been very close to Uncle Bob, even when his marriage to the Bales' mother prevented them from using the cabin.**

The Bales do not respond to the facts laid out in the opening brief. In very brief sum, John and Robert have used Uncle Bob's cabin their entire lives, apart from Uncle Bob's second marriage to the Bales' mother, Edna, who did not "appreciate" John and Robert. RP 381-82, 509. Uncle Bob thought of John and Robert as his "children," calling them "my boys." RP 472-73, 475, 508.

In 2003, Uncle Bob executed a Will bequeathing the cabin to the Bales and requiring that John and Robert be allowed to use it at the Bales' discretion. Ex 1. But Uncle Bob's relationship with the Bales changed when he remarried a few years after Edna's death. RP 322, 399-400. The Bales "backed away," leaving Bob feeling "abandoned." *Id.* John and Robert maintained their relationship with Uncle Bob. RP 553, 555, 557-58, 587.

In the fall of 2008, John and Robert took Uncle Bob to the doctor and discovered that he had terminal lung cancer. RP 556. Uncle Bob invited John and Robert over for lunch days later, during which Uncle Bob told them that he wanted them to have the cabin. RP 559-60, 587.

John filled out a form quitclaim-deed at Uncle Bob's request. RP 560-62, 588-89. Consistent with this gift, the deed recites no consideration. Ex 2. John and Robert first learned that Uncle Bob's Will left the cabin to the Bales months after Uncle Bob passed away. CP 8, 17; RP 567.

**B. At one time, Uncle Bob intended to leave the cabin to the Bales – that is not an oral contract to devise.**

The Bales' statement of the case reads as if it were undisputed that Uncle Bob promised them the cabin in exchange for their labor on the property. BR 6-7.<sup>1</sup> They use the terms "commitment," "agreed," "agreement," and "promise," even claiming that Uncle Bob's Will "expressly satisfied and performed [t]his agreement." *Id.* The testimony on this point is not nearly so strong:

- ◆ Larry Hunter testified that Uncle Bob "basically" told him that the Bales would inherit the property. RP 61. He never heard the word "contract." *Id.*
- ◆ Herman Peterson testified that Bob said that the property is "going to be Denny and Allen's when I'm gone." RP 359.
- ◆ Kenneth Danielson testified that Uncle Bob told him that "eventually" the cabin would go to the Bales. RP 439.

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<sup>1</sup> The Bales claim that Bob's mental functioning was declining, but do not challenge the finding rejecting their undue influence claim. BR 3-4, 9; CP 202. The trial court saw no "evidence of undue influence." RP 637; CP 202.

- ◆ Terry Scatena testified that Uncle Bob told him that the cabin would be Denny's because of all the work he had done on it. RP 434.<sup>2</sup>

As the trial court explained, this testimony suggests that at some time, Uncle Bob intended to leave the property to the Bales, but “[t]hat is not the same as a contract.” RP 632-33.

Contrary to the Bales' claim, Uncle Bob's Will does not satisfy, perform, or confirm the alleged “agreement,” which the Will does not even mention. *Compare* BR 7-8 *with* Ex 1. The Will simply attempts to bequeath property Uncle Bob no longer owned when he passed away. Ex 1.

## ARGUMENT

### A. The standard of review is *de novo*.

The parties agree that construing a deed is a legal question reviewed *de novo*. BA 10 and BR 11 (both citing *Martin v. City of Seattle*, 111 Wn.2d 727, 732, 765 P.2d 257 (1988)). The Bales argue, however, that determining the intent of the parties to the deed – John, Robert and Uncle Bob – is a factual question, and thus that this Court must defer to the trial court's factual findings. BR 11. There is no ambiguity here, and no question about what the

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<sup>2</sup> Allen Danielson was the only witness, other than the Bales, who used the term “agreement.” RP 294. Danielson did not offer any specifics. *Id.*

deed means or what the parties to the deed intended. Rather, the issue before this Court is purely legal: whether the deed, which does not recite consideration, is valid. No deference is required.

**B. The trial court erred in concluding that a deed must recite consideration to effectively gift property.**

The trial court erroneously ruled that the deed is invalid under RCW 64.04.050 because it does not recite consideration. CP 200-01, CL 1, 2. But RCW 64.04.050, a permissive statute, does not require that a deed recite consideration. Nor is consideration required for a gift, as the trial court correctly recognized. RP 635. As the opening brief explains:

- ◆ The deed is valid under RCW 64.04.020, which does not require a deed to recite consideration (BA 10-12);
- ◆ The deed properly recited no consideration because the property conveyance was a gift, for which no consideration is required (BA 12-14);
- ◆ Assuming arguendo – and contrary to law – that a deed must recite consideration, Uncle Bob’s real-estate-tax affidavit, which references the deed and explains that it effectuates a gift, satisfies the statute of frauds (BA 15-17);
- ◆ Again, assuming arguendo – and contrary to law – that a deed must recite consideration, parol evidence proves that Uncle Bob received adequate consideration from John and Robert – their love and affection (BA 17-19); and
- ◆ The trial court erroneously concluded that consideration is required under RCW 64.04.050, a permissive statute setting forth a form deed a party “may” follow “in substance.” (BA 19-20).

The Bales address only the first of these five arguments, and even then only in passing. BR 12-14. Thus, this Reply does not repeat arguments two through four, but addresses one and five in light of this Court's decision in **Newport Yacht Basin Ass'n of Condo. Owners v. Supreme Nw., Inc.**, \_\_ Wn. App. \_\_, 277 P.3d 18 (2012), decided after the opening briefs were filed. This Court should affirm.

**1. The deed met all statutory requirements.**

Real property conveyances, including gifts, must be accomplished by a deed. RCW 64.04.010; **Key Design, Inc. v. Moser**, 138 Wn.2d 875, 881, 983 P.2d 653 (1999); **Roesch v. Gerst**, 18 Wn.2d 294, 305, 138 P.2d 846 (1943), *overruled on other grounds* by **Chaplin v. Sanders**, 100 Wn.2d 853, 861, 676 P.2d 431 (1984). The deed must state a complete legal description, and must be in writing, signed by the grantor, and acknowledged by a notary. RCW 64.04.020; **Berg v. Ting**, 125 Wn.2d 544, 551, 886 P.2d 564 (1995); **Maier v. Giske**, 154 Wn. App. 6, 15, 223 P.3d 1265 (2010). The deed need not recite consideration (RCW 64.04.020):

Every deed shall be in writing, signed by the party bound thereby, and acknowledged by the party before some person authorized by this act to take acknowledgements of deeds.

The deed plainly satisfied the statute. Exs 2, 4.

In the opening brief, John and Robert argued that this issue is controlled by *Duggar v. Dempsey*, in which the Court upheld the validity of a deed that did not recite consideration, stating, “that fact alone would not, in our opinion, under the circumstances, make the deed void.” 13 Wash. 396, 399-401, 43 P. 357 (1896). This holding is consistent with the English Common Law and with other persuasive authorities. BA 12.

Since the opening briefs were filed, this Court decided *Newport Yacht Basin*, reversing a trial court ruling invalidating a deed for failure to state adequate consideration. \_\_ Wn. App. at ¶¶ 46-47. There, this Court recognized that quitclaim deeds “are commonly used in transactions that are not the result of a sale for value,” such as clearing title, correcting prior deeds, adjusting disputed boundaries, and giving gifts. *Newport*, \_\_ Wn. App. at ¶ 51. In such cases, no actual consideration passes, “except perhaps love and affection.” *Id.* (quoting 17 William B. Stoebuck & John W. Weaver, *Washington Practice: Real Estate: Property Law* § 7.2, at 472 (2d ed. 2004)).

When no consideration passes, it is “the common practice in Washington,” to recite nominal consideration such as “ten dollars

and other good and valuable consideration.” **Newport**, \_\_\_ Wn. App. at ¶ 51 (quoting 17 Stoebuck & Weaver, *supra*, § 7.7, at 483). While such language is sufficient to support a deed, this Court did not hold that it is necessary. **Newport**, \_\_ Wn. App. at ¶ 52. Nor would it make any sense to recite even nominal consideration for a gift, a “voluntary transfer of property without consideration.” BA 13 (quoting **City of Bellevue v. State**, 92 Wn.2d 717, 720, 600 P.2d 1268 (1979)); WAC 458-61A-201(1) (“A gift of real property is a transfer for which there is no consideration given in return for granting an interest in the property”). Washington courts have consistently affirmed gifts, including real property gifts, without consideration. BA 13-14.

The Bales state the obvious and uncontested fact that the deed does not recite consideration. BR 13-14. But they do not answer John and Robert’s argument that a deed need not recite consideration. *Compare* BA 11-13 *with* BR 13-14. Instead, they accuse John and Robert of having “improperly attempted to cure the defects by altering the deed that was signed by Bob before his death,” and even accuse John of forgery. BR 13-14. This undue criticism is meritless.

After Uncle Bob passed away, John learned that the deed recited no consideration, and was advised that people often correct and re-record deeds. BA 7. John inserted “love and affection.” *Id.* John, Robert, and the PR signed a new real estate tax affidavit and recorded the deed. *Id.* It was only after having done so that John and Robert first received a copy of the Will. *Id.* at 7-8.

This is irrelevant in any event, where John and Robert do not argue that the deed John filled-in controls. BA 11-20. Again, they argue that a deed need not recite consideration, that gifts do not require consideration, and that Uncle Bob received adequate consideration. *Id.*

This Court’s decision in ***Newport*** requires reversal for a different reason too – this Court held “as a threshold matter that a stranger to a deed may not challenge its validity based on inadequate consideration. \_\_ Wn. App. at ¶ 47. Rather, this defense is personal to the parties to the deed, where it “constitutes the heart of the parties’ bargain.” *Id.* (citing ***Spanish Oaks, Inc. v. Hy-Vee, Inc.***, 265 Neb. 133, 138, 655 N.W.2d 390 (2003) (“the fact that a third party would be better off if a contract were unenforceable does not give him standing to sue to void the contract”)). Thus, the trial court in ***Newport*** erroneously set aside

the deed for inadequate consideration, where neither party to the deed challenged it on that basis. *Id.*

Likewise, the Bales cannot challenge the deed since they are not parties to the deed. *Id.* This Court should reverse under **Newport** and hold (1) that the deed, which effectuates a gift, need not recite consideration, and (2) that the Bales cannot challenge the deed for lack of consideration.

**2. The trial court erroneously relied on RCW 64.04.050, which simply suggests a valid form of quitclaim deed, not a required form.**

This Court's **Newport** decision also does away with another of the trial court's erroneous legal conclusions. In ruling that the deed was "ineffective to transfer the Winthrop property," the trial court concluded that the deed "does not meet the fundamental statutory requirements . . . pursuant to RCW 64.04.050." CP 201, CL 2. But this Court held that "a quitclaim deed need not precisely match the form described in RCW 64.04.050 in order to convey fee title." **Newport**, \_\_ Wn. App. at ¶ 17. This Court should reverse.

RCW 60.04.050 provides a sample-form quitclaim deed:

Quitclaim deeds may be in substance in the following form:

The grantor (here insert the name or names and place of residence), for and in consideration of (here insert consideration) conveys and quitclaims to (here insert

grantee's name or names) all interest in the following described real estate (here insert description), situated in the county of . . . . ., state of Washington. Dated this . . . . day of . . . . ., 19. . .

Focusing on the term “may,” John and Robert correctly argued that this statute is permissive, not mandatory. BA 19-20. Thus, while a deed “may” recite consideration, it does not have to. *Id.*

In **Newport**, this Court focused not on “may,” but on the term “in substance,” rejecting a claim that a deed must include the precise statutory language “all interest in the following described real estate.” **Newport**, \_\_ Wn. App. at ¶ 17. RCW 64.04.050 provides that a deed is a “good and sufficient conveyance” if it conforms to the statutory language “in substance.” *Id.* Thus, this Court held that a deed need not strictly adhere to the statutory form, but is a “good and sufficient conveyance” if it “‘in substance’ conforms to the statutory language.” *Id.* (citing RCW 64.04.050). The only “operative words” of a quitclaim deed are “conveys and quitclaims.” **Newport**, \_\_ Wn. App. at ¶ 17 (citing 18 William B. Stoebuck & John W. Weaver, *Washington Practice: Real Estate: Transactions*, § 14.2, at 116 (2d ed. 2004)).

In short, under this Court’s recent decision in **Newport** and under hundred-year old precedent, the trial court erred in reading

RCW 64.04.050 to require a recital of consideration. This Court should reverse.

**C. John and Robert should receive their attorney fees.**

A court has discretion to award attorney fees to any party in a TEDRA action. *In re Guardianship of Matthews*, 156 Wn. App. 201, 212-13, 232 P.3d 1140 (2010); RCW 11.96A.150(1). But the trial court refused John and Robert's fee request, having incorrectly ruled that the deed was defective. CP 202. This Court should reverse and remand with instructions to quiet title to John and Robert and to reconsider the fee award. The Court should also award John and Robert their appellate attorney fees. RCW 11.96A.150; RAP 18.1.

**RESPONSE TO CROSS-APPEAL**

**A. The Bales' cross-appeal is untimely, so should be dismissed.**

The Bales' cross-appeal is untimely, where they filed their Notice of Cross-Appeal more than 30 days after the Judgment was entered, and more than 14 days after John and Robert served their Notice of Appeal. RAP 5.2(f). Thus, the Bales failed to invoke this Court's jurisdiction. *Buckner, Inc. v. Berky Irrigation Supply*, 89

Wn. App. 906, 911, 951 P.2d 338 (1998). The Court should dismiss the Bales' untimely cross-appeal.

The trial court entered the judgment awarding title to the Bales on Friday, July 8, 2011. CP 191-92. The court signed Findings and Conclusions on Saturday, July 9, and filed them on Tuesday, July 12. CP 197-203. John and Robert timely appealed from the Judgment on July 12, and amended their Notice of Appeal, adding the Judgment Summary and Findings and Conclusions, on August 11. CP 193, 206-20. The Bales filed their cross-appeal on August 12. CP 221-30.

The cross-appeal is untimely, so must be dismissed. Under RAP 5.2(f), a party must file a cross-appeal within 30 days after the decision being appealed is entered, or 14 days after the notice of appeal is served, whichever is later. Here, the "later" of the two is 30 days after the judgment was filed, giving the Bales until August 7 to cross-appeal. Thus, the Bales' August 12 Notice is untimely.

The Bales cross-appeal from the Findings of Fact. CP 221. But even assuming arguendo that the 30-days would run from the date the findings were entered, not the date the judgment was entered, the Bales had to file their Notice of Cross Appeal no later than August 11, 2011. Again, the Bales' notice is untimely.

The Bales' Notice is timely only if the Fletcher's Amended Notice of Appeal, filed August 11, 2011, gave the Bales additional time to file. RAP 5.2 does not address the effect, if any, an Amended Notice has on the time to file a cross-appeal. Amending a notice of appeal to add orders entered after the judgment was entered should not give the would-be cross-appellants more time, where, as here, the orders do not alter the judgment. This Court should dismiss the Bales' untimely cross-appeal.

**B. The Bales had to prove the alleged oral contract by clear, cogent, and convincing evidence.**

The trial court ruled that the Bales failed to prove an oral contract to devise by clear, cogent and convincing evidence. CP 202. The Bales agree that "the clear, cogent, and convincing evidence requirement usually applie[s]" to a claimed oral contract to devise, and repeatedly asserted that this was the applicable standard at trial. BR 16; CP 90, 125, 179. But they now argue that the trial court erroneously failed to apply the "reasonable certainty" standard, which they claim applies where a "will had been made in conformity with an alleged oral contract." BR 16-17 (quoting *Worden v. Worden*, 96 Wash. 592, 605, 165 P. 501 (1917); *Jansen v. Campbell*, 37 Wn.2d 879, 227 P.2d 175 (1951); *Ellis v.*

**Wadleigh**, 27 Wn.2d 941, 948, 182 P.2d 49 (1947)). These older cases are inapposite and do not impose an evidentiary burden that is “less than” the clear, cogent and convincing standard. BR 4, 16. This Court should reject this newly-raised argument.

**1. The Bales waived this argument in any event.**

The Bales waived this argument, repeatedly accepting the clear, cogent and convincing standard at trial. CP 125, 179. They stated at the outset that they would “present clear, cogent and convincing evidence to prove the essential elements of an oral contract to devise.” CP 125. They stated in their written closing that they had “met the standard of proof of clear, cogent and convincing evidence.” CP 179.

The Bales asserted at trial, as on appeal, that a Will is “significant” in proving an oral contract to devise. *Compare* BR 16 with CP 126, 90-95. But they never argued that Uncle Bob’s Will lowered the standard of proof. *Id.* Thus, the Bales waived their argument that “reasonable certainty” is “less than” clear, cogent and convincing evidence. And the Bales invited the non-existent error they claim. This Court need not consider this new argument. RAP 2.5; **State v. Jones**, 163 Wn. App. 354, 359, 266 P.3d 886 (2011), *rev. denied*, 173 Wn.2d 1009 (2012).

**2. Our Courts have repeatedly held that oral contracts to devise are viewed with suspicion and must be proved by “highly probable” evidence.**

Many Washington cases, including *Thompson v. Henderson*, upon which the Bales rely, have held that oral contracts to devise are “regarded with suspicion and will be enforced only on the strongest evidence that they are founded upon valuable consideration and deliberately entered into by the decedent.” *Thompson v. Henderson*, 22 Wn. App. 373, 375, 591 P.2d 784 (1979) (citing *Resor v. Schaefer*, 193 Wash. 91, 74 P.2d 917 (1937); *Arnold v. Beckman*, 74 Wn.2d 836, 840, 447 P.2d 184 (1968)); *Cook v. Cook*, 80 Wn.2d 642, 644, 497 P.2d 684 (1972). A claimant asserting an oral contract must show that it is “highly probable” (1) that the deceased agreed to leave the claimant certain property; (2) that the services contemplated as consideration for the agreement were actually performed; and (3) that the claimant performed the services in reliance on the contract. *Thompson*, 22 Wn. App. at 376 (citing *Cook*, 80 Wn.2d at 644-45, 647 (holding that the claimant must produce “substantial evidence” of these three elements, sufficient to convince the trier “to a high probability that all required elements are truly fact”); *Jennings v. D’Hooghe*, 25 Wn.2d 702, 706, 172 P.2d 189 (1946)). This “highly

probable” requirement is equivalent to the standard of proof requiring clear, cogent and convincing evidence. **Thompson**, 22 Wn. App. at 376 n.2 (citing **In re Sego**, 82 Wn.2d 736, 739, 513 P.2d 831 (1973) (requiring “clear, cogent and convincing evidence is . . . the equivalent of saying that the ultimate fact in issue must be shown by evidence to be ‘highly probable’”)).

Like **Thompson**, **Jansen**, upon which the Bales also heavily rely, plainly holds that alleged oral contracts are viewed “with suspicion and require strict proof”:

Most witnesses in cases of this kind are usually partisan, and, although sincere, they quite often permit their enthusiasm for the litigant for whom they are testifying, to color their testimony. In addition is the fact that the oral contract sought to be established cannot be disputed by the deceased person with whom the contract is alleged to have been made. As a result, the courts look upon such alleged contracts with suspicion and require strict proof thereof.

37 Wn.2d at 884; BR 17. This rule dates back to 1919, if not earlier. **Fredrick v. Michaelson**, 138 Wash. 55, 56, 244 P. 119 (1926) (quoting **Wall v. Estate of McEnnery**, 105 Wash. 445, 462, 178 P. 631 (1919)).

Where the trial court rules that the claimant has failed to meet this heavy burden, obtaining reversal is “doubly hard”:

Where, as here, the trial court determines that a plaintiff has failed to meet the high burden of proof, it becomes doubly

hard for an appellate court to rule in the plaintiff's favor. We may not reweigh the evidence or the credibility of witnesses even though we may disagree with the trial court in either regard. . . . We are compelled to affirm the dismissal unless there is no reasonable way for the evidence to substantiate the trial court's findings.

**Thompson**, 22 Wn. App. at 376 (citations omitted).

**3. The Bales fail to support their claim that a lower evidentiary burden applies to this matter.**

None of the cases upon which the Bales rely support their belated claim that since there is a Will consistent with the alleged oral contract, "the appropriate standard of proof is less than clear, cogent, and convincing: sometimes stated as 'reasonable certainty.'" BR 4, 16 (citing **Worden**, **Ellis**, and **Jansen**, *supra*). Of these three cases, the term "reasonable certainty" appears only in **Ellis**. **Ellis**, 27 Wn.2d at 950. There, the Court upheld an oral contract to devise based on a Will consistent with the alleged oral contract and unequivocal testimony from the deceased's lawyer – an uninterested third-party – establishing the oral contract. 27 Wn.2d at 946-48. The **Ellis** Court reaffirmed that the evidentiary burden to establish an oral contract to devise requires "evidence that is conclusive, definite, and beyond legitimate controversy." *Id.* at 949-50. The Court explained that the required "certain[ty]" must be "reasonable," not "absolute." *Id.*

**Ellis** indicates only that “reasonable certainty” is something less than “[a]bsolute certainty.” *Id.* Contrary to the Bales’ claims, **Ellis** does not remotely suggest that reasonable certainty is “less than” clear, cogent and convincing evidence. BR 16.

In **Jansen**, our Supreme Court again reiterated the Court’s adherence to the very high evidentiary burden on claims of an oral contract to devise. **Jansen**, 37 Wn.2d at 884 (citing **Blodgett v. Lowe**, 24 Wn.2d 931, 167 P.2d 997 (1916); **Jennings**, 25 Wn.2d 702)).<sup>3</sup> The Bales’ reliance on **Jansen** is misplaced.

The same is true of **Worden**. There, unrebutted testimony from eight witnesses demonstrated a nephews’ agreement to farm his uncle’s land and care for him in exchange for the land. 96 Wash. at 601-604. The uncle’s Will documented the agreement, but was unenforceable for failure to comply with controlling statutes. *Id.* at 594-95. There was no evidence contradicting the claimed agreement. *Id.* at 604-05. **Worden** states, “A case of this kind would not require the same degree of convincing evidence as those cases where no will had been made in conformity with an

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<sup>3</sup> In **Jennings**, the Court reviewed thirty-seven cases involving oral contracts to devise, holding that 12 were enforceable and that 25 were unenforceable. **Jennings**, 25 Wn.2d at 708-25.

alleged oral contract.” *Id.* at 605. In other words, **Worden** simply holds that it is less difficult to prove an oral contract to devise under the precise facts of that case than it might otherwise be.

At most, these cases suggest that it is more difficult to prove an oral contract to devise when there is no Will that is consistent with the alleged contract. None suggests that the “standard of proof is less than clear, cogent, and convincing.” BR 4. The Court should reverse.

These cases are inapposite in any event – none involves an *inter vivos* gift that plainly contradicts the alleged contract to devise – and the Will. This distinction is crucial, where the deed is “equally strong evidence” that the alleged agreement did not exist, compared to the Will. **Thompson** 22 Wn. App. at 377 (citing **Widman v. Maurer**, 19 Wn.2d 28, 40-41, 141 P.2d 135 (1943)).

In **Widman**, the deceased executed two Wills – the first was consistent with the alleged oral contract, and the second was not. 19 Wn.2d at 40-41. The claimant argued that the first will was “strong evidence” of the alleged agreement. *Id.* The Court acknowledged as much, but held that the second Will “must also be taken as similar evidence of the absence of any such agreement.” *Id.* at 41. The same is true of the deed.

**C. The trial court correctly rejected the Bales' oral-contract claim.**

The trial court correctly rejected the Bales' argument that they entered an oral contract with Uncle Bob to maintain and improve the cabin property in exchange for a future devise. CP 202; RP 632-33. While Uncle Bob may have expressed his intent to leave the property to the Bales at one time, "[t]hat's not a contract. . . . There needs to be considerably more specificity as to the terms, what the nature of the performance is and of course reliance." RP 632. This Court should affirm.

The Bales' argument is simply a summary of evidence presented at trial: (1) that they did a lot of work on the property; and (2) that they and their friends understood that Uncle Bob would leave the property to the Bales someday. BR 20-23. The Bales ignore the legal framework within which a trial court weighs this evidence. *Id.* The type of evidence the Bales rely on is immaterial to whether a contract exists and inherently untrustworthy, and this Court does not reweigh the evidence of an oral contract to devise. ***Thompson***, 22 Wn. App. at 376.

A party alleging an oral contract to devise must first prove that the parties entered the contract (element 1) before proving that

the services contemplated as consideration were performed in reliance on the contract (elements 2 and 3). **Thompson**, 22 Wn. App. at 376 (citing **Humphries v. Riveland**, 67 Wn.2d 376, 380, 407 P.2d 967 (1965); **Blodgett**, 24 Wn.2d at 939). This is particularly significant where the amount of work a claimant does for the deceased “is immaterial to the question of whether there was an oral contract.” **Thompson**, 22 Wn. App. at 378 n.3. Put another way:

The argument that nobody would have worked so hard . . . without a contract with [decedent] to leave him the farm and other property is a pure non sequitur as proof of the existence of such a contract.

**Bicknell v. Guenther**, 65 Wn.2d 749, 760, 399 P.2d 598 (1965).

The Bales’ talk about their “work on the cabin” and their “improvements to the property” (BR 20-21) “is immaterial to the question of whether there was an oral contract.” **Thompson**, 22 Wn. App. at 378 n.3. Since the Bales failed to prove a contract – the first element of an oral contract to devise – the inquiry ends and their performance is irrelevant. *Id.*

The testimony that Uncle Bob “intended to give his property to the [Bales]” is “by its very nature of the weakest character known to the law.” **Fredrick**, 138 Wn.2d at 57. Uncle Bob allegedly said

that “Denny and his family would inherit this property,” that “someday” the cabin would be theirs, or that “at some time the cabin would become Denny and Allen’s.” RP 52-53, 294, 434; BR 20, 22. In **Thompson**, the appellate court rejected the following similar statements of testamentary intent (and others like them): (1) that the deceased stated that the plaintiff “was going to have the farm some day because [plaintiff] was doing all the work;” (2) that the deceased stated that the claimant “was always taking care of him and he’d leave it to [the claimant];” and (3) that the deceased stated that the farm “belongs to [his] son, who had been “doing all this work to improve the property.” 22 Wn. App. 378 n.4. The court explained that statements of “moral obligation” or “testamentary intent” do not prove a contract:

From these statements, one may speculate whether the decedent recognized some moral obligation to the plaintiff. The statements, however, fail to show he recognized any legal contractual obligation to the plaintiff. Expressions of testamentary intent like these do not prove the making of a contract, nor do they indicate the terms of a contract.

*Id.* (citing **Jennings**, 25 Wn.2d at 724; **Silhavy v. Doane**, 50 Wn.2d 110, 114, 309 P.2d 1047 (1957)).

Thus, the trial court was plainly correct in concluding that Uncle Bob’s intent to leave the property to the Bales does not

establish an oral contract to devise. RP 632-33. Uncle Bob changed his mind – and gave the property to the Fletchers – when the Bales abandoned him. BA 5-6.

A third important factor cutting against the Bales' claim is that the Will does not mention the alleged contract. *Thompson*, 22 Wn. App. 378. "The wills' failure to mention a previous contract implies there was no contract." 22 Wn. App. at 378 (citing *Estes v. Estes*, 48 Wn.2d 729, 731, 296 P.2d 705 (1956)). The Bales' repeated reliance on the Will is misplaced.

Finally, this Court will not reweigh the evidence even if it disagrees with the trial court. *Thompson*, 22 Wn. App. 379. Trial lasted four days. The trial court heard from Denny, Allen, and Linda Bale, and ten additional witnesses, all claiming that at some undefined point in time Uncle Bob stated something to the effect that he would leave the cabin to the Bales someday. BR 22. The trial court was unconvinced that the Bales met their high burden. This Court should defer to the trial court and affirm.

**D. This Court should affirm the trial court order denying the Bales fees and deny the Bales' fee request.**

The Bales seek trial and appellate fees, arguing that John and Robert's "legal and factual positions . . . have no merit or

relevance.” BR 25. This ignores that the trial court rejected all but one of the Bales’ claims. CP 202. The only successful argument – that the deed had to recite consideration – was an afterthought. RP 636-37. Neither party focused on that issue, a “technicality.” *Id.* Thus, it is incredible to suggest that John and Robert’s opposition to the Bales’ claims were meritless or irrelevant. BR 25. This Court should deny the Bales’ fee request.

### CONCLUSION

This Court should (1) hold that the deed is valid and reverse on that ground; (2) dismiss the Bales’ cross-appeal or affirm the trial court’s decision that the Bales failed to prove an oral contract; (3) award John and Robert appellate fees; and (4) instruct the trial court to reconsider fees.

RESPECTFULLY SUBMITTED this 16<sup>th</sup> day of June, 2012.

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**CERTIFICATE OF SERVICE BY MAIL**

I certify that I caused to be mailed, a copy of the foregoing **REPLY/RESPONSE TO CROSS-APPEAL**, postage prepaid, via U.S. mail on the 26 day of June 2012, to the following counsel of record at the following addresses:

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