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72496-7

No. 72496-7

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COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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JULIE ANN THOMAS, a single woman,

*Appellant,*

v.

J.R. LeVASSEUR and DONNA LOUISE LeVASSEUR,  
husband and wife, individually and the marital  
community composed thereof,

*Respondents.*

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**BRIEF OF APPELLANT**

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2014 DEC 18 PM 3:01  
STATE OF WASHINGTON  
COURT OF APPEALS, DIVISION I

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## **I. INTRODUCTION**

This appeal follows a separate appeal to this Court (at Case No. 71845-2) regarding two April 17, 2014 decisions by the trial court in a civil action commenced in King County Superior Court. The trial court rulings that are the subject matter of this appeal were entered on August 26, 2014.

Appellant believes that context regarding the overall case will be helpful to the Court in this appeal. Accordingly, the Introduction and the Statement of the Case below include references to what transpired prior to August 26, 2014.

In June 2012, Julie Ann Thomas (“Thomas”) purchased a condominium in Seattle (the “Condominium”) with a combination of her own funds, money she borrowed from a private lender (which has since been fully repaid) and a bank loan taken out by her parents, J.R. LeVasseur and Donna LeVasseur (the “LeVasseurs”). The loan to the LeVasseurs was secured by real property that Thomas had owned but which she transferred to them less than a month before closing for the express purpose of permitting them to borrow against it to obtain additional funds to purchase the Condominium. Through a series of payments to the family business, Thomas has provided money to the LeVasseurs to service the bank loan.

Pursuant to the parties' agreement, at closing title to the Condominium was temporarily placed in the LeVasseurs. In late 2013, despite the parties' agreement and Thomas' repeated requests, the LeVasseurs refused to convey title to the Condominium to Thomas. Indeed, they threatened to sell the Condominium.

On January 29, 2014, Thomas filed suit against the LeVasseurs, seeking to have title to the Condominium placed in her name, pleading causes of action sounding in declaratory judgment and quiet title. Because the litigation affected title to real property, Thomas also filed a lis pendens. The LeVasseurs' answer to the complaint generally denied Thomas' allegations, contending that they had paid for the Condominium and that it rightfully belonged to them.

On March 12, 2014, the LeVasseurs filed a motion for summary judgment seeking dismissal of Thomas' claims, an award of sanctions under CR 11 and attorneys' fees under RCW 4.28.328. Thomas opposed the summary judgment motion and also requested a continuance of the hearing to permit depositions of the LeVasseurs that had been noted since February 13, 2014.

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A summary judgment hearing was held on April 11, 2014 before The Honorable Julie Spector. In colloquy with the trial court, Thomas made an oral motion to amend the complaint to allege causes of action sounding in breach of contract and specific performance. At the conclusion of the hearing, the court took the matter under advisement.

On the afternoon of April 11, 2014, counsel for Thomas sought the consent of the LeVasseurs' counsel to file an amended complaint to add breach of contract and specific performance claims. This request was rejected. On April 15, 2014, Thomas filed a motion for order shortening time and a motion for leave to amend.

On April 17, 2014, the trial court entered three orders: (1) granting Thomas' motion for order shortening time; (2) denying Thomas' motion for leave to amend; and (3) granting the LeVasseurs' motion for summary judgment in its entirety, reserving only the amount of the sanctions. None of the court's three April 17, 2014 orders addressed canceling or removing the *lis pendens*.

On April 23, 2014, Thomas filed an appeal of the trial court's April 17, 2014 orders denying her motion for leave to amend and granting the LeVasseurs' summary judgment motion. That appeal is currently before this

Court at Case No. 71845-2. Briefing was completed on October 6, 2014, and a date for oral argument has not been set.

Meanwhile, on July 15, 2014, the LeVasseurs filed a motion to enter judgment for fees and to remove the lis pendens Thomas had filed on January 29, 2014. On July 21, 2014, Thomas responded to the LeVasseurs' motion, challenging both the entitlement to fees and the amount of fees sought and the propriety of removing the lis pendens.

On July 24, 2014, counsel for the parties received an email from the trial court indicating that the court could not cancel the lis pendens while the appeal was pending, but that Thomas could file a supersedeas bond. Further, the court requested supplemental briefing on the amount of the supersedeas bond.

On August 26, 2014, the trial court entered an order granting the LeVasseurs' motion, awarding fees and costs in the amount requested (apparently pursuant to CR 11), "reserving" the cancellation of the lis pendens pending appeal, and requiring Thomas to post a \$950,000 supersedeas bond. On the same date, the court entered a judgment for sanctions in the exact amount of fees and costs requested by the LeVasseurs.

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On September 5, 2014, Thomas filed an appeal of the trial court's August 26, 2014 orders and released the lis pendens. On September 12, 2014, Thomas fully paid the judgment entered on August 26, 2014 and the judgment has been satisfied of record.

## **II. ASSIGNMENTS OF ERROR**

- A. The trial court erred when it awarded fees and costs to the LeVasseurs.
- B. The trial court erred when it canceled / removed the lis pendens pending appeal.
- C. The trial court erred when it required Thomas to post a supersedeas bond as a condition of maintaining the lis pendens.
- D. The trial court erred when it required a supersedeas bond based on the purchase price of the residential real property that was the subject of the action.

## **III. STATEMENT OF THE CASE**

- A. **Thomas Commences Suit Alleging that Title to Certain Real Property Should be in Her Name Under Declaratory Judgment and Quiet Title Theories.**

On January 29, 2014, because the LeVasseurs had failed and refused to reconvey title to the Condominium, Thomas filed suit. (CP 1-14). The facts

were intentionally sparse and the claims were broadly asserted, seeking declaratory judgment that Thomas should rightfully be on title to the Condominium and an order quieting title to the Condominium in Thomas. LeVasseur was on notice that Thomas claimed title to the Condominium.

On February 13, 2014, Thomas sent out Notices of Deposition for the LeVasseurs, setting their depositions for April 24, 2014. The scheduling of the depositions was designed to allow the LeVasseurs to answer the complaint, to permit Thomas to propound written discovery requests based on the response to the complaint, and to have depositions thereafter. (CP 267).

**B. The LeVasseurs File a Motion for Summary Judgment and for CR 11 Sanctions and Attorney Fees.**

On March 12, 2014, the day after they provided answers to Thomas' first set of written discovery requests, the LeVasseurs filed a motion for summary judgment, seeking dismissal of Thomas' claims, an award of sanctions under CR 11 and an award of attorney fees under RCW 4.28.328. (CP 35-47).

The LeVasseurs claimed that they were the rightful owners of the Condominium and that they paid for it. (CP 48-52). They conveniently failed to attach documents (which they had produced only the previous day)

showing numerous and substantial payments by Thomas for the purchase of the Condominium including, without limitation, her personal check for the earnest money (CP 176) and wire transfer receipts from Thomas totaling \$542,500 (CP 180, 194). These documents, among others, were attached to the Declaration of Julie Thomas filed in response to the LeVasseurs' motion. (CP 160-223).

**C. Thomas Opposes the LeVasseurs' Motion and Requests a Continuance Under CR 56(f).**

On April 1, 2014, Thomas filed her response to the summary judgment motion (CP 141-55) together with supporting Declarations of Doug Bain (CP 156-9), Julie Thomas (CP 160-223) and Dan Lossing (CP 224-67). Among other things, the Declarations of Doug Bain and Julie Thomas directly contradicted assertions by the LeVasseurs that they had paid for the Condominium and that they were rightfully on title.

The Declaration of Dan Lossing (CP 224-67) filed in opposition to the LeVasseurs' summary judgment motion highlighted the lack of documentary discovery produced by the LeVasseurs tending to prove that they had any of their own money in the Condominium and explained the nascent status of discovery. The LeVasseurs had provided their responses to written discovery requests only a day before they filed their summary judgment motion, and

none of the seventeen witnesses the LeVasseurs identified as having knowledge of the transaction had been deposed. (CP 225).

Thomas' response to the summary judgment motion included a CR 56(f) request to continue the summary judgment hearing to conduct discovery which, at a minimum, would involve the depositions of the LeVasseurs. (CP 149-51; CP 226). Since February 13, 2014, the depositions of the LeVasseurs had been scheduled for April 24, 2014. It is worth noting that, according to the Civil Case Schedule, the discovery cutoff was not until February 9, 2015 and the trial date was March 30, 2015, nearly a year away. (CP 17).

**D. At Oral Argument, In Addition to Opposing the Motions, Thomas Requests Leave to Amend.**

At oral argument on April 11, 2014, counsel for Thomas requested the opportunity to amend. Counsel stated his belief that the existing causes of action of declaratory judgment and quiet title were sufficiently broad to provide notice to the LeVasseurs of a challenge to title, but sought the opportunity to amend to add claims for breach of contract and/or specific performance. (RP page 22, lines 6 to 20). The Clerk's Minute Entry regarding the summary judgment hearing also reflects this request to amend. (CP 293).

At the close of the hearing, the court took the matter under advisement, indicating to counsel that a ruling would be issued within the

next week. (RP page 31, line 14 to page 32, line 3).

**E. Before the Court Rules on the LeVasseurs' Motions, Thomas Files a Motion for Leave to Amend.**

Under the circumstances, CR 15(a) required either leave of court or consent of the other party to file an amended pleading. On the afternoon of April 11, 2014, counsel for Thomas sought the consent of the LeVasseurs' attorney to file an amended complaint. (CP 314). That request was rejected.

On April 15, 2014, Thomas filed a motion for order shortening time on motion for leave to amend (CP 294-296) and supporting Declaration of Dan Lossing. (CP 297-301). This motion was necessary because Thomas wanted the issue decided before the court ruled on LeVasseurs' summary judgment motion.

Also on April 15, 2014, Thomas filed a motion for leave to amend (CP 302-309) and supporting Declaration of Dan Lossing. (CP 310-343). On April 17, 2014, Thomas filed a reply to the LeVasseurs' response to the motion for leave to amend. (CP 355-359). It is not clear whether the trial court reviewed this reply before issuing its April 17, 2014 orders.

**F. The Court Grants the LeVasseurs' Summary Judgment Motion and Reserves Sanctions, Grants Thomas' Motion for Order Shortening Time and Denies Thomas' Motion for Leave to Amend, Without Explanation.**

On April 17, 2014, the trial court issued three orders. According to the Index to Clerk's Papers, they were entered in the following sequence: (1) an order granting Thomas's motion to shorten time (CP 360-1); (2) an order denying Thomas' motion for leave to amend (CP 362-3); and an order granting the LeVasseurs' motion for summary judgment and for sanctions. (CP 364-7).

The form of order denying Thomas' motion for leave to amend was identical to the proposed order submitted by the LeVasseurs. (CP 362-3). It reflected no changes other than the date and the judge's signature. The court provided no explanation or justification whatsoever for its decision to deny Thomas' request for leave to amend.

The form of order granting the LeVasseurs' summary judgment motion was also identical to the proposed order submitted by the LeVasseurs. (CP 364-7). Other than the date and the judges' signature, the only revision was the insertion of the word "reserved" on the line indicating the amount of sanctions to be awarded to the LeVasseurs.

On April 23, 2014, Thomas appealed the trial court's rulings denying Thomas's motion for leave to amend and granting the LeVasseurs' motion for summary judgment. (CP 368-77).

**G. The Court Grants the LeVasseurs' Motion to Enter Judgment and Remove Lis Pendens; Awards Sanctions to the LeVasseurs; Reserves Cancellation of the Lis Pendens Pending Appeal; and Requires Thomas to Post a \$950,000 Supersedeas Bond Pending Appeal.**

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On July 15, 2014, the LeVasseurs filed a motion to enter judgment and remove the lis pendens Thomas had filed on January 29, 2014. (CP 380-5). Among other things, the LeVasseurs claimed: they were entitled to an award of \$26,280.50 in attorneys' fees and costs (apparently pursuant to CR 11); the trial court was authorized to remove the lis pendens; and the court should require Thomas to post a \$1 million supersedeas bond if the lis pendens was not removed.

On July 21, 2014, Thomas responded to the LeVasseurs' motion to enter judgment and remove the lis pendens, challenging both the entitlement to fees and costs (whether under CR 11 or RCW 4.28.328) and the quantum of the claimed fees and costs. (CP 452-62). In addition, Thomas pointed out that the April 17, 2014 order (which Thomas had separately appealed) did not call for the removal or cancellation of the lis pendens and argued that it would be inappropriate for the court to exercise its discretion under RCW 4.28.320 to remove the lis pendens. Finally, Thomas disputed the LeVasseurs' assertions regarding the amount of the supersedeas bond.

On July 24, 2014, counsel for the parties received an email from the trial court stating that the court could not cancel the lis pendens or award attorneys' fees until there was a final resolution of the appellate process. However, the email also indicated that Thomas could file a supersedeas bond and asked for supplemental briefing by August 7, 2014. In response to Thomas' request for clarification, the court advised "... the amount of the supersedeas bond is what remains, nothing else. Plaintiff would have to post a bond while the first matter...is on appeal. It should represent the fair market value of the property in question (around \$1m.)." On August 6, 2014, pursuant to the trial court's request, Thomas submitted her brief regarding the supersedeas bond. (CP 485-8).

On August 26, 2014, the court entered an order granting the LeVasseurs' motion to enter judgment and remove the lis pendens. (CP 492-4). The court struck the language in the proposed order that would have immediately canceled the lis pendens and noted: "Reserved pending appeal. Appellants shall file a supercedeas bond in the amount of \$950,000 pending appeal. The supercedeas bond shall be filed by September 5, 2014." The trial court also entered a judgment, awarding fees and costs to the LeVasseurs in the exact amount requested. (CP 489-91). The authority for the award (*i.e.*,

CR 11 or RCW 4.28.328) was not stated. However, it was apparently intended as a sanction, based on the court's prior finding of a CR 11 violation.

On September 5, 2014, Thomas filed an appeal of the trial court's August 26, 2014 orders. (CP 495-501). On the same date, Thomas released the lis pendens that it had filed on January 29, 2014. (CP 504-7). On September 12, 2014, Thomas tendered full payment of the judgment amount (plus interest) to counsel for the LeVasseurs. On October 7, 2014, the judgment was fully satisfied. (CP 508-9).

#### **IV. ARGUMENT AND AUTHORITY**

##### **A. The Trial Court Erred When It Awarded Fees and Costs to the LeVasseurs.**

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###### **1. Standard of Review.**

Thomas has challenged the trial court's April 17, 2014 ruling that Thomas had violated CR 11 and / or was liable for fees and costs pursuant to RCW 4.28.328. These issues were addressed and briefed in the appeal at Case No. 71845-2. See, Brief of Appellant, pages 14-20. That argument regarding the propriety of the court's decision to award sanctions will not be repeated here.

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In its April 17, 2014 ruling on the LeVasseurs' summary judgment motion, the trial court "reserved" the question of the amount of fees and costs to be awarded. (CP 366, line 5). On August 26, 2014, pursuant to the LeVasseurs' motion to enter judgment and remove lis pendens, the trial court entered an order and a judgment. (CP 497-501), awarding sanctions of \$26,280.00. That amount was promptly paid, and the judgment has been fully satisfied. (CP 508-9).

Because neither the August 26, 2014 order nor the August 26, 2014 judgment expressly referenced the authority for the award of fees and costs (*i.e.*, CR 11 or RCW 4.28.328), the legal basis in the for the award is not clear. However, the order recites that the trial court "...determined sanctions were appropriate." (CP 497, lines 20-21). Accordingly, Thomas respectfully submits that case law pertaining to CR 11 – as opposed to RCW 4.28.328 – is the appropriate standard by which to measure the fee and cost award.

A court's ruling with regard to sanctions under CR 11 is to be reviewed for abuse of discretion. See, *Biggs v. Vail*, 124 Wn.2d 193, 197, 876 P.2d 448 (1994). The trial court's decision constitutes abuse of discretion when its order is manifestly unreasonable or based upon untenable grounds.

*Hizey v. Carpenter*, 119 Wn.2d 251, 268, 830 P.2d 646 (1992); *Lincoln v. Transamerica Investment Corp.*, 89 Wn.2d 571, 577, 573 P.2d 1316 (1978); *Tex Enterprises, Inc. v. Brockway Standard, Inc.*, 110 Wn.App. 197, 203-4, 39 P.3d 362 (Div.1 2002), rev'd on other grounds 149 Wn.2d 204, 66 P.3d 625 (2003); *Watson v. Maier*, 64 Wn.App. 889, 896, 827 P.2d 311 (Div. 2 1992); *Mullen v. North Pacific Bank*, 25 Wn.App. 864, 878-9, 610 P.2d 1175 (Div. 2 1980).

2. The Trial Court's Award of Fees and Costs Constituted an Abuse of Discretion.

Thomas argued in her initial appeal (at Case No. 71845-2) that an award of fees and costs was not appropriate, under either CR 11 or RCW 4.28.328. If this Court agrees with that argument, the trial court's August 26, 2014 award of sanctions becomes moot.

However, if this Court does not reverse the trial court's April 17, 2014 ruling that fees and costs should be awarded (apparently pursuant to CR 11), the amount of the award must be judged by the abuse of discretion standard. In the exercise of that discretion, those sanctions must be consistent with the purpose of the rule:

CR 11 is not meant to act as a fee shifting mechanism, but rather as a deterrent to frivolous pleadings. (Citation omitted) When attorney fees are granted

under CR 11, the trial court “must limit those fees to the amounts reasonably expended in responding to the sanctionable filings. (Citation omitted)

...

In fashioning the appropriate sanction, the trial judge must of necessity determine priorities in light of the deterrent, punitive, compensatory, and educational aspects of sanctions as required by the particular circumstances. “The basic principal governing the choice of sanctions is that the least severe sanctions adequate to serve the purpose should be imposed.” (Citation omitted).

*MacDonald v. Korum Ford*, 80 Wn.App. 877, 891, 912 P.2d 1052 (1996).

See, *Biggs v. Vail*, 124 Wn.2d 193, 201, 876 P.2d 448 (1994); *Miller v.*

*Badgley*, 51 Wn.App. 285, 304, 753 P.2d 530 (1988).

In this case, it is clear that the trial court utilized CR 11 as a fee-shifting mechanism. The trial court simply awarded all of the fees and costs allegedly incurred by the LeVasseurs’ counsel, made no findings regarding possible lesser sanctions and made no attempt to focus on the allegedly sanctionable conduct. Nor did the court attempt to adjust the sanction for duplicate fees, time spent on unrelated matters, charges for non-legal services or unrecoverable costs.

In addition, any award of fees or costs – either as a sanction under CR 11 or pursuant to RCW 4.28.328 – must not simply reflect all fees and costs requested. The court must exercise its discretion to award only

reasonable fees. *State v. Roth*, 78 Wn.2d 711, 716, 479 P.2d 55 (1971). Here, the trial court failed to exercise its discretion in that regard.

Among other things, the reasonableness of attorneys' fees depends upon the specific circumstances of a given case. The trial court possesses broad discretion in awarding such fees. *Absher Construction Co. v. Kent School District*, 79 Wn.App. 841, 847, 905 P.2d 1229 (1995). However, fee applicants always bear the burden of showing the reasonableness of their fees. *Absher*, 79 Wn.App. at 847. Courts awarding attorneys' fees should further take into account the correlation between the disputed amount and the requested fees. *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 151, 859 P.2d 1210 (1993). In arriving at a fee award, the trial court may deduct time spent on unsuccessful claims, duplicative labor and unproductive time. *Absher* at 847.

Applying the foregoing considerations to this case, Thomas respectfully submits that the fees and costs awarded by the trial court were improper and excessive.

*a. The LeVasseurs' Numbers Did Not Compute.*

The Declaration of John A. Kesler, III, filed in support of defendants' motion (the "Kesler Declaration") asserted that the LeVasseurs

were entitled to recover \$26,280.00 in fees and costs. (CP 386-451). But, the billing records attached to the Kesler Declaration did not support that figure. The basic math was wrong.

Exhibit A to the Kesler Declaration consisted of two invoices, one dated February 25, 2014 and the other dated April 25, 2014. Irrespective of a host of other issues with the billings, as discussed below, the billed time entries for those two invoices total \$25,505.50. While on its face the disparity may seem small, the fact remains that even the simple math was wrong.

*b. The LeVasseurs Failed to Adequately Support Their Claims for Fees.*

The LeVasseurs had the burden of submitting "...detailed time records justifying the hours claimed to have been expended." *Chambers v. City of Los Angeles*, 796 F.2d 1205, 1210 (9<sup>th</sup> Cir. 1986). In contrast to this requirement, many of the billing entries consisted of generalities that failed to adequately describe the substance of the work performed. Indeed, many of the billing entries contained little specificity at all, merely referencing "email to" or "work on" or "revisions to."

Fees should not have been awarded for such generic billing entries because the court could not properly determine the nature of the tasks performed. *Gagliardi v. Denny's Restaurants, Inc.*, 117 Wn.2d 426, 450, 815

P.2d 1362 (1991). In addition, virtually all of the billing entries constituted “block billing” (*i.e.*, several distinct tasks lumped into a single time entry). This would make it literally impossible for any court to determine whether the fees for a particular activity were reasonable.

*c. Fees for Duplicated Effort are Not Recoverable.*

The bills attached to the Kesler Declaration contained numerous time entries reflecting duplication of effort. These entries were identified by yellow highlighting in Exhibit “1” to the Lossing Declaration. (CP 463-75). It is nearly impossible to determine the precise number of additional fees charged to the client as a result of this duplication of effort. This is because, among other things, virtually all of the relevant entries had many component parts and the individual tasks were not broken out. Because the LeVasseurs bore the burden of establishing their fees, the motion seeking an award of fees was defective and should have been rejected.

*d. Fees Unrelated to the Sanctionable Filing, and Fees that are Clearly Excessive, Are Not Recoverable.*

The LeVasseurs sought to recover fees for time spent before the litigation was commenced on January 29, 2014, as well as fees for work unrelated to the sanctionable filing (*e.g.*, discovery). Fees not related to the sanctionable filing are not recoverable. See, *MacDonald v. Korum Ford*, 80

Wn.App. At 891. In addition, the LeVasseurs claimed it was reasonable for a staff person or paralegal to spend 1.2 hours calendaring the Civil Case Schedule (see time entry for February 28, 2014). (CP 470).

Many entries in the Kesler Declaration reflected duplication of time and effort and other unreasonable and excessive components of the LeVasseurs' fee and cost billing, and are therefore not recoverable. These entries were identified by red highlighting in Exhibit "1" to the Lossing Declaration. (CP 463-75).

*e. The LeVasseurs are Not Entitled to Recover Fees for Non-Legal Work.*

Several time entries by law firm paralegals or assistants showed that they performed clerical or ministerial tasks. These entries were identified by green highlighting in Exhibit "1" to the Lossing Declaration. (CP 463-75). While it might be appropriate to charge for a paralegal performing quasi-legal functions, it is clearly improper to charge for tasks that could and/or should have been performed by a secretary or legal assistant as part of overhead. These charges are not compensable.

*f. The LeVasseurs are Not Entitled to Recover Non-Statutory Costs.*

The LeVasseurs sought (and were awarded) costs for so-called

“records/documents” which lacked any specificity or explanation. These inappropriate charges were highlighted in blue in Exhibit “1” to the Lossing Declaration, and should not have been allowed. (CP 463-75).

The trial court abused its discretion when it awarded fees and costs to the LeVasseurs, apparently on the basis of CR 11. The mere fact that the court awarded an amount equal to the fees and costs requested by the LeVasseurs clearly indicates that the court engaged in fee-shifting, which is contrary to the purpose of CR 11. In addition, the trial court failed to analyze the LeVasseurs’ fee and cost billings to focus on those tasks reasonably related to the allegedly sanctionable conduct and to otherwise remove inappropriate fees and costs. Thomas respectfully submits that the trial court’s order and judgment relating to fees and costs must be reversed.

**B. The Trial Court Erred When It Canceled / Removed the Lis Pendens.**

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1. Standard of Review.

The trial court’s August 26, 2014 rulings regarding the cancellation or removal of the lis pendens entail interpretation of statutes and court rules. Accordingly, the standard of review is de novo. *Welch v. Southland Corporation*, 134 Wn.2d 629, 632, 952 P.2d 162 (1998); *Westberg v. All-Purpose Structures, Inc.*, 86 Wn.App. 405, 409, 936 P.2d 1175 (Div.

2 1997).

2. The Trial Court's Ruling Canceling / Removing the Lis Pendants Was Contrary to Law.

Once an appeal is filed, Rule of Appellate Procedure 7.2 provides that the trial court is essentially divested of jurisdiction except in very limited instances enumerated in the Rule. The LeVasseurs' request to cancel or remove the lis pendens did not constitute one of those instances.

With their subsequent motion to cancel or remove the lis pendens, the LeVasseurs were seeking additional relief, not sought in the summary judgment motion and not reflected in the summary judgment order prepared and presented by them and signed by the court (unedited) on April 17, 2014. The order prepared by the LeVasseurs on their summary judgment motion did not call for the removal of the lis pendens. Nor did the LeVasseurs thereafter seek to modify the summary judgment order to include such a provision. Their efforts to obtain additional relief should have been denied.

Although the LeVasseurs cited to RCW 4.28.320 and *Beers v. Ross*, 137 Wn.App. 566, 575, 154 P.3d 277 (2007) as support for their position before the trial court, neither of them is helpful. The statute provides, in part:

And the court in which the said action was commenced may, at its discretion, *at any time after the action shall be settled, discontinued or abated*, on application of any person aggrieved and on good cause shown and on such notice as shall be directed or approved by the court, order the notice authorized in this section to be canceled of record, in whole or in part, by the county auditor of any county in whose office the same may have been filed or recorded... (Emphasis added)

Here, none of the predicates to the trial court's exercise of discretion under RCW 4.28.320 has been met. Specifically, the action has not been "settled, discontinued or abated."

Moreover, *Beers* does not stand for the proposition claimed by the LeVasseurs. In fact, the court in *Beers* expressly noted that "... Washington courts have not addressed the need for an appellant to file a motion to stay the trial court's order vacating the lis pendens." 137 Wn.App. at 575. Perhaps this is because, as the court noted, a lis pendens is procedural only and does not create substantive rights.

Under RAP 8.1(b)(2), unless prohibited by statute, a party may obtain a stay of enforcement of a decision affecting a *right* to use of real property by filing a supersedeas bond...Initially, we note that because the lis pendens did not give the Beers any substantive property rights, it is not clear that a RAP 8.1(b)(2) stay would apply. But, we do not

resolve that issue because the Beers did not request a stay.

137 Wn.App. at 575. At best, *Beers* is inapposite to the LeVasseurs' argument. Thomas submits that *Beers* actually supports her position because it speculates – albeit without deciding – that Thomas would be permitted to seek a stay of a ruling cancelling a lis pendens.

In response to the LeVasseurs' post-summary judgment motion to cancel or remove the lis pendens, the trial court initially advised counsel that it could not do so while the appeal was pending. However, the court indicated that Thomas could file a supersedeas bond. It is not clear why Thomas would do so if the court was taking the position that it could not cancel or remove the lis pendens. Nonetheless, pursuant to the court's request, Thomas provided supplemental briefing on the issue of a supersedeas bond.

The trial court's August 26, 2014 ruling, which had the effect of removing the lis pendens unless Thomas posted a \$950,000 supersedeas bond within ten days, was improper. Upon a de novo review of the trial court's ruling, Thomas respectfully submits that this Court should reverse.

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**C. The Trial Court Erred When it Required Thomas to Post a Supersedeas Bond as a Condition of Maintaining the Lis Pendens.**

1. Standard of Review.

The trial court's August 26, 2014 rulings regarding the supersedeas bond requirement involve interpretation of court rules. Accordingly, the standard of review is de novo. *Welch v. Southland Corporation*, 134 Wn.2d 629, 632, 952 P.2d 162 (1998); *Westberg v. All-Purpose Structures, Inc.*, 86 Wn.App. 405, 409, 936 P.2d 1175 (Div. 2 1997).

2. The Trial Court's Ruling Requiring Thomas to Post a Supersedeas Bond to Maintain the Lis Pendens was Contrary to Law.

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The Court's April 17, 2014 order granting the LeVasseurs' motion for summary judgment motion does not include an order that Thomas pay money to the LeVasseurs, nor does it order the cancellation of the lis pendens filed in connection with this action. Similarly, the separate April 17, 2014 order denying Thomas' motion for leave to amend does not require Thomas to pay money to the LeVasseurs, nor does it otherwise include any relief pursuant to which execution could follow.

Thomas respectfully submits that the April 17, 2014 rulings by the trial court did not constitute decisions that might be "enforced," as contemplated by the supersedeas procedures set forth in RAP 8.1.

Accordingly, Thomas did not seek to have the “enforcement” of the April 17, 2014 rulings stayed, and no supersedeas was appropriate.

In light of the procedural posture of the case at the time the August 26, 2014 rulings were entered, and the trial court’s representations that it could not remove the lis pendens while the appeal was pending, Thomas respectfully submits that the portion of the court’s decision requiring Thomas to post a supersedeas bond was error. This Court, on de novo review, should reverse.

**D. The Trial Court Erred When it Required a Supersedeas Bond Based on the Purchase Price of the Residential Property that Was the Subject of the Action.**

1. Standard of Review.

The trial court’s August 26, 2014 ruling regarding the amount of the supersedeas bond entails interpretation of court rules. Accordingly, the standard of review is de novo. *Welch v. Southland Corporation*, 134 Wn.2d 629, 632, 952 P.2d 162 (1998); *Westberg v. All-Purpose Structures, Inc.*, 86 Wn.App. 405, 409, 936 P.2d 1175 (Div. 2 1997).

2. The Trial Court’s Ruling Basing the Amount of the Supersedeas Bond on the Alleged Value of the Real Property Was Contrary to Law.

On July 28, 2014, nearly a month before the trial court issued

its August 26, 2014 ruling, the court advised counsel that the amount of the supersedeas bond "...should represent the fair market value of the property in question (around \$1m.)." (CP 486, lines 1-5). Given that comment, the court's subsequent ruling regarding the supersedeas bond was perhaps no surprise. But, it was clearly erroneous.

RAP 8.1(c)(2) concerns the amount of a supersedeas bond with regard to trial court decisions affecting real property:

The supersedeas amount shall be the amount of any money judgment, plus interest likely to accrue during the pendency of the appeal and attorney fees, costs and expenses likely to be awarded on appeal entered by the trial court plus the amount of the loss which the prevailing party in the trial court would incur as a result of the party's inability to enforce the judgment during review. *Ordinarily, the amount of loss will be equal to the reasonable value of the use of the property during review.* (Emphasis added)

Clearly, the "reasonable value of the loss of use of the property during review" is not equal to the purchase price of the Condominium, which is residential property that was not acquired as an income-producing asset. Nor is it related in any way to the "fair market value" of the property, to which the court alluded before making its ruling.

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Furthermore, RAP 8.1(c)(2) provides a specific mechanism if a party believes the “loss of use” analysis is insufficient:

A party claiming that the reasonable value of the use of the property is inadequate to secure the loss which the party may suffer as a result of the party’s inability to enforce the judgment shall have the burden of proving that the amount of loss would be more than the reasonable value of the use of the property during review. If the property at issue has value, the property itself may fully or partially secure any loss and the court may determine that no additional security need be filed or may reduce the supersedeas amount accordingly.

The LeVasseurs did not avail themselves of this procedure, possibly because the trial court failed to utilize the “loss of use” analysis called out in RAP 8.1(2)(c). Even if the LeVasseurs had sought to use such a procedure, it would not have resulted in setting a supersedeas bond of \$950,000. The Condominium has substantial value, and it is totally unencumbered by any deed of trust or other liens. And, it is likely appreciating in value in a rising Seattle real estate market. In addition to the fact that the LeVasseurs provided none of the money to purchase the Condominium in the first place, they cannot in good faith argue that they are suffering any “loss of use” of the property pending review – let alone

\$950,000 in loss of use.

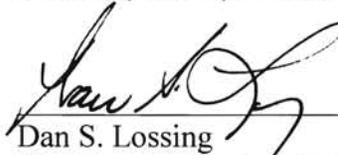
The trial court's decision regarding the amount of the supersedeas bond to be posted by Thomas reflects an erroneous interpretation of RAP 8.1(c)(2). Thomas respectfully submits that, upon a de novo review, this Court should reverse.

#### **V. CONCLUSION**

Based on the foregoing arguments, this Court should reverse the trial court's decision awarding fees and costs as sanctions to the LeVasseurs and its determination to cancel / remove the lis pendens. The Court should also reverse the trial court's ruling requiring a supersedeas bond as a condition to maintaining the lis pendens, and its determination that the amount of the supersedeas bond should be based on the purchase price of the residential real property that was the subject of the action.

RESPECTFULLY SUBMITTED this 18<sup>th</sup> day of December, 2014.

INSLEE, BEST, DOEZIE & RYDER, P.S.



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