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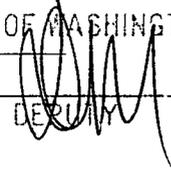
NO. 47482-4-II

STATE OF WASHINGTON

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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

BY



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CHRISTOPHER GUEST and SUZANNE GUEST,  
Appellants,

v.

DAVID LANGE and KAREN LANGE,  
Respondents.

THE COE FAMILY TRUST and Trustee Michael Coe,  
Interveners/Respondents,

v.

CHRISTOPHER GUEST and SUZANNE GUEST,  
Respondents/Appellants.

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CHRISTOPHER GUEST and SUZANNE GUEST,  
Appellants,

v.

MICHAEL COE and CAROL COE, and CAROL ANN WHITE and  
JOHN L. WHITE,  
Respondents.

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APPELLANTS' BRIEF

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ORIGINAL

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## I. STATEMENT OF THE CASE

This case involves whether the filing of a supersedeas bond staying enforcement of a judgment pending appeal prevents the cancellation of a validly filed lis pendens. To date, Washington Appellate Courts have faced the issue of cancelling a lis pendens on appeal only when no supersedeas bond had been filed.

In this case, the trial court canceled two recorded lis pendens notices after the Guests had deposited a cash supersedeas bond with the Pierce County Superior Court Clerk to stay the underlying Judgment, orders and rulings adverse to the Guests pending appeal. Under RAP 8.1, the Guests had the right as a matter of law to stay and supersede any enforcement of any real property and/or money judgments, rulings, or orders in this case pending appeal by depositing a cash supersedeas bond with the Superior Court Clerk. The Guests deposited cash supersedeas bonds with the Superior Court Clerk on March 5, 2015. There is no dispute that the lis pendens notices were properly recorded. When the court cancelled the lis pendens, the underlying *Guest v. Lange* action had not settled, discontinued, or abated as required by RCW 4.28.320. The trial court erred when it cancelled the lis pendens notices.

The Guests asserted below and continue to assert that the Langes lacked standing to file the motion to cancel the lis pendens under a 1987 recorded defense, indemnity, hold harmless and release document and contract that the Langes had adopted and had ratified not only prior to trial but also at the last stage of the trial proceedings in 2014 prior to verdict in

the Langes' favor, entry of Judgment in the Langes' favor and the Guests' appeal.

Additionally, the trial court abused its discretion in "vitiat[ing]" the Guests' Motion to Conduct Discovery Pursuant to RAP 7.2 and CR 27 regarding the Langes' allegations of alleged damages and in failing to rule on the Guests' Motion to Strike hearsay portions of David Langes' declaration in support of the Langes' motion to increase the amount of the Guests' cash supersedeas bond.

The Guests ask that this Court vacate the order cancelling the lis pendens and remand with instructions to reinstate the Guests' lis pendens notices and strike the hearsay portions of David Lange's declaration. If this Court remands for any other purpose, the Guests ask that this Court remand with instructions to allow the Guests to conduct limited discovery regarding the Langes' alleged lis pendens damages, or to at least hold an evidentiary hearing on the matter.

## **II. ASSIGNMENTS OF ERROR**

1. The trial court erred by granting the Langes' motion to cancel the Guests' lis pendens notices.

2. The trial court abused its discretion by denying the Guests' motion for discovery.

3. The trial court abused its discretion by failing to rule on the Guests' motion to strike.

### **III. ISSUE STATEMENTS**

1. The trial court erred as a matter of law by granting the Langes' motion to cancel the Guests' lis pendens when this matter had not been abated, settled, or discontinued. (Assignment of Error No. 1)

2. The trial court abused its discretion by granting the Langes' motion to cancel the Guests' lis pendens when the Guests had filed a cash supersedeas bond staying enforcement of all judgments, orders, or rulings below adverse to the Guests. (Assignment of Error No. 1)

3. The trial court abused its discretion by granting the Langes' motion to cancel the Guests' lis pendens when the Langes failed to show prejudice. (Assignment of Error No. 1)

4. The trial court abused its discretion in denying the Guests' motion for limited discovery given the unsupported allegations made by the Langes about their alleged damages. (Assignment of Error No. 2)

5. The trial court abused its discretion in failing to rule on the Guests' motion to strike the unsupported hearsay declaration testimony of David Lange. (Assignment of Error No. 3)

6. The Guests are entitled to attorney fees on appeal pursuant to RAP 18.1 and Section D of the 1987 Recorded Document.

### **IV. FACTS**

The Guests and the Langes are adjoining property owners who share a single property line along the north-south portion of Lot 4 and Lot 5 in the

Spinnaker Ridge development in Gig Harbor.<sup>1</sup> The Langes have owned Lot 4 since 1993, and the Guests have owned Lot 5 since 2004.<sup>2</sup> This matter involves a deck constructed by the Langes, over the Guests' objection, which encroaches onto Lot 5 and abuts the Guests' house and extends beyond their master bedroom window.<sup>3</sup>

There are two alleged easements at issue in this case.<sup>4</sup> One concerns an approximately 5' wide by 21' long section that encroaches onto the Guests' Lot 5 property. The Langes contend that this is permitted by a document purportedly executed by Nu-Dawn Homes, Inc. in 1987 and recorded under Pierce County Auditor No. 8704290509 (the "1987 Recorded Document").<sup>5</sup> The second alleged easement involves an area approximately 3' long by 5' wide that also extends onto the Guests' Lot 5 property, which is not covered by the 1987 recorded document.<sup>6</sup> The covenants, conditions, and restrictions that were recorded in August 1986, if valid, would have granted the Langes an alleged easement to the 3' by 5'

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<sup>1</sup> Supplemental Clerk's Papers (Supp. CP) at 291 (*Declaration of David S. Cottnair in Support of Plaintiffs' Motion for Summary Judgment Dismissal of Counterclaims* at Exhibit 6).

<sup>2</sup> Supp. CP at 296 – 97 (*Defendants' Motion for Summary Judgment Dismissal of Plaintiffs' Claims* at 2 – 3).

<sup>3</sup> Supp. CP at 378 – 79, 405, 424 (*Declaration of Shelly M. Andrew in Support of Defendants' Response to Plaintiffs' Motion for Summary Judgment Dismissal of Counterclaims*, Exhibit D, pages 15 – 16; *Plaintiffs' Response, without waiver, to Defendants' Motion for Summary Judgment Dismissal of Complaint* at 6, 25).

<sup>4</sup> The Guests strongly disagree that the Langes have any valid easements over and/or on their Lot 5, but these issues are not the subject of this appeal. These facts are offered to provide context for the issues before the Court.

<sup>5</sup> Supp. CP at 461 (*Declaration of S. Andrew in Support of Defendants' Response to Motion to Intervene and Continue Trial*, Exhibit B at 1).

<sup>6</sup> Supp. CP at 339 (*Declaration of Shelly M. Andrew in Support of Defendants' Motion for Summary Judgment Dismissal of Plaintiffs' Claims*, Exhibit F at 1).

overhang that existed on their prior deck only if (1) the original deck with the ‘overhang’ had been built by the developer, (2) the encroachment was minor *and* (3) the encroachment had been unintentional.<sup>7</sup> The scope and invalidity of the alleged easements, and the scope of the Langes’ defense, indemnity, hold harmless and release contract duties and obligations to the Guests are the subject of an existing appeal under cause number 46802-6-II.

During the pendency of the litigation in this matter,<sup>8</sup> the Guests filed and recorded a lis pendens on the Langes’ Lot 4 to provide constructive notice to any subsequent purchaser, assignee, devisee, or encumbrancer of the Langes’ real property that they would take the property subject to the outcome of *Guest v. Lange*.<sup>9</sup>

On September 19, 2014, the trial court entered judgment in favor of the Langes, quieting title to the disputed easement areas in the Langes, awarding the Langes “exclusive” use and enjoyment of the encroaching deck, and awarding the Langes statutory attorney fees and costs in the amount of \$565.<sup>10</sup>

The Guests timely appealed the judgment and other underlying issues in this matter.

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<sup>7</sup> Supp. CP at 354 – 55 (*Declaration of Shelly M. Andrew in Support of Defendants’ Response to Plaintiffs’ Motion for Summary Judgment Dismissal of Counterclaims*, Exhibit A).

<sup>8</sup> A more complete explanation of the underlying facts in this matter can be found in the Appellant’s Brief in cause number 46802-6-II.

<sup>9</sup> CP at 7 – 10, 14, 243 – 51.

<sup>10</sup> CP at 87 – 88.

After the trial court entered judgment in this matter, and after this Court had accepted jurisdiction over the Guests' appeal, the Langes moved to cancel the lis pendens, claiming they were entitled to relief because the court had entered judgment in favor of the Langes.<sup>11</sup>

The Guests opposed cancelling the lis pendens, pointing out that the matter had not been "settled, discontinued, or abated."<sup>12</sup> The Guests informed the court that they would be filing a supersedeas bond to stay enforcement of the Judgment.<sup>13</sup> The Guests also asserted in opposition that the Langes lacked standing in this instance to move to cancel the lis pendens.<sup>14</sup> On March 5, 2015, before the Langes' motion was heard, the Guests filed a supersedeas bond staying enforcement of the Judgment.<sup>15</sup> On March 6, 2015, the Guests recorded an amended and updated lis pendens.<sup>16</sup>

At the hearing, the trial court set the matter over to give the Langes an opportunity to brief their challenges to the sufficiency of the cash supersedeas bond.<sup>17</sup>

The Langes then filed a motion objecting to the amount and sufficiency of the cash supersedeas bond.<sup>18</sup> The Langes argued that the cash bond amount was insufficient, claiming that the cash bond should be substantially increased to cover the Langes' alleged (1) attorney fees on

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<sup>11</sup> CP at 1 – 3.

<sup>12</sup> CP at 12 – 16.

<sup>13</sup> CP at 12 – 16.

<sup>14</sup> CP at 33 – 35.

<sup>15</sup> CP at 42 – 43.

<sup>16</sup> CP at 243 – 250.

<sup>17</sup> CP at 57; Verbatim Report of Proceeding (VRP) (March 6, 2015) at 7 – 8.

<sup>18</sup> CP at 59 – 65.

appeal, (2) potential lost savings on mortgage interest payments for the mortgage refinance that allegedly could not go through while the lis pendens was in effect, (3) not being able to remodel their kitchen in the absence of a refinance, and (4) inability to pay off bills with money from the refinance.<sup>19</sup>

The Guests opposed, noting that the cash supersedeas bond posted already included the amount of the money judgment, plus the interest that would likely accrue during the appeal.<sup>20</sup> Additionally, the Guests noted that the Langes had offered no basis for recovering attorney fees on appeal, and that the Langes could not ask for any such amount to be included in the cash supersedeas bond amount.<sup>21</sup> The Guests also argued that the Langes had already admitted that the benefit to the Langes and/or the “loss” of use for that part of Lot 5 to the Langes where the Langes’ deck sits was only \$364.00.<sup>22</sup> Finally, the Guests moved to strike hearsay statements from the declarations of David Lange.<sup>23</sup>

In addition, the Guests moved for discovery based on the unsupported allegations in the Langes’ Motion Objecting to Amount and Sufficiency of Cash Supersedeas.<sup>24</sup>

On March 27, 2015, the trial court entered an Order Cancelling Notice of Lis Pendens, finding that the existing supersedeas amount was sufficient to stay the judgment at issue.<sup>25</sup> The trial court also found that the

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<sup>19</sup> CP at 59 – 65.

<sup>20</sup> CP at 145 – 46.

<sup>21</sup> CP at 146.

<sup>22</sup> CP at 148.

<sup>23</sup> CP at 141 – 42.

<sup>24</sup> CP at 93 – 100.

<sup>25</sup> CP at 222 – 23; VRP (March 27, 2015) at 16 – 17.

Order Cancelling Notice of Lis Pendens “vitiating” the Guests’ Motion for Leave to Conduct Discovery.<sup>26</sup>

The Guests timely appealed.<sup>27</sup>

## V. ANALYSIS

### A. **The Trial Court Erred By Granting the Langes’ Motion to Cancel the Lis Pendens.**

The trial court erred as a matter of law when it cancelled the Guests’ notices of lis pendens because the matter had not been settled, discontinued, or abated as required by RCW 4.28.320. Additionally, the trial court abused its discretion in cancelling the lis pendens when (1) the Guests had filed a cash supersedeas bond staying and superseding enforcement of the underlying Judgment, orders, and rulings; and (2) the Langes did not show good cause to justify cancelling the lis pendens notices.

#### ***1. The trial court erred in interpreting RCW 4.28.320 to allow cancellation of a lis pendens before the matter had been settled, discontinued, or abated.***

The trial court erred in cancelling the Guests’ lis pendens notices when the matter has not been settled, discontinued, or abated.

Statutory construction is a question of law that this Court reviews de novo.<sup>28</sup> The Court’s purpose when interpreting a statute is to discern and implement the legislature’s intent.<sup>29</sup> Where the meaning of statutory

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<sup>26</sup> CP at 217 – 18.

<sup>27</sup> CP at 224 – 25.

<sup>28</sup> *Cosmopolitan Eng’g Grp. v. Ondeo Degremont*, 159 Wn.2d 292, 298, 149 P.3d 666 (2006).

<sup>29</sup> *Cosmopolitan Eng’g Grp.*, 159 Wn.2d at 298.

language is plain on its face, courts must give effect to that plain meaning as an expression of legislative intent.<sup>30</sup>

The lis pendens<sup>31</sup> statute provides that a lis pendens may be cancelled only when an action has been settled, discontinued, or abated. RCW 4.28.320 provides, in relevant part, that the court “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 . . . .”<sup>32</sup>

By its plain language, the authority to cancel a lis pendens notice arises only “at any time after the action shall be settled, discontinued[,] or abated.” The statute does not give the trial court authority to cancel the lis pendens prior to the action being settled, discontinued, or abated. As a threshold matter, therefore, RCW 4.28.320 did not apply to the lis pendens on appeal because the Guests filed a supersedeas bond staying enforcement of the Judgment and any other underlying orders or rulings adverse to the Guests.

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<sup>30</sup> *Cosmopolitan Eng'g Grp.*, 159 Wn.2d at 298. See also *Segura v. Rogaciano*, No. 90088-4, Slip Op. at 4 (Wash. Sup. Ct. October 29, 2015) (“The purpose of statutory interpretation is to determine the legislature’s intent and to apply it...When possible, we derive the legislature’s intent solely from the statute’s plain language, considering the text of the provision at issue, the context of the statute, related provisions, and the statutory scheme as a whole”).

<sup>31</sup> A lis pendens is a “notice, recorded in the chain of title to real property, required or permitted in some jurisdictions to warn all persons that certain property is the subject matter of litigation, and that any interests acquired during the pendency of the suit are subject to its outcome.” BLACK’S LAW DICTIONARY (10<sup>th</sup> ed. 2014) at 1073.

<sup>32</sup> (Emphasis added).

Chapter 4.28 RCW does not define “settled,” “discontinued,” or “abated,” so the Court turns to the dictionary definition of those terms.<sup>33</sup>

*Webster’s Third New International Dictionary* defines “settled” as “established or decided beyond dispute or doubt” or “secured or held by legal settlement.”<sup>34</sup> In this case, the Guests have not settled with the Langes. Although the trial court has entered a Judgment, the Guests appealed the Judgment and filed a supersedeas bond, and therefore, this matter has not been established or decided beyond dispute or doubt. “[D]iscontinue” is defined as “to break off : give up : TERMINATE . . . to abandon or terminate by discontinuance or other legal action.”<sup>35</sup> Again, by virtue of the appeal and the supersedeas bond, the Guests have made it clear that they have not abandoned or given up their claims. To the contrary, the Guests are pursuing this matter on appeal. The issues in this matter remain very much alive. Finally, *Webster’s* defines “abate” as “to bring entirely down : DEMOLISH : put an end to : do away with.”<sup>36</sup> The record demonstrates that the Guests have not abated their claims to their Lot 5 real property, their challenges to the Judgment or to the alleged easement areas, or their appeal of the money judgment against them.

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<sup>33</sup> *City of Yakima v. Johnson*, 16 Wn. App. 143, 146, 553 P.2d 1104 (1976) (“commonly understood words require no definition”, “[i]n the absence of a contrary statutory definition, words contained in a statute or ordinance should be construed in accordance with their general dictionary definition”), *rev. denied*, 88 Wn.2d 1004 (1977); *Clipse v. Commercial Driver Serv., Inc.*, No. 45407-6-II, Slip Op. at 11 (Wash. Ct. App. Aug. 25, 2015) (“We look to a statute’s plain language to give effect to the legislature’s intent [and i]f the statute is unambiguous, it is not open to judicial interpretation”; “[w]e avoid “disregarding an otherwise plain meaning and inserting or removing statutory language”).

<sup>34</sup> WEBSTER’S THIRD NEW INT’L DICTIONARY at 2079 (1993).

<sup>35</sup> WEBSTER’S THIRD NEW INT’L DICTIONARY at 646 (1993).

<sup>36</sup> WEBSTER’S THIRD NEW INT’L DICTIONARY at 2 (1993).

The plain language of RCW 4.28.320 requires settlement, discontinuance, or abatement of an action as a mandatory precondition to cancellation. None of the mandatory preconditions were met here. Because this case has not been settled, discontinued, or abated, RCW 4.28.320 did not authorize the lis pendens' cancellation.

Even if the trial court had authority to cancel the lis pendens at this stage, which it did not, the court erred because the Guests had filed a supersedeas bond staying enforcement of the Judgment. Accordingly, none of the three RCW 4.28.320 mandatory conditions for cancelling a lis pendens were or could be met as a matter of law. The Guests ask that this Court vacate the order cancelling the lis pendens and remand with instructions to reinstate the Guests' lis pendens notices.

**2. *The trial court, alternatively, abused its discretion in cancelling the lis pendens notices.***

Alternatively, if the court's had discretion to cancel the lis pendens notices, which the Guests deny, the trial court abused its discretion because the Guests had filed a supersedeas bond staying enforcement of the Judgment and Langes did not show good cause to cancel the lis pendens.

This Court reviews a trial court's order to cancel a notice of lis pendens for abuse of discretion.<sup>37</sup> The trial court abuses its discretion only when its decision is manifestly unreasonable or based on untenable

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<sup>37</sup> *Beers v. Ross*, 137 Wn. App. 566, 575, 154 P.3d 277 (2007).

grounds,<sup>38</sup> or if the trial court applies the wrong legal standard or relies on unsupported facts.<sup>39</sup>

At any time after an action affecting title to real property has been commenced, or after a writ of attachment with respect to real property has been issued in an action . . . the plaintiff . . . may file with the auditor of each county in which the property is situated a notice of the pendency of the action, containing the names of the parties, the object of the action, and a description of the real property in that county affected thereby. From the time of the filing only shall the pendency of the action be constructive notice to a purchaser or encumbrancer of the property affected thereby, and every person whose conveyance or encumbrance is subsequently executed or subsequently recorded shall be deemed a subsequent purchaser or encumbrancer, and shall be bound by all proceedings taken after the filing of such notice to the same extent as if he or she were a party to the action.<sup>40</sup>

A party has the right to stay enforcement of any money judgment “by filing in the trial court a supersedeas bond or cash, or by alternate security approved by the trial court pursuant to subsection (b)(4).”<sup>41</sup> Additionally, a party also has the right to stay enforcement “of a decision affecting rights to possession, ownership or use of real property...by filing in the trial court a supersedeas bond or cash, or by alternate security approved by the trial court pursuant to subsection (b)(4).”<sup>42</sup> Both provisions are allowed as a matter of right “[e]xcept when prohibited by statute.”<sup>43</sup>

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<sup>38</sup> *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

<sup>39</sup> *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 669, 230 P.3d 583 (2010).

<sup>40</sup> RCW 4.28.320.

<sup>41</sup> RAP 8.1(b)(1).

<sup>42</sup> RAP 8.1(b)(2).

<sup>43</sup> RAP 8.1(b)(1), (2).

It is undisputed that the Guests' cash supersedeas bond stayed both the Judgment against them and enforcement of the same during the pendency of the appeal. The Langes made no argument, nor could they have made any argument, that the Guests' Notice of Cash Deposit as Supersedeas Bond is "prohibited by statute." Instead, the dispute centers around the effect of a supersedeas bond on a validly filed and recorded lis pendens.<sup>44</sup>

The purpose of a supersedeas bond is to stay enforcement of a judgment, ruling or order or further proceedings, such as execution on a judgment, ruling, or order, and to maintain the status quo that existed prior to the filing of the supersedeas bond.<sup>45</sup> Although no reported Washington cases appear to discuss what "status quo" means in terms of a lis pendens, in the injunctive relief context, status quo means the last actual, peaceable, non-contested condition which proceeded the pending controversy.<sup>46</sup>

Here, the last actual, peaceable, non-contested condition, as it relates to this appeal, before the Guests filed their supersedeas bond was that no collection action had begun on the Judgment and a lis pendens notified all potential parties of the pending dispute over the real property at issue. The lis pendens notices were constructive notice to all persons that certain property is the subject matter of litigation and that any interests acquired in that property during the pendency of the suit and in this case and the appeal

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<sup>44</sup> There was no dispute below during the briefing to the Guests' entitlement to a lis pendens; CP at 14.

<sup>45</sup> *Malo v. Anderson*, 76 Wn.2d 1, 5, 454 P.2d 828, 830 (1969).

<sup>46</sup> *Nw. Gas Ass'n v. Wash. Utilities & Transp. Comm'n*, 141 Wn. App. 98, 114 n.16, 168 P.3d 443 (2007).

are subject to its outcome.<sup>47</sup> Because of the Judgment entered in their favor, the Langes wanted the lis pendens cancelled so that they could alter the status quo and give a new lender priority over the Guests' claim, which has been pending since 2011. In fact, the Langes admitted in their briefing that "their most significant loss resulting from the stay is their inability to enforce the judgment quieting title to their property, which, in turn, prevents them from obtaining refinancing."<sup>48</sup> By cancelling the notices of lis pendens, the trial court altered the status quo.

The Langes previously argued that because a lis pendens was procedural only and does not confer any substantive rights to the filing and recording party, a supersedeas bond will not have any impact on a notice of lis pendens.<sup>49</sup> However, no Washington case has held this. The Guests validly recorded lis pendens notices identifying the claims at issue in this matter concern a dispute over alleged easements which affect title to real property.<sup>50</sup> The Langes obtained a Judgment, which granted them an easement over the Guests' real property. The Guests timely appealed and filed a supersedeas bond to stay and supersede enforcement of the Judgment.

The plain language of RAP 8.1(b)(2) grants a party the right to stay enforcement of any judgment, ruling, or order affecting "rights to

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<sup>47</sup> See BLACK'S LAW DICTIONARY at 1073, definition of "lis pendens."

<sup>48</sup> CP at 172.

<sup>49</sup> CP at 34.

<sup>50</sup> See *Schwab v. City of Seattle*, 64 Wn. App. 742, 748, 826 P.2d 1089 (1992) (holding that a party can file and record a notice of lis pendens on a dispute over an easement because an easement affects title to real property).

possession, ownership, or use of real property.” There is no limitation in this language that permits a Court to protect only some of the rights an appealing party may have to that possession, ownership, or use, as suggested by the Langes. The lis pendens notices protected the Guests’ right to possess and to use their Lot 5 real property. The lis pendens sought to ensure that as this process continues, the Guests’ priority claim over the disputed section of their Lot 5 property is not endangered because of issues like the Langes’ mortgage refinance.

The lis pendens cases that the Langes relied upon below to support their motion to cancel the lis pendens are not instructive. The appellants in those actions did not file a supersedeas bond staying enforcement of the judgment, so the courts did not address the effect of a supersedeas bond on a notice of lis pendens other than to state that no supersedeas bond had been filed.<sup>51</sup>

The trial court’s order altered the status quo and adversely impacted the Guests’ right to the possession, ownership, and use of their real property. This Court should vacate the trial court’s order cancelling the lis pendens and remand with instructions to reinstate the lis pendens notices.

Finally, notwithstanding the above arguments, the trial court also abused its discretion, if discretion is even reached, by cancelling the lis

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<sup>51</sup> *State v. Superior Court of Mason Cnty.*, 19 Wn. 118, 119, 52 P. 1009 (1898) (declining to issue writ prohibiting lower court from setting aside a lis pendens while an appeal was pending when the appellant had not filed a supersedeas bond); *Beers*, 137 Wn. App. at 575 (declining to decide in that case as dicta whether an order vacating a lis pendens could be stayed on appeal where appellant did not file a supersedeas bond; appellant had not filed a response or an objection to the underlying trial court motion to cancel the lis pendens before filing their notice of appeal).

pendens notices because the Langes failed to demonstrate good cause for cancellation. RCW 4.28.320 requires that prior to cancellation, the moving party demonstrate “good cause.” Simply acknowledging that the trial court entered a Judgment in their favor does not, in and of itself, evidence good cause to cancel a lis pendens. The Langes did not attempt to address the potential prejudice to the Guests if the lis pendens is canceled, but the Guests prevail in their appeal. In that instance, the statutory constructive notice would be lost, thereby potentially depriving the Guests of the notice and protection they properly preserved when they filed the lis pendens. The Langes’ conclusory statements were not enough to merit cancellation.

The Guests respectfully request that this Court vacate the trial court’s order cancelling the lis pendens and remand for entry of an order denying the motion and reinstating the lis pendens. Enforcement of the Judgment is stayed pending the resolution of the Guests’ appeals, which includes any attempt to cancel the lis pendens or any other enforcement action. Additionally, this matter has not been settled, discontinued, or abated. Finally, the Langes offered no good cause to justify cancelling the lis pendens.

**B. The Trial Court Abused its Discretion in Denying the Guests’ Motion for Discovery.**

The trial court declined to rule on the Guests’ motion for discovery because it cancelled the lis pendens. This was an abuse of discretion. However, on remand, it will not be unnecessary to reach this issue if this

Court holds that the lis pendens cannot be cancelled until this matter is settled, dismissed, or abated.

If this Court does reach this issue, the Court of Appeals reviews a trial court's decision to admit or exclude evidence for abuse of discretion.<sup>52</sup> RAP 7.2 provides the trial court with certain limited authority over an action which is pending on appeal. Specifically, RAP 7.2(h) states that the trial court has "authority to act on matters of supersedeas, stays, and bonds . . . ." RAP 7.2(k) allows the trial court to "supervise discovery proceedings pursuant to CR 27." Civil Rule 27 permits the Court to allow a party to conduct depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the superior court. The Langes made many assertions in their post-judgment motions as to the alleged consequences of not cancelling the lis pendens. The Guests are entitled to investigate those claims before the trial court would consider the Langes' request to substantially increase the bond amount. The Order cancelling the lis pendens included the trial court's ruling that the supersedeas amount was sufficient. In this case, the Guests ask that if this Court reaches this issue, this Court remand for additional discovery or at least an evidentiary hearing as to the proper amount of the lis pendens bond.

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<sup>52</sup> *Engstrom v. Goodman*, 166 Wn. App. 905, 910, 271 P.3d 959, *rev. denied*, 175 Wn.2d 1004 (2012).

**C. The Trial Court Abused its Discretion in Failing to Rule on the Guests' Motion for Strike.**

Because the trial court granted the motion cancelling the Guests' lis pendens, the trial court declined to rule on the Guests' motion to strike hearsay statements from the declaration of David Lange.

The Court of Appeals reviews a trial court's ruling on a motion to strike for abuse of discretion.<sup>53</sup> The Court of Appeals reviews a trial court's decision to admit or exclude evidence for abuse of discretion.<sup>54</sup>

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.<sup>55</sup>

In his declaration, Mr. Lange attempts to testify about statements allegedly made by Umpqua Bank.<sup>56</sup> These are statements made out of court and offered for the truth of the matter asserted. Umpqua Bank is not a party opponent, and there is no exception to the hearsay rule that would have allowed the testimony.

The trial court did not rule on the Guests' motion to strike. In doing so, the trial court abused its discretion. The Guests ask that this Court remand with instructions to grant the Guests' Motion to Strike the challenged portions of David Langes' declaration.

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<sup>53</sup> *Engstrom*, 166 Wn. App. at 910.

<sup>54</sup> *Engstrom*, 166 Wn. App. at 910.

<sup>55</sup> ER 801(c)

<sup>56</sup> CP at 74 – 75.

**D. Pursuant to RAP 18.1 and the 1987 Recorded Document, the Guests Request an Award of Attorney Fees, Costs, and Expenses.**

The Guests respectfully request an award of attorney fees, costs and expenses from this Court pursuant to RAP 18.1 and Section D of the 1987 recorded document.<sup>57</sup>

Section D states:

Grantee promises, covenants, and agrees that the Grantor shall not be liable for any injuries incurred by the Grantee, the Grantee's guests and/or third parties arising from the utilization of said easement and further Grantee agrees to hold Grantor harmless and defend and fully indemnify Grantor against any and all claims, actions, and suits arising from the utilization of said easement and to satisfy and [sic] all judgments that may result from said claims, actions and/or suits.<sup>58</sup>

Under the 1987 Recorded Document, the Langes are required to hold the Guests harmless and “defend and fully indemnify” the Guests from “all claims, actions and suits.”<sup>59</sup> The requirement for “defense” and “full[] indemni[ty]” can only be satisfied in the circumstances of this case by the Langes paying the Guests’ costs and expenses incurred on appeal.

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<sup>57</sup> If the 1987 Recorded Document is not invalid, the Guests are entitled to the benefit of the indemnity agreement. If the 1987 recorded document is invalid as alleged in Appeal No. 46802-6-II because, *inter alia*, the purported grantor did not have title to Lot 5, the Guests are still entitled to be indemnified, defended, released, and held harmless because the Langes repeatedly adopted, ratified and admitted that Section D applied to them with knowledge of the Guests’ challenges to the document. In any event the Guests may still rely on the indemnity provision for damages, including attorney fees. *Kaintz v. PLG, Inc.*, 147 Wn. App. 782, 787, 197 P.3d 710 (2008) (a party who prevails by proving that a contract is invalid may seek attorney fees if the invalid contract provided for attorney fees).

<sup>58</sup> Supp. CP at 461 (*Declaration of S. Andrew in Support of Defendants’ Response to Motion to Intervene and Continue Trial*, Exhibit B at 1).

<sup>59</sup> CP at 325.

Moreover, the trial court should be instructed to award the Guests their fees for any further proceedings on remand.

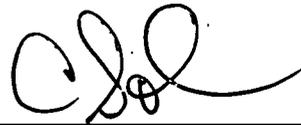
## VI. CONCLUSION

For the foregoing reasons, the Guests ask that this Court vacate the trial court's order cancelling the lis pendens and remand for entry of an order denying the Langes' Motion cancelling the lis pendens. Additionally, the Guests ask that this Court remand for entry of an order granting their Motion to Strike the hearsay statements from David Langes' declaration and, further, that the Court award fees, and costs to the Guests pursuant to RAP 18.1 and the Lange defense, indemnity, hold harmless and release contract.

RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of October, 2015.

LEDGER SQUARE LAW, P.S.

By: \_\_\_\_\_



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Attorneys for Appellants

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STATE OF WASHINGTON

BY *[Signature]*

### CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below, I caused to be served the foregoing document on the following persons and in the manner listed below:

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DATED this 30th day of October, 2015 at Tacoma, Washington.

*Amy Jean Shackelford*  
Amy Jean Shackelford, PLS  
Legal Assistant to Stuart C. Morgan