IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CHRISTOPHER A. DUNCAN, a single man,	)	**No. 28213-9-III**
	)	
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
CATHERINE A. PETERSCHICK, a single woman,	)	
	)	**UNPUBLISHED OPINION**
Appellant.	)	
	)	

Sweeney, J. — Partition and sale of property is a matter addressed to the sound discretion of the trial judge. On remand following the first appeal in this case, the trial court heard further testimony and established the respondent's interest in a house. There are tenable grounds for the court's award, so we affirm the decision.

FACTS

This is the second appeal in this case.

Christopher Duncan and Catherine Peterschick began dating in 1995 or 1996. In March 1998, they obtained a joint mortgage and bought a house at 4111 East 37th

Avenue, Spokane, Washington (37th Avenue property). Both contributed equally to the down payment and closing costs and both were named on the warranty deed.

The original amount of the mortgage was $82,157.00. Mr. Duncan and Ms. Peterschick each paid one-half of the mortgage payments until they broke up in April 2001. Ms. Peterschick lived in the 37th Avenue property by herself from April 2001 until November 2005. She made the mortgage payments and paid taxes and insurance by herself during this time. Mr. Duncan paid one late fee of $186.24.

From November 2005 to November 2006, Ms. Peterschick rented out the 37th Avenue property for $725 per month. She apparently used the rent payments to pay the mortgage. She then moved back into the property in November 2006 and continues to live there and pay the mortgage by herself.

Mr. Duncan sued Ms. Peterschick for partition in February 2006. Ms. Peterschick countered with a claim for all she had invested in the property. *Duncan v. Peterschick*, noted at 144 Wn. App. 1029, 2008 WL 1952285, at *3. The property was worth $139,000 at that time. And the mortgage's remaining balance was $69,781.

The trial court concluded that the parties' relationship was not meretricious and awarded each party a one-half interest in the 37th Avenue property. Clerk's Papers (CP) at 6, 7; *Duncan*, 2008 WL 1952285, at *3. The court imposed an equitable lien on the property for Mr. Duncan's one-half interest. And it ordered that Ms. Peterschick pay Mr. Duncan's award within eight months from

the entry of judgment with interest accruing at a rate of 6 percent per annum after four months.

Ms. Peterschick appealed, and we reversed the trial court's partition award and remanded for recalculation of the parties' ownership interests in proportion to their contributions toward the purchase price:

> We reverse and remand for the trial court to calculate the amount of ownership interest by each party in the East 37th Avenue property. The amount awarded to each party should be based on the presumption that the parties intended to share the property in proportion to their contribution toward the purchase price.

Duncan, 2008 WL 1952285, at *7.

On remand, the trial court took additional evidence from Ms. Peterschick and her expert witness, Hanna Franchino, a certified public accountant. The court then entered findings of fact and conclusions of law. It concluded that Mr. Duncan owns 28 percent of the net equity in the house, or $19,381.32. It ordered that Ms. Peterschick pay Mr. Duncan a net judgment of $18,997.56 (his ownership interest with adjustments) within four months of the entry of judgment plus interest at a rate of 6 percent per annum.

Ms. Peterschick again appeals.

DISCUSSION

We review a trial court's equitable remedy for abuse of discretion. *In re Foreclosure of Liens,* 123 Wn.2d 197, 204, 867 P.2d 605 (1994). And we review findings of fact and conclusions of law by

determining whether substantial evidence supports the challenged findings and whether the findings support the conclusions of law. *Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999). Unchallenged findings of fact are verities on appeal. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 808, 828 P.2d 549 (1992).

Ms. Peterschick contends the trial court erred by including one-half of the third party rent proceeds from November 2005 to November 2006 and Mr. Duncan's contribution to closing costs when calculating Mr. Duncan's ownership interest in the 37th Avenue property.

The trial court found that Mr. Duncan was entitled to one-half interest in the third party rent proceeds and paid one-half of the earnest money, down payment, and closing costs:

> *A total of $4,837.51 was paid equally by the parties as earnest money, down payment and closing costs.* Each party contributed equally to a principal balance of $79,008.00 existing as of April 1, 2001. *Between November 1, 2005, and November 1, 2006, the property was rented to a third party and during which period of time the mortgage principal balance was reduced by $1,756.00*. The principal mortgage balance paid by the parties jointly, and the down payment/cost of acquisition is summarized as follows:
>
> | | |
> |---|---|
> | *Cost of Acquisition:* | *$4,837.51* |
> | Principal Reduced During Relationship: | $3,149.00 |
> | *Principal Reduced Because of Rental:* | *$1,756.00* |
> | | $9,742.51 |
>
> *One half of said amount is $4,871.26 and which was therefore paid equally by* [*Ms.*] *Peterschick and* [*Mr.*] *Duncan*.

CP at 89 (Finding of Fact XI[1]) (emphasis added). Based in part on those contributions and proceeds, the trial court found that Mr. Duncan had a 28 percent ownership interest in the 37th Avenue property:

Paid by Duncan:	$4,871.26
Including cost of acquisition and one-half of 3rd party rent:	28%
Paid by Peterschick	$12,612.26
Including cost of acquisition and one-half of 3rd party rent:	72%

CP at 90.

Third Party Rent Proceeds

Ms. Peterschick claims the law of the case doctrine precluded the trial court from attributing to Mr. Duncan one-half of the third party rent proceeds collected between November 2005 and November 2006. She says this court determined Mr. Duncan was not entitled to rent proceeds in the first appeal when we said he was not entitled to rent for ouster:

> Because Mr. Duncan was not ousted from the East 37th Avenue property, this court need not address his claim for rent during the alleged ouster or the issue as to whether he abandoned the property.

Duncan, 2008 WL 1952285, at *5.

The law of the case doctrine is "'the binding effect of determinations made by the

[1] Findings of fact are numbered before remand with European digits. Findings of fact after remand are numbered with Roman numerals.

appellate court on further proceedings in the trial court on remand.'" *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 113, 829 P.2d 746 (1992) (quoting 15 Lewis H. Orland & Karl B. Tegland, Washington Practice: Judgments § 380, at 55 (4th ed. 1986)). But "the doctrine applies only to issues actually decided." *Fluke Capital & Mgmt. Servs. Co. v. Richmond*, 106 Wn.2d 614, 620, 724 P.2d 356 (1986).

We did not "actually decide" Mr. Duncan's claim for *third party rent* during the first appeal. We declined to address his claim for *rent during his ouster* (i.e., his claim for an ousted cotenant's pro rata share of rental value from the cotenant in possession) because he was not ousted. *Duncan*, 2008 WL 1952285, at *5; *see* Br. of Resp't at 16-18 (Court of Appeals No. 26162-0-III). Nor did we "actually decide" the third party rent issue on Mr. Duncan's motion for reconsideration; the order does not explain the reasons for the court's decision. *See* Order Denying Motion for Reconsideration (Court of Appeals No. 26162-0-III). The law of the case doctrine, then, did not preclude the trial judge from further exercising his discretion on the third party rent issue on remand.

And Ms. Peterschick has not shown that the trial court abused its discretion by attributing one-half of the third party rent proceeds from November 2005 to November 2006 to Mr. Duncan. *Carr v. Deking*, 52 Wn. App. 880, 887, 765 P.2d 40 (1988) (cotenant was entitled to share in benefits of other tenant's lease).

Closing Costs

We instructed the trial court to

calculate the amount of ownership interest by each party "based on the presumption that the parties intended to share the property in proportion to their contribution toward the purchase price." *Duncan*, 2008 WL 1952285, at *7. Ms. Peterschick argues that the term "purchase price" excludes closing costs and that, therefore, the trial court erred by including closing costs in its calculation of the parties' ownership interests. For support, she relies on *Iredell v. Iredell*, 49 Wn.2d 627, 631, 305 P.2d 805 (1957).

Iredell followed an action to restrain the sale of real property. 49 Wn.2d at 628. Olive Iredell paid "[a] down payment of eighteen hundred dollars and all closing costs . . . from her separate funds" for the property at issue. *Id.* Her husband's ex-wife issued a writ of execution upon the property to satisfy a judgment for past due child support owed by Ms. Iredell's husband. *Id.* Ms. Iredell sued to stop the sale, "claiming as her separate property the interest in the real property represented by the down payment of eighteen hundred dollars." *Id*. The trial court concluded that Ms. Iredell's $1,800 interest in the real property could not be reached to satisfy the ex-wife's judgment. *Id.* at 631. And the Supreme Court affirmed that conclusion because the evidence showed that Ms. Iredell and her husband contributed unequally to the purchase price. *Id*.

Iredell does not stand for the proposition that a person gains no interest in real property by paying closing costs. The *Iredell* court did not consider whether the term "purchase price" included closing costs. And that is because Ms. Iredell never claimed that her interest in the property included the

amount she paid in closing costs. *Id.* at 628.

We find no Washington authority either way on this question. But another jurisdiction has included closing costs when calculating a party's ownership interest. *See Sharpe v. Raffer*, 69 A.D. 3d 1137, 839 N.Y.S. 2d 674, 676 (2010) (affirming partition award that included closing costs and holding that "[i]n fashioning an award in a partition action, a court may consider the amount of any down payment and any mortgage payments"); *but see Baker v. Drabik*, 224 N.J. Super. 603, 612, 541 A.2d 229 (1988) (remanding to adjust partition award for the difference between "initial capital contributions," apparently including closing costs).

Ms. Peterschick argues, nonetheless, that closing costs should not be included when calculating ownership interests because closing costs do not increase a person's ownership interest in real property. We conclude that the decision in this equitable action ultimately lies in the discretion of the trial judge charged with dividing this property. *Carbon v. Spokane Closing & Escrow, Inc.*, 135 Wn. App. 870, 878, 147 P.3d 605 (2006).

That said, we understand the concern Ms. Peterschick has with the trial court's formula for determining the parties' ownership interests. The formula combined equity gains with money spent on mortgage payments and closing costs, but it probably should have focused on one element or the other. It could have divided one-half of the equity gained when the parties were paying the

mortgage jointly by the equity gained when Ms. Peterschick was making all of the payments. But closing costs and mortgage payments reduced the parties' mortgage, too. So, instead, the trial court could have divided the amount Mr. Duncan paid in closing costs and mortgage payments (including one-half of the third-party rent) by the total amount of closing costs and mortgage payments paid. Either formula would have resulted in a quotient – x percent. The court then could have multiplied that quotient and the parties' total equity to determine the dollar amount of Mr. Duncan's ownership interest.

For example, the parties here paid the mortgage for 108 months (April 1998 through March 2007) by the time the trial court entered its findings. They paid the mortgage jointly for 36 months (through March 2001). And a third party renter paid the mortgage for 12 months (November 2005 through October 2006). Those payments are appropriately allocated to both parties for a total of 48 months of joint payments. Ms. Peterschick then paid the mortgage by herself for the remaining 60 months. Mr. Duncan would be entitled to one-half of only the joint payments, or 24 months' worth of mortgage payments, which amounts to 22.2 percent of 108 payments.[2] If we then

[2] Similarly, if one assumes equity is earned equally per month, the same result would be reached. While that is not the reality of a declining balance mortgage where equity is gained slowly at first and faster in later payments, it is a fair assumption to make considering that equity was also being created by appreciation of the property's value.

multiply 22.2 percent and the equity existing at the time of trial ($69,219), Mr. Duncan's ownership interest would be $15,366.62.

At first blush, then, it appears the trial court mistakenly concluded that Mr. Duncan's ownership interest is 28 percent. But our example does not consider the money the parties paid in closing costs. Closing costs are important because they allowed the parties to enter this venture, and the trial court attempted to recognize the importance of closing costs in its formula.[3] If we add Mr. Duncan's share of the closing costs ($2,418.75) to his $15,366.62 interest, the sum is $17,785.37, a total within the ballpark of the trial court's adjusted award of $18,997.56.

This brings us back to the controlling principle here that the trial court has great discretion to divide and assign value to property. The trial court's formula and the example here are two ways to reach the same end. Other formulas are undoubtedly possible and proper. But Ms. Peterschick's preferred formula of disregarding the closing costs and comparing the equity when Mr. Duncan stopped paying with the total equity at partition overstates the value of the later mortgage payments. The court combined two elements that probably should have remained separate in its effort to account for the accumulated equity and the money paid for closing costs; however, we cannot say that

[3] It also is a debatable proposition, left to the considered discretion of the trial court, whether the closing costs needed to be returned to the parties or not.

the trial court's approach was untenable. And the interests here are best served by a final resolution of this dispute. *In re Marriage of Landry*, 103 Wn.2d 807, 809-10, 699 P.2d 214 (1985).

Modification of Unchallenged Rulings on Payment Dates

Ms. Peterschick next contends the trial court violated the law of the case doctrine by changing its decision on interest and payment terms. We review conclusions of law de novo. *Soltero v. Wimer*, 159 Wn.2d 428, 433, 150 P.3d 552 (2007).

The trial court originally ordered that Ms. Peterschick pay Mr. Duncan's judgment in full within eight months of the entry of judgment. It determined that interest would begin to accrue four months after the entry of judgment at a rate of 6 percent per annum.

On remand, the trial court ordered that Ms. Peterschick pay Mr. Duncan's judgment in full within four months of the entry of judgment, during which time interest would accrue at a rate of 6 percent per annum:

> Plaintiff, Christopher A. Duncan, a single man, is entitled to a judgment lien against the East 37th Avenue property in the amount of $18,997.56 together with interest at the rate of six percent (6%) per annum from the date of judgment. Said lien represents a fair and equitable division of the interest of the parties.
>
> The lien shall be paid in full within four months, during which time equity requires interest accrue given the extended period of time this matter has been in litigation, or be subject to real estate mortgage foreclosure as an equitable lien and to include the payment of reasonable attorney fees and costs.

CP at 92 (Conclusions of Law 4 and 5).

Ms. Peterschick argues that the trial court could not adjust the payment and interest terms on remand because the parties did not challenge the terms in the first appeal and because the original findings became the law of the case. But again the law of the case doctrine only prohibits trial courts from revisiting issues that were *actually decided on appeal*. *Lutheran Day Care*, 119 Wn.2d at 113; *Fluke Capital*, 106 Wn.2d at 620. A trial court, then, is *not* bound on remand by findings, conclusions, or rulings not dealt with in the first appeal. Other jurisdictions have held the same. *Hulihee v. Heirs of Hueu (K)*, 57 Haw. 387, 388-89, 556 P.2d 920 (1976); *accord Hutchins v. State*, 100 Idaho 661, 666, 603 P.2d 995 (1979) (quoting *Hulihee*, 57 Haw. 387, and citing 5 Am. Jur. 2d *Appeal & Error* §§ 955-56 (1962); 5B C.J.S., *Appeal & Error* § 1964(c)(1) (1958)).

The trial court did not err by reviewing and revising the interest and payment terms on remand.

Findings on Remand

Ms. Peterschick next contends generally that the record does not support findings of fact IX, XI, XII, XIII, XIV, and XV entered on remand on June 9, 2009. Her contention appears to be based on two incorrect assumptions: (1) that the trial court cannot adopt findings and conclusions proposed by a party who produces no evidence on remand, and (2) that the record now consists of only the unchallenged findings and conclusions entered before the first appeal

and the evidence Ms. Peterschick offered on remand.

First, it does not matter whose proposed findings and conclusions the trial court ultimately adopts on remand as long as evidence from the entire record supports the findings of fact and the findings of fact support the conclusions of law. *Willener v. Sweeting*, 107 Wn.2d 388, 393, 730 P.2d 45 (1986). And, second, the record in this case includes all the evidence produced by the parties, before and after the remand. It is true that unchallenged findings are verities on appeal. *Cowiche Canyon*, 118 Wn.2d at 808. That rule of law, however, does not limit this court's standard of reviewing the entire record for substantial evidence in support of challenged findings. *In re Marriage of Burrill*, 113 Wn. App. 863, 868, 56 P.3d 993 (2002). We will not overturn a finding that is supported by substantial evidence even if other evidence may contradict it. *Id.*

Having reviewed the record for this appeal and the report of proceedings and exhibit 103 from the first appeal, we are satisfied that substantial evidence from the entire record supports findings of fact IX and XI-XV. Specifically, unchallenged finding of fact 12 and exhibits 103 and 202 support findings of fact IX and XI, exhibit 201 and unchallenged finding of fact 12 support finding of fact XII, unchallenged findings 18 and 19 support finding of fact XIII, unchallenged findings 20 and 22 support finding of fact XIV, and unchallenged finding of fact 5 supports finding of fact XV.

Attorney Fees

Ms. Peterschick requests statutory

attorney fees and costs in her reply brief. An attorney fee and cost request must be made in a party's opening brief. RAP 18.1(b). We, therefore, deny Ms. Peterschick's request because it is untimely.

We affirm the decision of the trial court, and we deny fees and costs on appeal.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Sweeney, J.

WE CONCUR:

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Brown, A.C.J.

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Korsmo, J.