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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

KELLY JOHNSON,

Plaintiff and Respondent,

v.

BOB GRAYSON,

Defendant and Appellant.

G044975

(Super. Ct. No. 04CC07117)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Robert J. Moss, Judge. Affirmed in part and reversed and remanded in part.

Buchalter Nemer, Harry W.R. Chamberlain II, Robert M. Dato; Chavos & Rau, Laurie D. Rau and Anthony G. Chavos for Defendant and Appellant.

Law Offices of John B. Taylor and John B. Taylor for Plaintiff and Respondent.

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Defendant Bob Grayson appeals from the judgment in favor of plaintiff Kelly Johnson in her quiet title and slander of title action. He contends the record does not support the quiet title decree or the elements for slander of title. Additionally, he challenges the award of attorney fees on the grounds the tort of another doctrine does not apply and plaintiff failed to differentiate between recoverable and unrecoverable fees. He also argues the award of inconvenience damages has no legal basis.

Although we conclude plaintiff is entitled to recover reasonable attorney fees and legal expenses, we reverse the award in this regard and remand the matter to the trial court to redetermine the appropriate amount to which plaintiff is entitled in a manner consistent with the views expressed in this opinion. In all other respects, we affirm the judgment.

In her respondent's brief, plaintiff requests attorney fees on appeal. We deny the request.

## FACTS AND PROCEDURAL BACKGROUND

Married in 1978, plaintiff and former husband Richard Kelter operated a business together in which they acquired parcels of property and cleared titles in order to build residential homes. They had business dealings with Thomas Sullivan, another real estate developer, until his death in 2001 and also worked with defendant and his company, Grayson Services, a family-owned business providing oil and gas well services operated by defendant, his wife, and their son and daughter. Defendant and Kelter were longtime friends and defendant did business with the Kelters during their marriage.

In 1997 or 1998, Kelter began trying to consolidate title to two lots (Lots 2 and 4) and acquire clear title for the purpose of developing homes. After obtaining approximately 70 percent of the record title to both lots, the Kelters sued Robert and Beverly Vigue to remove the toxic contamination on the property caused by their

operation of oil wells, resulting in a settlement requiring the Vignes to pay for the cleanup. The Vignes hired defendant's company to perform the work, in partial compensation for which they assigned their interests in an oil lease on the property to "Robert W. Grayson" in May 2001.

Kelter filed for divorce in 1999. He continued acquiring title interests in the two lots and hired attorney Jeffery Bloom to assist him. Bloom prepared only two deeds in Kelter's favor but at least a dozen deeds naming Sullivan or defendant as the grantee. The deeds were paid for by Kelter and delivered to him. When Sullivan died, his interests were transferred into defendant's name. Defendant testified he did not know about the deeds prepared in his name by Bloom and did not see them until after plaintiff sued him.

In May 2001 a stipulated judgment of dissolution awarded plaintiff the community interest in Lot 2 (61.9 percent) as her sole and separate property; Kelter received Lot 4. Plaintiff later discovered defendant held an ownership interest in Lot 2. She entered into a settlement with Kelter in which he agreed to try to obtain a quitclaim deed from defendant to plaintiff transferring any interest he had in Lot 2. If Kelter was unable to do so, the settlement could be rescinded.

On September 6, 2002, defendant signed a quitclaim deed disclaiming interest in Lot 2 to plaintiff as a personal favor to Kelter. The original deed was later lost and defendant refused to sign a replacement deed because he did not like plaintiff or think she had been a good wife.

In mid-2003, Devin Dwyer, a neighbor who in 2002 had bought Kelter's interest in Lot 4, approached defendant about acquiring his interest in Lot 2. Dwyer's attorney, Doug Mahaffey, who had also previously represented defendant and the Kelters' businesses, advised him he could obtain up to a 25 percent "clear" interest in Lot 2 from defendant. Defendant accepted a \$30,000 offer from Dwyer and on July 17, 2003 signed a quitclaim deed in favor of Dwyer's company, DDD Enterprises (DDD), stating

it was without representation or warranties “as to the exact amount of [the] undivided interest” held. The deed was recorded the next month. Dwyer then approached plaintiff and proposed she buy DDD’s interest in Lot 2 for \$100,000.

Plaintiff sued defendant and DDD, among others, alleging causes of action for quiet title, partition, and declaratory relief. She later amended her complaint to add unjust enrichment and slander of title claims, as well as filing a supplemental complaint concerning her quiet title action. The court granted her motion to disqualify Mahaffey from representing defendant.

Dwyer and his company, cross-complained against plaintiff, defendant, and Mahaffey seeking damages, to quiet title, and other relief. The cross-complaint settled, with Mahaffey refunding the \$30,000 purchase price to Dwyer plus \$15,000 in partial payment of his attorney fees. Plaintiff was dismissed as a cross-defendant and DDD quitclaimed its interest in Lot 2 back to defendant. The deed was recorded in September 2007.

Trial in this action was bifurcated on liability and damages. In July 2009, the court granted judgment to plaintiff on her quiet title and slander of title claims. After the damages phase of the trial in September 2010, the court awarded plaintiff almost \$430,000 in compensatory damages, consisting of approximately \$330,000 for legal expenses in removing the cloud on title and \$100,000 for “inconvenience” damages.

The court signed an amended statement of decision finding, as relevant, the September 6, 2002 quitclaim deed transferred any title defendant had as of that date to plaintiff, defendant admitted he did not thereafter acquire any other interest in Lot 2 and knew all of his interest had been transferred when he placed a cloud on plaintiff’s title by, among other things, issuing the quitclaim deed to DDD, and that he acted with malice by intending to cause plaintiff harm. Following entry of judgment, defendant moved for a new trial on grounds of insufficiency of the evidence and excessive damages. The court denied the motion.

## DISCUSSION

### 1. *Quiet Title Decree*

Defendant first challenges the court's judgment quieting title in plaintiff's favor. He is correct a de novo standard of review applies to legal questions presented when a trial court interprets deeds and written agreements (see *City of Manhattan Beach v. Superior Court* (1996) 13 Cal.4th 232, 238), but we review findings of fact for substantial evidence (see *Blackmore v. Powell* (2007) 150 Cal.App.4th 1593, 1598, fn. 2). His claims lack merit under these standards.

Defendant contends plaintiff did not "prove 100% fee title" as of September 6, 2002. But he cites no authority requiring that in order to maintain a quiet title action. The cases on which he relies, *Pacific States Savings & Loan Co. v. Warden* (1941) 18 Cal.2d 757, 760 and *Wagner v. Worrell* (1941) 76 Cal.App.2d 172, 180, merely state the general proposition a plaintiff in a quiet title action must have some interest in the property at issue. And contrary to his contention, "[a] quiet title action may be brought where the plaintiff alleges less than a fee interest in the estate . . . . [Citations.]" (*Golden West Baseball Co. v. City of Anaheim* (1994) 25 Cal.App.4th 11, 50; see also 5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 654, pp. 80-81 [quiet title action "available to establish any kind of title or interest, legal or equitable, in real . . . property" and "lies to clear the title against any kind of adverse claim"].)

Here, defendant acknowledges plaintiff had an approximately 69.1 percent interest in Lot 2 as of the date he signed the original quitclaim deed and all of her complaints asserted a record title of 75 percent fee title interest. His own expert, Fred Rappleye, confirmed plaintiff held a "75.55558" percent interest in the record title to Lot 2. Plaintiff's title was thus sufficient for her to maintain the action.

Defendant argues the evidence does not support the court's determination he acquired no interest in Lot 2 after September 6, 2002. The record shows otherwise. Defendant himself testified he acquired his interest in Lot 2 from Sullivan in 2001 and did not receive any other deeds to, nor have any interest in, Lot 2 after he quitclaimed it to plaintiff. Additionally, all of the deeds prepared by Bloom naming Sullivan or defendant as grantee from potential interest holders dated from 1999 to 2001.

Defendant claims the deeds prepared in his name did not transfer any interest at that time because he was not part of and did not know about them until around 2006. He relies on Civil Code section 1054, which states "[a] grant takes effect, so as to vest the interest intended to be transferred, only upon its delivery by the grantor." But constructive delivery may occur "[w]here [a deed] is delivered to a stranger for the benefit of the grantee, and his assent is shown, or may be presumed." (Civ. Code, § 1059, subd. 2.) And a beneficial gift is deemed accepted, even if the grantee does not know of or consent to it, when first handed over to a third party for delivery to the grantee. (*Yamaha Corp. of America v. State Bd. of Equalization* (1999) 73 Cal.App.4th 338, 359; *Neely v. Buster* (1920) 50 Cal.App. 695, 700 [beneficial deed imposing no burdens on grantee is presumed accepted as of date of delivery to third party for grantee's benefit].) The presumption applies here, as the deeds were beneficial gifts to defendant, having been paid for, delivered to, and held by Kelter, for whom Bloom worked. Defendant does not argue otherwise.

Defendant maintains undelivered deeds from three estates (Baumgardner, Garvey and Sellers) would not have transferred title to him until they were delivered and recorded, or those interests were adjudicated in the quiet title actions he filed in 2007. But he concedes in his reply brief no valid transfer of interest resulted from the quiet title actions because court-approved personal representatives were not available to bind the estates and decedent co-owners.

Defendant also asserts the “Robert W. Grayson” to whom the Vignes assigned their oil lease on Lot 2 in May 2001 was his son, Robert, Jr., and the lease was later reassigned to defendant in early 2003, before he received Dwyer’s offer. Although defendant testified he and his son prepared a deed transferring rights to defendant, that deed was not presented at trial and he did not have a copy of it. “[F]ailure to back up [an] assertion with hard evidence . . . provide[s] . . . a rational basis” for a trier of fact to “reject even uncontradicted testimony” (*Bardis v. Oates* (2004) 119 Cal.App.4th 1, 12) and here defendant’s testimony was controverted by other evidence. The 2003 deed in the record has no attachments despite a reference to “exhibit ‘A,’” whereas the 2007 deed from DDD to defendant attached the assignment from the Vignes as an exhibit showing it was notarized on May 10, 2001. Moreover, at the time he gave his deposition, Mahaffey believed defendant “actually got the lease from [Mr.] Vigue.” These facts support the court’s findings defendant acquired no other interest in Lot 2 after September 6, 2002.

## 2. *Slander of Title Judgment*

“The elements of the tort [of slander of title] . . . have traditionally been held to be publication, falsity, absence of privilege, and disparagement of another’s land which is relied upon by a third party and which results in a pecuniary loss.” (*Appel v. Burman* (1984) 159 Cal.App.3d 1209, 1214.) Defendant argues these factors were not established. We disagree.

### *a. Publication, Falsity, and Disparagement of Title*

Defendant contends he did not disparage plaintiff’s title because he had no legal obligation to sign the original gratuitous 2002 deed and thus did not have to sign a replacement deed. He cites a letter from Kelter’s attorney, Rick Edwards, who drafted the divorce settlement, in which Edwards states his belief defendant might sign a duplicate quitclaim deed given the alternative of a lawsuit, but that “[o]f course, he has

no obligation to sign anything, as I understand it.” But defendant *did* sign the original deed, transferring all interest in Lot 2 to plaintiff. By issuing the second quitclaim deed to DDD, he then falsely published “to all the world” (*Seeley v. Seymour* (1987) 190 Cal.App.3d 844, 859 (*Seeley*)) that he still had an interest in Lot 2, thereby disparaging plaintiff’s title.

We reject defendant’s claim plaintiff’s purported admission in her trial brief on liability that he “probably did not hold any interest in Lot 2” demonstrates no slander of title occurred. *Seeley*, cited by defendant, dismissed a similar argument that an invalid document “was legally insufficient to create a ‘cloud on title’ and consequently incapable of giving rise to an actionable tort.” (*Seeley, supra*, 190 Cal.App.3d at p. 857.) Even “a publication of no real legal consequence” (*id.* at p. 858) or one that “create[s] no interest in the property” may be the basis for a slander of title action if a third party might reasonably understand it as an announcement that a defendant was claiming an interest in the property (*id.* at p. 859). Such is the case here.

Defendant asserts plaintiff also could have avoided this litigation by returning to family court to prove the lost deed’s contents. That plaintiff “could have” done so under defendant’s cited authorities does not mean she was legally required to do so. Defendant’s failure to identify any authority mandating the matter be resolved in family court forfeits the issue. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785.)

*b. Absence of Privilege*

For slander of title purposes, malice may be actual or implied (*Gudger v. Manton* (1943) 21 Cal.2d 537, 544, disapproved on another ground in *Albertson v. Raboff* (1956) 46 Cal.2d 375, 381) and will be implied when the circumstances are deemed in law to show a lack of privilege or good faith (*ibid.*). That is the case here.

Defendant claims he was entitled to rely on the advice of counsel, specifically naming Mahaffey, and thus acted in good faith. But although Mahaffey had previously represented defendant, he was representing Dwyer at the time defendant executed the quitclaim deed to DDD. Additionally, defendant provides no evidence he relied on an attorney's advice. To the contrary, when asked why he refused to give plaintiff a replacement quitclaim deed and instead executed a quitclaim deed to DDD, he responded, not that he relied on counsel's advice, but because he "didn't like" plaintiff. "It is futile for defendant to argue that good faith reliance on the advice of counsel is a defense, [where] the record shows no such advice." (*MacDonald v. Joslyn* (1969) 275 Cal.App.2d 282, 292, fn. omitted.)

Defendant also argues a conditional privilege applies to his acceptance of Dwyer's offer because he was "entitled to quitclaim" whatever interest he had "without warranty." The problem is substantial evidence supports the court finding he had no interest in Lot 2 at the time he signed the quitclaim deed to DDD. Failure to cite supporting authority for how that constitutes a conditional privilege forfeits the issue. (*Badie v. Bank of America, supra*, 67 Cal.App.4th at pp. 784-785.)

Substantial evidence supports the court's findings defendant acted maliciously and without privilege in issuing the quitclaim deed to DDD. In light of that, it is unnecessary to discuss defendant's assertions the absolute litigation privilege attaches to the quitclaim deed from DDD back to defendant and to his three quiet title actions.

*c. Sufficiency of Plaintiff's Title*

Defendant contends "[t]itle cannot be slandered if it is not marketable" and plaintiff's title was neither marketable nor insurable as of September 2002 because the most she held was 75 percent of the record title. We are not persuaded.

A slander of title plaintiff need only “show[] title *or* interest in the property.” (*Edwards v. Burris* (1882) 60 Cal. 157, 161; see also *Truck Ins. Exchange v. Bennett* (1997) 53 Cal.App.4th 75, 85, fn. 3; *Davis v Wood* (1943) 61 Cal.App.2d 788, 793-794 [leasehold interest sufficient to assert slander of title].) Plaintiff here alleged “the invasion of a[] legally protected interest.” (Cf. *Broadway Fed. etc. Loan Assoc. v. Howard* (1955) 133 Cal.App.2d 382, 401 [affirming dismissal of slander of title cross-complaint that “not only fails to allege the invasion of any legally protected interest . . . , but inferentially even negatives such an implication”].)

Defendant’s reliance on *Howard v. Schaniel* (1980) 113 Cal.App.3d 256 is misplaced. That case held only that an “adverse [possession] title alone . . . is not enough to found a slander of title tort” and is “not . . . marketable . . . until the title is established by judicial proceedings against the record owner [citation].” (*Id.* at pp. 264, 265.) As defendant acknowledges, plaintiff did not obtain her 75 percent record title by adverse possession.

None of the cases cited by defendant require 100 percent marketable title in order to maintain a slander of title action. *Howard* does not so hold. *Mertens v. Berendsen* (1931) 213 Cal. 111 involved an action to rescind a contract for the sale of real estate and the issue was whether an encroachment affected the marketability of the title sufficiently to allow the plaintiff to rescind the contract. (*Id.* at p. 114.) *Mertens* does not address slander of title; neither do *Hocking v. Title Ins. & Trust Co.* (1951) 37 Cal.2d 644 [action on title insurance policy], *Parkmerced Co. v. City and County of San Francisco* (1983) 149 Cal.App.3d 1091 [lawsuit against city and county for refund of real property taxes paid under protest], nor *Solomon v. Walton* (1952) 109 Cal.App.2d 381 [quiet title action]. “‘It is axiomatic that cases are not authority for propositions not considered.’ [Citation.]” (*Baeza v. Superior Court* (2011) 201 Cal.App.4th 1214, 1228.)

*d. Reliance and Pecuniary Loss*

Defendant argues plaintiff failed to show reliance resulting in actionable damages because “the ‘weight of authority’ in California disallow[s] . . . speculative damages claims” ““for impairment of vendibility without showing that the loss was caused by prevention of a particular sale.”” On the contrary, the treatise he cites, 5 Miller & Starr California Real Estate (3d ed. 2009) § 11:48, states “the weight of authority makes it clear that the owner *can* recover damages without proving that he or she lost a prospective lender, purchaser, or lessee as a result of the disparagement.” (Italics added, fn. omitted; see also *Hill v. Allan* (1968) 259 Cal.App.2d 470, 489 [“not necessary to show that a particular pending deal was hampered or prevented”].) The question is whether it is reasonably foreseeable a purchaser or lessee would alter his or her conduct based on the disparagement. (*Seeley, supra*, 190 Cal.App.3d at pp. 858-859.) Defendant raises no challenge to the court’s resolution of this factual issue against him.

Nor is the absence of evidence of actual depreciation or pecuniary loss resulting from the impairment of vendibility fatal to the cause of action. As defendant acknowledges, a slander of title plaintiff’s damages may include “(1) the expense of legal proceedings necessary to remove the doubt cast by the disparagement, (2) financial loss resulting from the impairment of vendibility of the property, and (3) general damages for the time and inconvenience suffered by plaintiff in removing the doubt cast upon his property. [Citations.]” (*Seeley, supra*, 190 Cal.App.3d. at p. 865.) *Seeley* remanded the case for a new trial on damages after concluding the plaintiff “did not prove that he suffered any financial loss from ‘impaired vendibility’ of the property” (*ibid.*) but nevertheless was entitled to “inconvenience” damages that were not duplicative of other damages and attorney fees incurred to remove doubt cast by the disparagement. (*Id.* at pp. 865-866, 869; see also *Sumner Hill Homeowners’ Assn., Inc. v. Rio Mesa Holdings, LLC* (2012) 205 Cal.App.4th 999, 1031 [rejecting claim “a plaintiff must always show specific harm to vendibility, such as through proof of a lost sale or diminished value” and

holding “at least in cases such as this one where title was disparaged in a *recorded* instrument, attorney fees and costs necessary to clear title or remove the doubt cast on it by defendant’s falsehood are, by themselves, sufficient pecuniary damages for purposes of a cause of action for slander of title”].) Similarly here, the court did not award damages for financial loss caused by the property’s impairment of vendibility, but concluded plaintiff was entitled to attorney fees and inconvenience damages.

### 3. *Legal Fees and Expenses*

Defendant contends the tort of another doctrine does not authorize the approximately \$330,000 in attorney fees because this is not an action against a fiduciary for a tort requiring the bringing or defending of an action to protect interests or rights. He overlooks the fact the doctrine has also been applied to slander of title cases to award attorney fees incurred to clear title to property. (*Glass v. Gulf Oil Corp.* (1970) 12 Cal.App.3d 412, 438; cf. *Contra Costa County Title Co. v. Waloff* (1960) 184 Cal.App.2d 59, 68 [allowing fees by analogizing slander of title to malicious prosecution actions].)

Regardless of the theory, defendant acknowledges legal fees and costs are compensable, but claims they are not recoverable for prosecuting the slander of title action itself. According to defendant, plaintiff failed to differentiate between those fees incurred to clear title as opposed to those incurred to prove slander of title, making the award excessive. We agree.

*Seeley* held the plaintiff was entitled to recover fees reasonably necessary to remove the cloud on the title but not those “incurred merely in pursuit of damages against . . . defendants” or “in negotiations with third parties over sale or lease of the property.” (*Seeley, supra*, 190 Cal.App.3d at pp. 865-866.) The plaintiff had submitted legal bills from four attorneys covering a two-year period “without any segregation as to the nature of the services.” (*Id.* at p. 866.) Only a quarter of the fees claimed were supported by an attorney’s verification they were “directly attributable to removing the

disparagement.” (*Ibid.*) For that and other reasons, *Seeley* reversed the damages award as being excessive as a matter of law and remanded for a new trial on damages. (*Id.* at pp. 866, 869.)

Plaintiff responds defendant forfeited this argument by not contesting the fee amount awarded in his new trial motion. The case she cites, however, holds only that the “[f]ailure to move for a new trial on the ground of excessive or inadequate damages precludes a challenge on appeal to the amount of damages if the challenge turns on the credibility of witnesses, conflicting evidence, or other factual questions. [Citations.]” (*County of Los Angeles v. Southern California Edison Co.* (2003) 112 Cal.App.4th 1108, 1121.) Defendant did not rely on such factors and this court reviews de novo the legal basis for an attorney fees award. (*Butler-Rupp v. Lourdeaux* (2007) 154 Cal.App.4th 918, 923.)

Here, as in *Seeley*, none of the billing statements submitted by plaintiff from her two attorneys as proof of litigation expenses distinguished between whether they were incurred to prosecute the slander of title claim or to remove the cloud on the title. Thus, plaintiff failed to demonstrate how much was “directly attributable to removing the disparagement.” (*Seeley, supra*, 190 Cal.App.3d at p. 866.)

We are not persuaded by plaintiff’s attempt to distinguish *Seeley* on the ground it involved a jury trial whereas *Spencer v. Harmon Enterprises, Inc.* (1965) 234 Cal.App.2d 614, 621 held that in a challenge to an attorney fees award after a slander of title bench trial, separate evidence is not needed “to establish the reasonable value of whatever should be justly awarded, the theory being that the trial judge is competent from his own knowledge of legal practice to fix the amount of the fees. [Citations.]” *Spencer* did not address the necessity of distinguishing between fees incurred to clear title versus those to prosecute the slander of title claim and is not authority for that unconsidered proposition.

Plaintiff acknowledges fees relating only to slander of title are inappropriate but contends they may be awarded for quieting title as part of a slander of title claim where both are alleged in the same lawsuit. (*Appel v. Burman, supra*, 159 Cal.App.3d at p. 1216; *Glass v. Gulf Oil Corp., supra*, 12 Cal.App.3d at pp. 437-438; *Contra Costa County Title Co. v. Waloff, supra*, 184 Cal.App.2d 67.) That fees may be recovered in the same action does not mean fees incurred to prove slander of title may also be recovered where, as here, plaintiff failed to demonstrate apportionment was impossible. She presented no argument or evidence, expert or otherwise, as to whether the legal fees and expenses could be apportioned between removing the cloud on title and slander of title.

In awarding fees, the court stated “plaintiff is entitled to recover the expense of legal proceedings to remove doubt cast on her title by the recorded disparagement,” but nevertheless awarded almost all of plaintiff’s requested fees and costs for the entire action. As it stands, the record is insufficient to determine whether the court’s award was based on a conscious determination it was “impracticable, if not impossible, to separate the attorney’s time into compensable and noncompensable units. [Citations.]” (*Bell v. Vista Unified School Dist.* (2000) 82 Cal.App.4th 672, 687.)

The court did note that defendant, by fighting “every issue tooth and nail,” engaging in an “inordinate number of discovery disputes” and filing numerous motions, “made what should have been a fairly simple dispute a protracted one.” Notwithstanding these statements, it remains unclear whether the court was aware legal fees and expenses are not recoverable for prosecuting the slander of title action itself. Although “apportionment of fees . . . rests within the sound discretion of the trial court” (*Bell v. Vista Unified School Dist., supra*, 82 Cal.App.4th at p. 687), to properly exercise that discretion ““all material facts and evidence must be both known and considered, together with legal principles essential to an informed, intelligent and just decision” [citations]’ [citation]” (*Wagner Farms, Inc. v. Modesto Irr. Dist.* (2006) 145 Cal.App.4th

765, 774). The court here did not have the necessary information because plaintiff never established the “issues [were] so interrelated that it would have been impossible to separate them into claims for which attorney fees are properly awarded and claims for which they are not . . . .” (*Akins v. Enterprise Rent-A-Car of San Francisco* (2000) 79 Cal.App.4th 1127, 1133.) Consequently, we reverse the award of legal fees and expenses and remand the matter to the trial court to make that determination.

#### 4. *Inconvenience Damages*

Defendant asserts no legal basis exists for the \$100,000 award for plaintiff’s inconvenience yet then cites *Seeley*, which held a court may award damages for “the time and inconvenience suffered by plaintiff in removing the doubt cast upon his property. [Citations.]” (*Seeley, supra*, 190 Cal.App.3d at p. 865; see also *Wright v. Rogers* (1959) 172 Cal.App.2d 349, 366-367.) Quoting *Trope v. Katz* (1995) 11 Cal.4th 274, 280, defendant maintains a party may not seek compensation for lost time and business opportunities. But *Trope* is inapposite as it involved attorney fees awardable under Civil Code section 1717 to an attorney litigating in propria persona, not inconvenience damages to a plaintiff in a slander of title action.

Defendant distinguishes *Wright* because it affirmed an inconvenience damages award significantly less than in this case. That may be but *Wright* was decided in 1959 and specifically held that where “[t]here is no express testimony of the amount of damage . . . [the character of inconvenience damages] is such that the trial judge could call on his general knowledge of their amount. [Citations.] ‘One whose wrongful conduct has rendered difficult the ascertainment of the damages cannot escape liability because the damages could not be measured with exactness.’ [Citations.]” (*Wright v. Rogers, supra*, 172 Cal.App.2d at p. 367.)

Likewise, here, the court in awarding inconvenience damages noted the “‘hundreds of hours’” plaintiff spent “‘researching title documents, appearing at court hearings and the like’” and her delay in “‘developing the property.’” As in *Wright*, the court then utilized its “‘general knowledge’” of the value of such harm to assess plaintiff’s inconvenience damages at \$100,000.

Defendant also notes *Seeley* reversed a \$70,000 award as excessive. But in *Seeley*, the jury awarded both inconvenience damages and an amount “to compensate [the plaintiff] for worry, disruption of his family life, etc.,” which the court held was “either duplicative of ‘time and inconvenience’ damages or indistinguishable from emotional distress damages; in either event they were nonrecoverable.” (*Seeley, supra*, 190 Cal.App.3d at p. 865.) No similar duplication of damages has been demonstrated in this case. Absent a showing the court abused its discretion, we will not disturb its assessment of damages. (*Zalk v. General Exploration Co.* (1980) 105 Cal.App.3d 786, 794.)

#### 5. *Issues Raised in Reply Brief*

Defendant assert a number of issues for the first time in the reply brief, including the court’s alleged failure to join necessary parties and require the plaintiff to obtain a title report (Code Civ. Proc., §§ 762.030, subd. (a), 762.040, subds. (a) & (b)). We do not discuss or consider these because defendant has not shown good cause for not raising them in his opening brief. (*In re Marriage of Ackerman* (2006) 146 Cal.App.4th 191, 214.)

#### 6. *Attorney Fees on Appeal*

Plaintiff requests attorney fees on appeal, arguing the cloud on her title remains while the case is on appeal. She analogizes this case to *Baron v. Fire Ins. Exchange* (2007) 154 Cal.App.4th 1184, 1198-1199, a bad faith denial of insurance benefits case allowing appellate attorney fees to be recovered as an element of tort

damages under *Brandt v. Superior Court* (1984) 37 Cal.3d 813, where they relate to an insured's continuing efforts to recover policy benefits. In doing so, *Baron* rejected the reasoning of *Burnaby v. Standard Fire Ins. Co.* (1995) 40 Cal.App.4th 787, which denied requests for attorney fees on appeal under *Brandt*. (*Baron v. Fire Ins. Exchange, supra*, 154 Cal.App.4th at pp. 1197-1198.) As part of its reasoning, *Burnaby* "note[d] that attorney[] fees incurred on appeal are not recoverable in any of the situations comparable to *Brandt*. We have searched in vain for a case in which attorney[] fees were awarded as an item of costs (or otherwise) on appeal when they were recovered at trial as damages and not pursuant to statute or contract. When fees are recovered at trial as an item of damages based upon the tort of another [citation], they are not recoverable on appeal." (*Burnaby v. Standard Fire Ins. Co., supra*, 40 Cal.App.4th at pp. 795-796, fns. & italics omitted.) As a specific example of this, *Burnaby* identified a quiet title action to clear a cloud on title. (*Id.* at p. 795, fn. 14.) It also pointed out fees are not recoverable on appeal when they are awarded at trial as an item of damages in false imprisonment and malicious prosecution cases. (*Id.* at pp. 795-796.)

*Burnaby's* distinction is persuasive. This is not a *Brandt* case and plaintiff has identified no authority allowing fees on appeal when they are awarded as damages in a quiet title or slander of title action. We decline to create such a rule and instead "follow the 'American rule,' which means everybody pays their own fees unless they agree otherwise or are entitled to claim the benefit of a statutory or judicially created exception. [Citation.]" (*Burnaby v. Standard Fire Ins. Co., supra*, 40 Cal.App.4th at p. 796.)

## DISPOSITION

We reverse that portion of the judgment awarding plaintiff \$329,346.17 for legal fees and expenses and remand the matter to the trial court to redetermine the amount to which plaintiff is entitled consistent with the views expressed in this opinion.

In all other respects, the judgment is affirmed. Plaintiff's request for attorney fees on appeal is denied. Plaintiff shall recover her costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

ARONSON, J.

IKOLA, J.