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No. 68803-1-I

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

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HELEN IMMELT and JUSTIN ELLWANGER,  
Respondents, and

JAY IMMELT,  
Plaintiff,

vs.

ROBERT BONNEVILLE and PATRICIA PROKOP,  
Appellants, and

THE ESTATE OF HANNA BONNEVILLE; SARA NICHOLS;  
EVERGREEN MANAGEMENT SERVICES LLC, and  
WASHINGTON APPRAISAL SERVICES, INC.,

Defendants.

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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE  
OF WASHINGTON FOR KING COUNTY

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BRIEF OF APPELLANTS BONNEVILLE AND PROKOP

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### **A. Assignments of Error**

1. The trial judge erred in finding that there was a violation of the Personality Rights Statute, RCW 63.60, by the unauthorized insertion of employee digital signatures on company real estate appraisal reports.
2. The trial judge erred in refusing to grant damages and attorney fees for the respondents' violation of RCW 4.28.328 because no evidence was submitted at trial before the court made its determination that there was no substantial justification for recording the numerous lis pendens.

### **B. Issues Pertaining to Assignments of Error**

1. Does the Washington Personality Rights Statute, RCW 63.60, encompass the wrongful insertion of an employee's digital signature on a real estate appraisal

report? (Assignment of Error 1).

2. Do written real estate appraisal reports constitute “goods, merchandise, or products entered into commerce in this state” as defined by RCW 63.60? (Assignment of Error 1).

3. Does the Lis Pendens Statute, RCW 4.28.320, require a party to demonstrate damages before an action shall be settled, discontinued or abated? (Assignment of Error 2).

4. Does the Lis Pendens Statute, RCW 4.28.320, require a party to demonstrate damages before a trial court makes a determination that there was no substantial justification for recording the lis pendens? (Assignment of Error 2).

5. Are Bonneville and Prokop entitled to their attorney fees and costs on appeal? (Assignment of Error 1).

### **C. Statement of the Case**

In the action below, the respondents Jay Immelt (the former attorney, now disbarred, and former employee of appellant Robert Bonneville's appraisal company) and his wife Helen Immelt (the former wife of Robert Bonneville and employee of Robert Bonneville's appraisal company), and Mrs. Immelt's son Justin Ellwanger (the son of Robert Bonneville and former employee of Robert Bonneville's appraisal company), claimed the defendants in the proceedings below, and each of them, prepared some 559 fraudulent appraisal reports bearing the plaintiffs' unauthorized digital signatures (CP 15, Finding of Fact 47), alleging the infringement of personality rights under RCW 63.60.060, conversion, criminal profiteering under RCW 9A.82.100, fraudulent transfers of real property under RCW 19.40,

civil conspiracy, and constructive trust or equitable lien on real properties, regarding which the respondents' caused notices of lis pendens to be recorded against 23 parcels of real property owned by the appellants and codefendants below. CP 11, Finding of Fact 14.

On September 2, 2011, the trial court entered its Findings of Fact, Conclusions of Law, and Order After Trial, modified by the court's Ruling and Order on Cross Motions for Reconsideration entered March 9, 2012, finding

1) no evidence to support any of the claims of Jay Immelt (CP 18, Finding of Fact 83),

2) no evidence for any of the claims of Helen Immelt or Justin Ellwanger against any of the defendants except for the two appellants Bonneville and Prokop (CP 18, Finding of Fact 83), and

3) insufficient evidence for any of the claims of Helen Immelt or Justin Ellwanger against Bonneville and Prokop except for violations of the Personality Rights Statute, RCW 63.60, by the insertion of 160 out of the 559 digital signatures on real estate appraisal reports alleged by respondents to have been unauthorized. CP 18, Finding of Fact 81 and 82. The court found “Ms. Prokop and Mr. Bonneville have used Plaintiffs’ signatures in products, *i.e.*, service reports, without permission.” CP 18, Finding of Fact 75. The trial court found there were no actual damages, so statutory damages of \$1,500 per violation were awarded. CP 19, Finding of Fact 6.

Regarding the lis pendens issue, the court specifically found “[p]laintiffs have not shown substantial justification for the recording of a lis pendens on any of the Defendants’ properties,” (CP 18, Finding of Fact 77),



and “[p]laintiffs did not prove justification for the recording of a lis pendens on any of the Defendants’ properties.” CP 19, Conclusion of Law 12. Thereafter, Bonneville and Prokop moved the trial court for an order cancelling the notices of lis pendens encumbering the real property and also for an award of damages and attorney fees. CP 51 - 57. In its Order Canceling, Vacating, Discharging, & Releasing Property From Lis Pendens and Awarding Damages entered April 19, 2012, the trial court cancelled the notices, but refused to grant attorney fees or damages, stated Bonneville and Prokop had not submitted sufficient proof of the fees and they had not presented evidence at trial of their damages.

#### **D. Legal Argument**

1. **Infringement of Personality Rights (RCW 63.60).** This is a case of first impression in that

no case law exists involving the infringement of personality rights through the use of a digital signature on appraisal reports. If this Court agrees with the trial court's decision, then all writings, reports, even pleadings filed with a court, become "goods, merchandise, or products entered into commerce in this state" and RCW 63.60 covers all conceivable cases involving the placement of an unauthorized signature, digital or otherwise.

The trial judge determined Bonneville and Prokop improperly inserted the digital signatures of Helen Immelt and Justin Ellwanger on 160 out of the 559 appraisal reports claimed to have been fraudulently signed. CP 17, Finding of Fact 71 and CP 18, Findings of Fact 81 and 82. It is the contention of the appellants that RCW 63.60 has no applicability to the facts of this case.

The respondents' appraisal reports are not "goods, merchandise, or products entered into commerce in this state." When a court examines a term in a statute, one looks for its meaning in the wording of the statute, the context in which the statute is found, and the entire statutory scheme.

The court's purpose in construing a statute is to ascertain and give effect to the intent and purpose of the Legislature. To determine legislative intent, we look first to the language of the statute. Undefined statutory terms are given their usual and ordinary meaning. Each provision of the statute should be read in relation to the other provisions, and the statute should be construed as a whole. In ascertaining the meaning of a particular word as used in a statute, a court must consider both the statute's subject matter and the context in which the word is used.

*Port of Seattle v. Dep't of Revenue*, 101 Wn. App. 106, 111, 112 (2000).

RCW 63.60 was enacted to broaden copyright and

trademark law, to allow a party to stop the unauthorized exploitation of his name or signature from being used to sell unlicensed merchandise, such as selling baseballs with the forged signature of Ken Griffey, Jr. or selling vodka with Jimi Hendrix's face and signature without license from his estate. *Experience Hendrix, LLC v. Electric Hendrix, LLC*, No. Co7-0338 TSZ (W.D. Wash 2007). The appraisal reports of Mrs. Immelt and Mr. Justin Ellwanger are not goods or products in commerce.

RCW 63.60.050 provides that any person who uses an individual's name or signature on or in goods, merchandise, or products entered into commerce in this state, without the consent of the owner of the right, has infringed such right.

The language of the statute clearly indicates the subject matter is baseballs and bottles, not written

reports:

The court may enjoin the use of all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such materials may be reproduced. As part of a final judgment or decree, the court may order the destruction or other reasonable disposition of all materials found to have been made or used in violation of the injured party's rights, and of all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such materials may be reproduced.

RCW 63.60.060(4). This statute should not be extended to include written reports within the definition of "goods, merchandise, or products entered into commerce in this state."

## **2. Lis Pendens.**

RCW 4.28.320 provides that a court may order the notice of lis pendens to be canceled of record at any time after the action shall be settled, discontinued or abated,

and such cancellation shall be evidenced by the recording of the court order.

RCW 4.28.328(3) provides

[u]nless the claimant establishes a substantial justification for filing the lis pendens, a claimant is liable to an aggrieved party who prevails in defense of the action in which the lis pendens was filed for actual damages caused by filing the lis pendens, and in the court's discretion, reasonable attorneys' fees and costs incurred in defending the action.

The trial court ruled “[p]laintiffs have not shown substantial justification for the recording of a lis pendens on any of the Defendants’ properties”(CP 18, Finding of Fact 77), and “[p]laintiffs did not prove justification for the recording of a lis pendens on any of the Defendants’ properties.” (CP 19, Conclusion of Law 12). Therefore, plaintiffs are liable to the defendants for their actual damages caused by filing the notices of lis pendens, and

in the court's discretion, reasonable attorneys' fees and costs incurred in defending the action.

As a direct and sole result of filing and recording of the lis pendens, Robert Bonneville was unable to obtain the refinancing need to stop several foreclosures of his property, CP 62 (Declaration of Kevin O'Brien at 2, ¶8) and CP 68 (Declaration of Robert Bonneville at 4, ¶9). This inability to obtain financing resulted in the foreclosure and sale of three properties of Mr. Bonneville. These foreclosures resulted in actual damages of \$633,622.85. CP 69 (Declaration of Bonneville at 5, line 18).

Additionally, Mr. Bonneville has incurred federal tax liability of \$778,498.91. CP 70 (Declaration of Bonneville at 6, lines 19-21).

### **3. Attorney Fees on Appeal**

Should this Court agree to reverse the lower court's determination of a violation of the Personality Rights Statute, Bonneville and Prokop are entitled to their costs and attorney fees. RCW 63.60.060(5) provides that the prevailing party may recover reasonable attorneys' fees, expenses, and court costs incurred in recovering any remedy or defending any claim brought under this section.

### **E. Conclusion**

Written appraisal reports do not constitute "goods, merchandise, or products entered into commerce in this state" under the Personality Rights Statute, RCW 63.60. It was erroneous to find any violation of that statute and the judgment based on that violation must be reversed.

Bonneville and Prokop request this Court to reverse



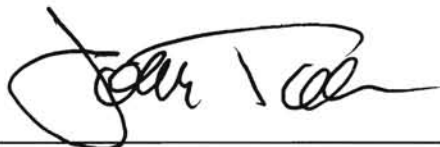
and vacate the lower court's Findings of Fact, Conclusions of Law, and Order After Trial, and the Judgments entered May 24, 2012 against Bonneville and Prokop, and direct the lower court to award appellants their costs and attorney fees.

The Lis Pendens Statute does not require the damaged party to prove damages before the court makes a determination that the filing party had no substantial justification to record the lis pendens. The statute itself specifically provides this determination of costs, damages, and award of attorney fees shall be made after the court has found the recording party did not carry his burden of establishing a substantial justification for filing the lis pendens.

Bonneville and Prokop request this Court to vacate the Order of the lower court and order a hearing to

determine the damages, costs, and attorney fees of the parties aggrieved by the wrongful recording of the lis pendens.

DATED: October 3, 2013.

A handwritten signature in black ink, appearing to read "Joe Tall", written over a horizontal line.

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