NO. 93552-1

SUPREME COURT OF THE STATE OF WASHINGTON

ROIL ENERGY, LLC, a Nevada Limited Liability Company, by and through the derivative claim of ALLAN HOLMS, a married man and a Washington resident; and ALLAN HOLMS, individually, a married man and a Washington resident,

Appellants,

v.

JOSEPH ("JAY") EDINGTON and JANE DOE EDINGTON, husband and wife and residents of Spokane County, Washington; TOLL RESERVE CONSORTIUM INC., a Nevada Corporation recently renamed as HOLMS ENERGY DEVELOPMENT CORPORATION, a Nevada Corporation; VAL and MARI HOLMS, husband and wife, and the marital community comprised thereof, residents of the State of Montana; HOLMS ENERGY, LLC, a Nevada Limited Liability Company; and BAKKEN RESOURCES, INC., a Nevada Corporation,

Respondents/Cross Appellants.

ANSWER OF RESPONDENTS/CROSS APPELLANTS TO PETITION FOR REVIEW FILED BY APPELLANTS ALLAN HOLMS AND ROIL ENERGY, LLC

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I. IDENTITY OF PARTIES FILING ANSWER

This Answer is filed on behalf of Respondents/Cross Appellants Val and Mari Holms; Holms Energy, LLC; and Bakken Resources, Inc., and on behalf of Respondent Toll Reserve Consortium, Inc., recently renamed as Holms Energy Development Corporation.

II. COUNTER STATEMENT OF ISSUE PRESENTED FOR REVIEW

Given that a dissenting opinion is not a decision of the Supreme Court and has no precedential authority, does Division III's failure to adopt a view expressed in a dissent by a Supreme Court Justice in 1953 place Division III's decision in the instant case "in conflict with a decision of the Supreme Court" as required by RAP 13.4(b)(1)?

III. COUNTER STATEMENT OF THE CASE

Petitioner Allan Holms' use of words such as blatant, greed, illegal, insidious and betrayal, by design, cast heat, but scant light upon the facts found by the trial court and affirmed by Division III.

The trial court found, and Division III agreed, that Allan Holms, his half brother Val Holms, and Jay Edington never came to an agreement upon the multiple terms for completion of a complex reverse merger using Val Holms's North Dakota mineral rights. Therefore there was never a contract formed and necessarily, no breach of contract. The trial court also

found, and Division III agreed, that Val Holms had the right to walk away from the discussions, which he did once he learned that not he, but his half brother Allan[1], would own a controlling interest in Val's mineral rights if the reverse merger under discussion were to be consummated.

Allan failed to establish that he suffered any damage or damages. He could not prove the 40/40/20 split he claimed at trial; or the 50/50 split he claimed on appeal; or the one-third each split he suggested in his February 26, 2010 email. EX-163. Allan was left asking the trial court to give him "something". RP 1456.

The Court of Appeals summed it up on page 28 of its Opinion, stating that there was "...overwhelming evidence that the parties never reached a definitive agreement and compelling testimony that the parties did not anticipate a binding agreement until the accomplishment of many tasks." And the court stated, "If the parties never reached an agreement, Allan was entitled to no profits." Court of Appeals Opinion at 38.

IV. ARGUMENT

A. Why Review Should Be Denied.

1. A Dissent Is Not a Decision of the Supreme Court.

Washington courts of appeals "...are bound to follow majority opinions of our Supreme Court". *In Re: Hoang Le*, 122

[1] No disrespect is intended by the use of first names.

Wn. App. 816, 820, 95 P.3d 1254 (2004). However, "Dissenting opinions are not binding upon [the Supreme Court]. *In Re: Domingo, et al*, 155 Wn.2d 356, 367, ¶30, 119 P.3d 816 (2005).

There is no dispute that "[a] majority opinion is settled law", even where there is a dissent. *State v. Brooks*, 157 Wn. App. 258, 265, ¶16, 236 P.3d 250 (2010). "But the meaning of a majority opinion is not found in a dissenting opinion." *Cole v. Harveyland, LLC*, 163 Wn. App. 199, 207, ¶16, 258 P.3d 70 (2011), citing *Roberts v. Dudley*, 140 Wn.2d 58, 75 n.13, 993 P.2d 901 (2000). "[T]he precedent which binds the court here is that spoken by the majority..., not the dissent." *Cole,* 163 Wn. App. at 207, ¶16.

2. There Is No Basis For Accepting Review.

Allan claims that Division III's opinion "conflicts with a decision of the Supreme Court or a published decision of the Court of Appeals." Petition at 10. However, the only Court of Appeals decision cited by Allan which addresses the "damages" issue is *Brummett v. Washington's Lottery*, 171 Wn. App. 664, 675 (2012). Petition at 12. The *Brummett* decision supports Division III's opinion. In fact, Division III cited and followed the *Brummett* decision. Court of Appeals Opinion at 42-43.

Therefore, only RAP 13.4(b)(1) is at issue, which rule provides that a petition for review will be accepted by the Supreme Court only:

> "If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court;"

The Petition for Review fails to provide the Supreme Court any basis for accepting review because the opinion rendered by Division III is not in conflict with any decision of the Supreme Court. A dissenting opinion in *Gilmartin v. Stevens Inv. Co.*, 43 Wn.2d 289, 261 P.2d 73 (1953), is not "a decision of the Supreme Court." It is the opinion of Justice Schwellenbach, the author of the dissent, but is neither settled law nor binding upon any appellate court of this state.

Allan claims that Washington Courts have long recognized the distinction between "damage" and "damages." Petition at 11. But none of the Supreme Court decisions Allan cites, except for the dissent in *Gilmartin*, draw any distinction between the terms damage and damages.

Petitioner's parsing of words and unsupportable claims that Division III's opinion was inconsistent with Supreme Court opinions, offers no reason why this case merits the attention of the Supreme Court. There is no significant point of law that must be decided or clarified by the Supreme Court. This petition fails to meet the criteria of RAP 13.4(b).

B. Petitioner Failed to Prove Damages – An Essential Element of Each Cause of Action.

Had Allan established at trial that he had suffered "damage", he then would need to prove the amount of his "damages". Allan presented no credible evidence upon which the trial court could award any dollar amount of "damages." There was no contract formed, so Allan's claim of 40% of a deal that was very different from the deal being discussed, was unsuccessful. His new theory on appeal to Division III of a 50/50 split with his brother Val had no success, as that court agreed with the trial court that there was no joint venture. And Allan presented no evidence whatsoever as to what dollar amount he thought he should receive as a facilitation value. In fact, when all was said and done, Allan's counsel asked the court to speculate on a damage amount and give Allan "something". RP 1456.

"...[T]he amount of damages is a question of fact." *Bunch v. Dept. of Youth Servs.*, 155 Wn.2d 165, 179 ¶24, 116 P3d 381 (2005). Division III noted that: "We review the trial court's decision regarding damages for abuse of discretion." Court of Appeals Opinion at 35. The trial court determined, after 8 days of trial, that Allan had failed to prove any amount of damages. Division III affirmed, finding no abuse of discretion.

Division III affirmed the trial court's conclusion that: "...it could not assess damages based on a benefit of the bargain..."; and further held that: "...the trial court was within its discretion in ruling that Allan failed to prove damages resulting from the fraud, conspiracy, breach of fiduciary duty, and oppression of minority interest." Court of Appeals Opinion at 36-37 and 39.

Had Division III reversed the trial court, as demanded by Allan in his Petition, then Allan would still be left with no monetary award due to lack of evidence of an amount of damages.

Allan attempts to draw a distinction between the *Brummett* decision, relied upon by Division III, and *Chiles v. Kail*, 34 Wn.2d 600, 208 P.2d 1198 (1949). Petition at 12. Allan claims Division III's opinion in the instant case is inconsistent with the ruling in *Chiles*, which described the ninth element of fraud as "consequent and proximate injury." *Chiles* at 605-06. Whether the ninth element of fraud is termed "damage"[2], "damages"[3], or "injury", one constant remains – Allan failed to prove by clear, cogent and convincing evidence that he suffered damage, damages or injury in any amount.

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[2] *Elcon Construction, Inc. v. Eastern Washington University*, 174 Wn2d 157, 166, ¶14, 273 P.3d 965 (2012).

[3] *Brummett v. Washington's Lottery*, 171 Wn. App. 664, 675, ¶20, 288 P.3d 48 (2012).

Allan asserts that Division III "ignored the distinction between 'damage' and 'damages'...". Petition at 12. To the contrary, Division III directly addressed the dissenting opinion in the *Gilmartin* case, and concluded: "Unfortunately for Allan, his citation of a dissenting opinion helps him none. Washington courts have never adopted Justice Schwellenbach's distinction, in his dissenting opinion in *Gilmartin*, between 'damage' and 'damages'." Court of Appeals Opinion at 44.

Further, Division III stated at p. 40 of its opinion that:

> Allan Holms emphasizes the trial court's finding of fact 28, in which the court, in part, found "'sufficient evidence of a direct loss suffered by Allan Holms.'" CP at 4438. From this finding, Allan argues that he must be granted some damages. Nevertheless, the finding was a precursor to the trial court allowing Allan to argue that he was entitled to recover damages for facilitating the contact between Jay Edington and Val Holms. In the end, Allan proved no facilitation damages."

C. Division III Correctly Reversed the Trial Court's Judgment for Civil Conspiracy.

A conspiracy itself is not actionable. *W.G. Platts, Inc. v. Platts*, 73 Wn2d 434, 439, 438 P.2d 867 (1968). There must be an act committed by one of the parties in pursuance of the agreement, which act is itself a tort. *W.G. Platts, Inc.*, 73 Wn.2d at 439, quoting W. Prosser, *Law of Torts*, § 43, p. 260 (3d ed. 1964).

There was neither an unlawful act, nor an unlawful purpose, when Val, once he learned of his brother Allan's plan to own a controlling interest in the minerals, terminated negotiations. The Trial court held, and Division III agreed, that Val had a right to do so.

In Conclusion of Law No. 18, the Trial court held:

> 18. Since no enforceable contract had been entered into between Allan Holms and Val Holms regarding the joint venture and/or reverse merger, Val Holms had the right to withdraw from the negotiations, and further had the right to develop his mineral interest by means of another transaction. CP 4436.

Division III agreed, stating that: "Val need not have defrauded Allan in order to terminate discussions with Allan regarding development of the mineral rights." Court of Appeals Opinion at 39.

Secondly, and just as important, an essential element of a conspiracy cause of action is proof of damages. *W.G. Platts, Inc.*, 73 Wn.2d at 438. "...[D]amage must result to the plaintiff or there is no cause of action [for conspiracy]." *Couie v. Local Union No. 1849*, 51 Wn.2d 108, 116, 316 P.2d 473 (1957). As succinctly stated by Division III, "Allan Holms failed to prove that he suffered any damages." Court of Appeals Opinion at 44.

D. Appellate Courts Are Not Bound to Follow a Jury Instruction Proposed by Professor DeWolf in Washington Practice.

"The pattern jury instructions. . .are not the law. . ." *In Re Domingo, et. al.*, 155 Wn.2d 356, 369, P35, 119 P.3d 816 (2005). Yet Allan cites a "sample jury instruction proposed by Professor DeWolf" as authority for his claim that Division III committed error when it reversed the trial court on Allan's claims for breach of fiduciary duty and oppression of minority interest. Petition at 14.

The fallacy of Allan's argument is shown by the Special Verdict Form that Professor DeWolf associates with his proposed jury instruction. The Special Verdict Form asks the jury if they find that the plaintiff has proved his claim for breach of fiduciary duty. If the answer is yes, then the jury must answer this question: "What do you find to be [plaintiff's] amount of damages?" Likewise, if the jury answers yes to the question whether plaintiff proved his claim for fraud, then the jury must answer this question: "...[What] is the amount of damages that are owed?" 29 DAVID K. DEWOLF, WASHINGTON PRACTICE: WASHINGTON ELEMENTS OF AN ACTION §12:14, at 388-89 (2015-16 ed.).

The suggestion that if the trier of fact found that a plaintiff has been injured, damages can be assessed in any amount without the necessity of proof, calls for pure speculation, which is the position Allan is championing.

Allan claimed he suffered damage but failed to prove the amount of damages he claimed. No semantical dissertation about the words damage and damages can rescue him from his failure to establish a contract, or a joint venture or any facilitation value.

V. CONCLUSION

In his Petition for Review, Allan Holms fails to meet the requirements of RAP 13.4(b)(1) or (2). Nor does he offer any other valid reason why the Supreme Court should accept review of this Division III opinion. Therefore, the undersigned respectfully requests that this Court deny the Petition for Review.

RESPECTFULLY SUBMITTED this 28th day of September, 2016.

FELTMAN, GEBHARDT, GREER & ZEIMANTZ, P.S.

BY: Frank J. Gebhardt

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28 day of September, 2016, I caused to be served a true and correct copy of the foregoing document on the following by the method indicated.

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Frank J. Gebhardt

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From: Angela Madrid [mailto:amadrid@fggzlaw.com]
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Subject: ROIL ENERGY, LLC and ALLAN HOLMS, et al, Appellants V. VAL & MARI HOLMS; HOLMS ENERGY, LLC; BAKKEN RESOURCES, LLC, et al, Respondents/Cross Appellants CASE NO. 93552-1

RE: ROIL ENERGY, LLC and ALLAN HOLMS, et al, Appellants V. VAL & MARI HOLMS; HOLMS ENERGY, LLC; BAKKEN RESOURCES, LLC, et al, Respondents/Cross Appellants
CASE NO. 93552-1

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Dear Clerk of the Court,

Please find attached for filing with the Supreme Court on today's date, the:

Answer of Respondents/Cross Appellants to Petition for Review Filed by Appellants Allan Holms and Roil Energy, LLC.

Filed on behalf of Frank J. Gebhardt, attorney for Respondents/Cross Appellants.

Mr. Gebhardt or I can be reached at the email or phone number listed herein should you have any questions or concerns.

Thank you in advance for your courtesies.

Sincerely,

Angela M. Madrid

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