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No. 68803-1-I

IN THE COURT OF APPEAL, DIVISION I
OF THE STATE OF WASHINGTON

HELEN IMMELT; JAY IMMELT; and
JUSTIN ELLWANGER,
Plaintiffs/Respondents,
vs.
ROBERT BONNEVILLE, AKA WILL
ELLWANGER, AKA WILHELM VAN
WANGER; HANNA BONNEVILLE AKA
JOHANNA ELLWANGER; SARA
NICHOLS; PATRICIA PROKOP;
EVERGREEN MANAGEMENT SERVICES
LLC, a Nevada limited liability company,
DBA APPRAISAL SERVICES; and
WASHINGTON APPRAISAL SERVICES, a
Nevada Corporation, DBA APPRAISAL
SERVICES,
Defendants/Appellants.

RESPONDENTS' BRIEF

Helen Immelt
Justin Ellwanger
Jay Immelt
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COUNTER STATEMENT OF ISSUES PRESENTED FOR REVIEW

1) Have appellants met their burden of providing an adequate record for review where there is a mixed question of law and fact regarding whether the particular appraisal reports at issue are "products" within the meaning of RCW 63.60.060 and appellants have failed to assign error to factual findings made by the trial court following a three week bench trial pertaining to that issue and have refused to provide a verbatim report of proceedings, a narrative report of proceedings or an agreed report of proceedings.

2) Have appellants met their burden of providing an adequate record for review where appellants in the case below counterclaimed against respondents for release of lis pendens, damages, attorney fees and costs, had the opportunity to present their counterclaim during the course of a three week bench trial but produced no evidence in support of their claim resulting in factual findings by the trial court that appellants produced no evidence to which findings, appellants failed to assign error and have additionally, refused to provide a verbatim report of proceedings, a narrative report of proceedings or an agreed report of proceedings.

COUNTER STATEMENT OF THE CASE

Following a three week bench trial, the Honorable Suzanne Barnett entered detailed findings of fact, conclusions of law and judgments in favor of plaintiffs Justin Ellwanger and Helen Immelt and against defendants Robert Bonneville aka Will Ellwanger aka Wilhelm Van Wanger and Patricia Prokop totaling approximately $289,581 for having forged plaintiffs' names to real estate appraisal reports[1] thus constituting

[1] Bonneville aka Ellwanger aka Van Wanger had been convicted of forgery and identity theft in 2009 for having forged yet another appraiser's signature to appraisal reports during the same time period as here involved (2004-2007). (CP 10-33; Finding of Fact 64.)

the unauthorized use of their names and signatures in violation of RCW 63.60.060. (CP 10-33; 140-145, Finding of Fact 75)

The trial court found as fact that *"Bonneville and his associates (Ms. Prokop, Ms. Nichols, and Ms. Woodward) had access to Mr. Ellwanger's and Ms. Immelt's digital signatures and applied these digital signatures to hundreds of appraisal reports submitted to appraisal management companies. Plaintiffs produced evidence of numerous reports bearing Landmark-style file numbers, identifying "significant assistance" by appraiser trainees with whom Plaintiffs had no working relationship, and records of payments for those reports to Landmark or other entities controlled by Mr. Bonneville or Ms. Prokop."* (CP 10-33; Finding of Fact 42).

The trial court found as fact that defendant Prokop and several of defendant Bonneville's employees *"created reports without the knowledge of, and without any assistance or input from plaintiffs... and affixed the digital signature of one of the plaintiffs, shifting all risks associated with the reports to the licensed appraiser whose digital signature she used."* (CP 10-33; Finding of Fact 65).

The trial court further found as fact that defendant *"Prokop changed the mailing and billing remittance address for Ms. Immelt with one of the appraisal management services. She informed the management*

company that Ms. Immelt no longer worked with her company, Evergreen Management, and directed that all future payments be sent to Ms. Prokop's Tacoma address. This change of address assured that Ms. Prokop or her colleagues would receive payment in full for reports bearing Ms. Immelt's digital signature, but completed without Ms. Immelt's knowledge or input." (CP 10-33; Finding of Fact 66).

The trial court found that *"Mr. Bonneville affixed or directed or condoned the affixing of the digital signatures of Ms. Immelt and Mr. Ellwanger, without authorization and consent, and without payment therefore."* (CP 10-33; Finding of Fact 71.)

The trial court made a specific finding of fact (#75) that appraisal reports were ***"products"*** within the meaning of RCW 63.60.060 and entered a conclusion of law that plaintiffs had met their burden of proving that defendants had infringed their rights under RCW 63.60.050, .060. (CP 10-33; Finding of Fact 75; Conclusion of Law 6.) The Court's findings and conclusions were not entered in a vacuum. Rather they were based upon substantial testimony by all parties during the course of the three week bench trial regarding the appraisal industry in general (Findings 20-32) and the parties' practice of that profession specifically (Findings 33-82) (CP 10-33).

Defendants counterclaimed against Plaintiffs for, among other things, improper filing of the lis pendens and prayed for release of the lis pendens, damages, costs and attorney fees. (CP 10-33; Finding of Fact 16.) Plaintiffs answered defendants' counterclaim and asserted affirmative defenses. (CP 10-33; Finding of Fact 17.) Much of defendants loosely asserted claims were dismissed at the commencement of trial having been previously dismissed by the Pierce County Superior Court in *Bonneville v. Immelt*, No. 08-2-09415-0. (CP 10-33; Finding of Fact 18.)

Having asserted their wrongful lis pendens claims as counterclaims, Defendants were afforded the opportunity to try those claims and present evidence during the course of the within trial but, for reasons known only to them, chose not to do so. The Court so found in a handwritten interlineation to her Order Vacating, Discharging and Releasing the aforementioned lis pendens filings wherein the court specifically finds that *"Defendants failed to prove attorney fees or costs. "Exhibit A" to the Tall declaration was not provided to the Court and defendants presented no evidence of damages at trial."* (CP 146; 155; 123-127). Again, defendants failed to assign error to these factual findings and provided no record from the trial court of the trial testimony whatsoever.

Defendants did not assign error to any of the Findings of Fact and did not produce the Verbatim Report of Proceedings pursuant to RAP 9.2, a Narrative Report of Proceedings pursuant to RAP 9.3 or an Agreed Report of Proceedings pursuant to RAP 9.4.[2]

ARGUMENT

1. Violation of RCW 63.60.050 By Forging Individual's Name and Signature to Appraisal Reports

RCW 63.60.050 provides protection to individuals for the unauthorized use of their name or signature on *"products" "entered into commerce in this state".*[3] The question presented for review consists of a

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[2] RAP 9.2 (b) requires a party to provide a verbatim report of proceedings necessary to present the issues on review including all evidence relevant to the disputed finding if a finding is alleged to not be supported by the evidence. RAP 10.3 (a)(3) requires that a party include a reference to the record "for each factual statement" included in the statement of the case and under section (g) requires a party to include a separate assignment of error for each finding a party contends was improperly made with reference to the finding by number and that the appellate court will only review claimed error in the assignment of errors.

In the present case, appellants provided virtually no citations to the record to support their factual statements and commenced their brief with a gratuitous slam of respondent Jay Immelt regarding the loss of his law license two decades previously. Appellants' counsel does not even feign any tangential relevance to the issues on appeal; the statement was included solely to besmirch all appellants in the eyes of the court. Coupled with the respondents' complete and utter failure to assign error to pertinent findings of fact, provide any appropriate citations to the record and provision of no report of proceeding for a three week bench trial -- verbatim, narrative or agreed – leads to but one conclusion, the within appeal is wholly without merit and this Court should *sua sponte* sanction respondent counsel for such egregious behavior.

[3] Note that appellants do not assign error to or request construction of the statute as to whether or not the within appraisal reports are *"entered into commerce in this state."* This failure, coupled with the failure to assign error to findings of fact pertaining to the *"product"* issue together with the complete failure to provide an adequate record of the three week bench trial provide more than ample reason for this court to find that

mixed question of law and fact as it requires the reviewing court, in the first instance, to determine, generically, what is a product within the meaning of the statute. Such is a question of law and is reviewed de novo. *Tingley v. Haisch*, 159 Wn.2d 652 (2007).

Where a statute does not define a term but the term has a well-accepted, ordinary meaning, a dictionary may be consulted to ascertain the terms' definition. *Tingley, supra.* In the present case, BusinessDictionary.com defines the term *product* as:

> A good, idea, method, information, object or service created as a result of a process and serves a need or satisfies a want.[4]

Having determined a generic framework for defining the term *product* as a question of law, it is then required that the court determine whether or not the specific facts of the current case fall within that framework. That determination is a question of fact.

In cases involving mixed questions of law and fact, reviewing courts determine the law independently and then apply it to the facts that

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appellants failed to meet their burden of providing an adequate record and the appeal should be dismissed *sua sponte*.

[4] http://www.businessdictionary.com/definition/product.html See, also *"What is a Product?"* https://boundless.com/marketing/products/what-is-a-product/what-is-a-product/ Note that industry wide including the federal government, appraisal reports are considered "products." *"Appraisal Products,"* http://www.fhapraiser.com/appraisal-products/products.htm *"Traditional Appraisal Products,"* http://www.fdicoig.gov/publications/evalreports/... See, *Tingley, supra*, re use of technical sources in order to define terms.

have been founded by the trier of fact, in this case, the trial court itself. *Dep't of Labor & Indus. v. Allen*, 100 Wn. App. 526, 530 (2000). Unchallenged findings of fact are verities on appeal. *Id.* at 530.

In the present case, appellants did not assign error to the findings of fact at all including Finding of Fact 75 which specifically held that appraisal reports were *products* within the gambit of the statute. By Court Rule and by case law, they have nothing to talk about as unchallenged findings are verities on appeal. **RAP** 9.2 (b), 10.3 (a)(5) and (g); *Allen, supra*. But there is more.

Not only did the appellants fail to assign error to the pertinent findings of fact, but they failed to provide any report of proceeding – verbatim, narrative or agreed – by which the reviewing court might make a determination as to whether the findings or decision were supported by the appropriate level of evidence. Appellants bear the burden of providing an adequate record for review. *Sime Construction v. WPPSS*, 28 Wn. App. 10 (1980); *Story v. Shelter Bay Company*, 52 Wn. App. 334 (1988). In *Sime*, the court held that since the appellant had failed to provide a report of proceedings, the analysis was confined to the trial court's findings which were unchallenged by appellant. The court went on to hold:

> On the basis of these unchallenged findings and without an adequate record to determine how the trial court arrived at these figures, we cannot say the trial court's decision was based upon opinion or discretion. Since WPPSS has the burden of providing an adequate record, but failed to do so, the decision must stand. (Citations omitted.)

Here, appellants willfully and intentionally refused to provide an adequate record by which the trial court's decision might be challenged. There was nothing inadvertent about this failure. Respondents brought this failure to the attention of the court by letter and appellants responded by filing a statement in lieu asserting that there was no need to provide a report of proceedings. Appellants have chosen their bed and should be required to lie in it to their detriment as there is no trial record, no factual evidence before this court to help this court determine what the "thing" in controversy is, let alone if it falls within the generic statutory framework as a "product" save for the unchallenged finding of the trial court or reference to industry technical data. The appeal of this issue should be dismissed for failing to provide an adequate record and failing to assign error to pertinent findings and, even if considered on the merit, is wholly without merit.

2. Appellants Failed to Produce Evidence at Trial Regarding Lis Pendens Damages; Failed to Assign Error to Pertinent Findings of Fact; and, Failed to Provide an Adequate Record for Review.

Appellants counterclaimed against respondents in the underlying case for release of lis pendens and sought damages, attorney fees and costs. (CP 10-33; Finding of Fact 16.) Respondents denied those claims and asserted affirmative defenses. (CP 10-33; Finding of Fact 17.) Much of defendants loosely asserted claims were dismissed at the commencement of trial having been previously dismissed by the Pierce County Superior Court in *Bonneville v. Immelt*, No. 08-2-09415-0. (CP 10-33; Finding of Fact 18.) Trial of the matter was had before the trial court for three weeks. During that time, appellants produced no evidence whatsoever in support of their claims. (CP 146; 155; 123-127). **Seven months after** the Court entered its Findings and Conclusions, appellants attempted to bootstrap into the case a claim for damages and attorney fees by way of self-serving and un-cross examined declarations, parts of which were not even provided to the Court.[5] (CP 58-95).

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[5] This case is similar to the posture of the case in *Engstrom v. Goodman*, 166 Wn. App. 905 (2012) wherein a party, as here, attempted to bootstrap declarations into the record after the underlying court had already made its decision.

In *Engstrom* the court held:

As with the previous issue, appellants assigned no error to the Court's finding of fact that appellants produced no evidence in support of their claim during trial when they had the opportunity and therefore, were not entitled to any relief other than release of the lis pendens. As with the previous issue, appellants have provided no record from which to challenge the trial court's decision. As with the previous issue, this court has no choice but to uphold the trial court's decision for lack of an adequate record and failure to assign error to findings of fact pursuant to *Sime* and *Story, supra.*

3. Attorney Fees on Appeal

Should this court uphold the judgments of the underlying court, RCW 63.60.060 (5) provides that the prevailing party may recover reasonable attorney fees, expenses and court costs incurred in recovering any remedy brought under the statute. As the failure to produce an adequate record is largely based upon the conduct of appellants' counsel, it would be wholly unfair to permit appellants to avoid the imposition of a

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"...a motion to strike is typically not necessary to point out evidence and issues a litigant believes this court should not consider. No one at the Court of Appeals goes through the record or the briefs with a stamp or scissors to prevent the judges who are hearing the case from seeing material deemed irrelevant or prejudicial. So long as there is an opportunity (as there was here) to include argument in the party's brief, the brief is the appropriate vehicle for pointing out allegedly extraneous materials--not a separate motion to strike. See *Cameron v. Murray*, 151 Wn. App. 646, 658, 214 P.3d 150 (2009), *review denied*, 168 Wn.2d 1018 (2010)." As in *Engstrom*, this court should not consider the bootstrap declarations of Bonneville, O'Brien and Tall.

penalty that would have been visited upon respondents solely because respondents have had to act as their own counsel. Moreover, providing respondents an award for attorney fees will ensure that pro se litigants are treated on an equal footing with their more well-heeled counterparts and provide for equal protection under the law for all parties. Therefore, respondents request that the Court award respondents reasonable attorney fees, costs and expenses to be based upon supplemental affidavit.

CONCLUSION

An entire nation was brought to its knees, fortunes lost, lives forever destroyed as a direct and proximate result of conduct such as that engaged in by appellants and found by the court to be matters of fact. Yet these appellants have the temerity to cry foul when caught and the rapacity to attempt avoidance of liability for a song. Appellants' conduct has been found wanting and there is no excuse or avoidance. Judgment day has arrived. The appeal should be dismissed outright and the trial court's judgments upheld.

Dated this 3rd day of November, 2013.

Helen Immelt

Justin Ellwanger

Jay Immelt

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the United States and 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 in the manner noted a copy of the following upon designated counsel:

Respondent's Brief

JOSEPH P. TALL 2611 NE 113th Street, Suite 300 Seattle, Wa. 98125-6700	[] Via U.S. Mail [] Via Fax: 206.440.0636 [] Via Hand Delivery [x] Via Email per CR 5 Agreement [] Via Pierce Co. Linx system
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DATED this 3rd day of November, 2013 at Snohomish, Washington.