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Court of Appeals
Division I
State of Washington

944351

NO.

COURT OF APPEALS NO. 74511-5-I

SUPREME COURT

OF THE STATE OF WASHINGTON

ALLYIS, INC.

Petitioner,

v.

SIMPLICITY CONSULTING INCORPORATED,

Respondent,

and

JEREMY AND NICOLE SCHRODER,

Defendants

PETITION FOR REVIEW

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I. INTRODUCTION

Few things are more fundamental to our system of justice than that judges sit as neutral referees of the disputes before them, and not as advocates for either side. In *State v. Studd*, 137 Wn.2d 533, 547, 973 P.2d 1049, 1055 (1999), this Court said that "we are not in the business of inventing unbriefed arguments for parties." Courts do not act as advocates for either party. However, that is precisely what occurred here.

Allyis, Inc. sued Simplicity Consulting, Inc. for unjust enrichment over the benefit that Simplicity obtained from a former employee's violation of a noncompete agreement. The essential legal question in this case is whether that claim was frivolous. Simplicity argued that unjust enrichment requires the plaintiff to prove "a benefit conferred on the defendant *by the plaintiff*." Allyis argued that the element is that the "benefit is at the plaintiff's expense."

Simplicity relied on the definition of unjust enrichment in *Black's Law Dictionary*, which this Court quoted in *Young v. Young*, 164 Wn.2d 477, 191 P.3d 1258 (2007). However, when the *Young* court stated the elements of unjust enrichment in its own words, it stated the element as: "the received benefit is at the plaintiff's expense." *Id.* at 484-85. When a defendant made the same argument to United States District Court Judge Robert Lasnik, he called it "misleading" and adopted the Supreme Court's wording. *Keithly v. Intelius Inc.*, 764 F. Supp.2d 1257 (W.D. Wash. 2011). King County Superior Court Judge Holly Hill, however, agreed with Simplicity and found Allyis' claim frivolous. She imposed $60,000 of

sanctions against petitioner Allyis and its counsel, Matthew Davis, for filing a frivolous action.

Allyis appealed to Division One of the Court of Appeals, and the assigned panel included two judges who had signed post-*Young* opinions stating the element as the "benefit is at the plaintiff's expense." *Norcon Builders, LLC v. GMP Homes VG, LLC*, 161 Wn.App. 474, 254 P.3d 835 (2011) (Judge Mary Kay Becker); *Puget Sound Sec. Patrol, Inc. v. Bates*, 197 Wn.App. 461, 389 P.3d 709 (2017) (Judge Marlin Appelwick). Judge Becker also authored two unpublished opinions while the appeal was pending that stated the element as the "benefit is at the plaintiff's expense." Appendix at A-26 and A-38 to A-39.

Moreover, *Puget Sound* was a case asserting an unjust enrichment claim against the wife of a former employee, and the court ruled that the claim at least arguably satisfied the benefit element. In this case, however, Judge Appelwick authored an opinion holding that Allyis' claim was frivolous because "Allyis had to show that it conferred a benefit on Simplicity." Opinion at 11.

Incredibly, the month after authoring the opinion in this case, Judge Appelwick wrote the opinion in another case, *Dutcher v. Holman* (Appendix A-40 to A-46), where he again stated the element as the "benefit is at the plaintiff's expense" despite his ruling in this case that this wording is frivolous. Appendix A-41.

Nothing about this case is or ever was frivolous. The unjust enrichment claim had both factual and legal merit. The remaining claims have never been tested or examined because Simplicity never presented

evidence or argument about them, and the trial court could not make findings about them because it had no evidence to consider. The Court of Appeals made its own findings and determinations for those claims based on an incomplete record and its own conjecture. Upholding $60,000 of sanctions for asserting meritorious claims would undermine the validity of the entire legal system and violate every principle that this Court has stated about sanctions. This Court should grant review and reverse.

II. IDENTITY OF PETITIONER

Allyis, Inc, and its counsel Matthew Davis ask this Court to accept review.

III. COURT OF APPEALS DECISIONS

This Court should review all of the February 27, 2017 decision of Division One of the Court of Appeals (Appendix A-1 to A-23) and the March 28, 2017 Order denying Reconsideration (Appendix A-24).

IV. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals err in ruling that the claims asserted by Allyis were frivolous?

2. Did the Court of Appeals err in failing to dismiss the RCW 4.84.185 claim for failure to show that all claims were frivolous?

3. Did the Court of Appeals err in awarding CR 11 sanctions that were not properly supported?

4. Did the Court of Appeals err in ruling that this appeal is frivolous?

V. STATEMENT OF THE CASE

A. Factual Background.

Allyis provides contract workers to companies like Microsoft. CP 450 at ¶ 2. It employed Jeremy Schroder ("Schroder") for twelve years, during which time he advanced from an entry position to management. CP 451-52 at ¶ 7; 452-53 at ¶ 9. Schroder signed noncompete and nonsolicitation agreements shortly after he commenced employment. CP 452 at ¶ 8.

In 2014, Schroder abruptly left Allyis and immediately began working for Simplicity. CP 452-53 at ¶ 9. Simplicity learned of the existence of the noncompete agreement during one of Schroder's job interviews. CP 465-66. While Schroder was employed by Simplicity, Simplicity expressly authorized him on at least one occasion to solicit an Allyis employee.

> Q. To your knowledge, did Mr. Schroder while he was employed by Simplicity contact the people that he worked with at Allyis for the purpose of recruiting them to Simplicity?
> A. Yes.
> Q. And were you aware of that when it happened?
> A. In one instance, yes.
> * * * *
> Q. So how was it that you knew that Mr. Schroder was making contact with someone that he knew because of his relationship at Allyis?
> A. He told me about one instance where this woman – We had had a client meeting and the client needed a specific skill set. It was a current Simplicity client and he told me about someone he knew that had that skill set and she was looking for a new role because hers was ending on June 30th of 2014.
> Q. So did you have Mr. Schroder contact that person about the possibility of --
> A. I didn't have him do anything. He did it on his own.
> Q. Well, if he told you he knew somebody who was perfect for the position -- He hadn't contacted them about this position yet obviously?
> A. Right.

Q. So did he have any direction from you one way or the other as to what to do or did you just say oh, that's interesting?
A. I basically said oh, okay. Great.

CP 467-70. All told, at least six Allyis employees followed Schroder to Simplicity, where they continued to work for the same companies on the same projects that they had with Allyis. CP 452-53 at ¶ 9. Simplicity received the benefits of Allyis' efforts for those employees.

B. Trial Court Proceedings.

Allyis brought this action against Schroder and Simplicity alleging claims for breach of the noncompete agreement, tortious interference with contract, injurious falsehoods, Trade Secrets, and violation of the Consumer Protection Act. CP 1-11. Allyis later amended its Complaint to replace those claims with one for unjust enrichment. CP 31-37.

After Allyis voluntarily dismissed its claims, Simplicity brought a Petition for Fees under RCW 4.84.185. CP 319-26. The motion was six pages long and sought relief only under RCW 4.84.185. CP 320 at Section III. The substantive argument in the motion was that "Allyis' unjust enrichment claim was advanced without reasonable cause because Allyis was well aware that it never conferred any benefit on Simplicity." CP 323. Simplicity's only reference to the original four claims in the case was its assertion that "Allyis Recognized its Original Claims Lacked Merit" in a section heading. CP 322.

Simplicity also argued that if Allyis blamed Davis for filing a frivolous lawsuit, it should award CR 11 sanctions.

> In the event Allyis responds by attempting to blame its counsel for pursuing a frivolous claim, or Allyis' counsel, on his own, accepts responsibility for pursuing a frivolous claim, the Court should exercise its discretion and award Simplicity its fees and costs

> against Allyis and its counsel, jointly and severally, as sanctions under CR 11. *See, e.g., Escude*, 117 Wn.App. at 193-94.

CP 324. Allyis never made that argument, and the condition precedent for the CR 11 motion was not satisfied. However, instead of awarding sanctions under either RCW 4.84.185 or CR 11 as requested, Judge Hill awarded them on both grounds. CP 478-82. She did so without any evidence or argument to support the CR 11 award and without making any specific findings in support of it as required by *Biggs v. Vail*, 119 Wn.2d 129, 137, 830 P.2d 350, 354 (1992) ("*Biggs I*). CP 428.

Judge Hill signed the proposed order without making a single change to it. CP 478-82. Allyis brought a Motion for Reconsideration, and Judge Hill called for a response. CP 485-86. Simplicity responded by again ignoring the other claims asserted by Allyis and again asserting that Allyis had the burden to prove that its claims were not frivolous. CP 499.

Judge Hill then wrote a new order attempting to fill the holes in her prior decision, but she had no evidence or argument about the other claims. CP 518-24. She again said that *Young* required the plaintiff to confer a direct benefit on the defendant, and she made sweeping and conclusory findings that all of the claims were frivolous even though she had heard no evidence or argument about them. CP 518-24; CP 521 at ¶ 9.

The following constitute the entirety of the findings that Judge Hill made in support of the sanctions:

> 9. The Court also finds that Allyis' original claims against Simplicity for (1) tortious interference with a contractual relationship; (2) violation of the Washington CPA; (3) injurious falsehood; and (4) violation of the UTSA were frivolous and advanced without reasonable cause.
>
> * * * *

22. In light of the facts and circumstances of the entire case, the claims asserted by Allyis were frivolous and not advanced with reasonable cause in violation of RCW 4.84.185.

23. The four claims against Simplicity in the Verified Complaint were not well grounded in fact. Dkt. No. 1.

24. The four claims against Simplicity in the Verified Complaint were not warranted by existing law, nor did Allyis present evidence or argument suggesting it was attempting in good faith to modify existing law.

27. Allyis and Mr. Davis failed to perform a reasonable inquiry before filing the Verified Complaint against Simplicity. They also failed to perform a reasonable inquiry before filing the First Amended Complaint against Simplicity. Dkt. No. 13.

28. Allyis and Mr. Davis filed the four claims in the Verified Complaint and the unjust enrichment claim in the First Amended Complaint against Simplicity for the improper purpose of bringing, and keeping, Simplicity's presumably deep pockets into the litigation.

CP 521-523.

C. Court of Appeals Proceedings.

Allyis appealed to Division One of the Court of Appeals, which affirmed in an unpublished decision that made entirely and new and different arguments and ruled against Allyis on the merits of claims that had never been briefed or argued, and which relied heavily on earlier discovery orders were "subsumed in and superseded by the order on reconsideration. CP 524.

1. CR 11.

The court first addressed CR 11 and stated that courts "must make findings that specify the actionable conduct to impose CR 11 sanctions for a baseless complaint." Opinion at 5. Accordingly, the court should have then examined the trial court's findings to verify whether they satisfied that requirement, but it did not do so. The Court of Appeals instead proceeded to make its own findings and determinations about the claims as if it were deciding the facts after a bench trial.

The court found Judge Hill's collective and conclusory findings adequate to support her decision. The court said that Findings of Fact 9 and 22-28 set forth above were sufficient because Judge Hill

> made not one, but both Biggs findings: that the claims were not grounded in fact or law and Allyis and Davis failed to perform a reasonable inquiry before filing the original and amended complaints, and that the claims were filed for the improper purpose of bringing Simplicity's deep pockets into the litigation.

Opinion at 7. According to the court it did not matter that those findings lacked any detailed information. *Id.* The Court of Appeals then went through the claims and purported to explain why they were frivolous. Opinion at 7-18. However, all of the reasons given by the court were brand new and had never been advanced by the parties before.

. ***a. Unjust Enrichment.***

The unjust enrichment claim presents a question of law. The parties' disagreement concerns whether unjust enrichment requires proof that the plaintiff directly conferred a benefit on the defendant or proof that the defendant received a benefit at the plaintiff's expense. Although Allyis presented extensive analysis and argument about the legal standard, the court did not discuss or acknowledge any of it. The court said that lower courts have "clarified" that

> Under *Young*, Allyis had to show that it conferred a benefit on Simplicity, and the circumstances made it unjust for Simplicity to retain the benefit without paying. 164 Wn.2d at 484-85. Allyis never argued that it conferred a benefit on Simplicity, contending instead that Schroder improperly bestowed profits from Allyis employees and clients on Simplicity. Given these allegations, we conclude that substantial evidence supports the trial court's findings that Allyis's unjust enrichment claim was not well grounded in fact or warranted by existing law or a good faith argument to modify the law.

Opinion at 11.

b. Tortious Interference.

As set forth above, Judge Hill made no specific findings about Allyis' tortious interference claim. Division One, however, came up with its own arguments. First, it said that while Allyis discussed the business expectancy element, it "never elicited evidence that could establish the other four elements of tortious interference." Opinion at 12. Because Allyis did not present that evidence, the court ruled that the claim had no merit and was frivolous. Opinion at 12. That argument was never made by Simplicity, nor did Judge Hill make any findings about it. It was a brand new argument made by the Court of Appeals in its decision.

The court then said that Allyis had not proven a business expectancy either because the noncompete agreement lacked consideration. Opinion at 12. It said that *Labriola v. Pollard Grp., Inc.*, 152 Wn.2d 828, 833,100 P.3d 791 (2004), held that "later training and continued employment alone are not sufficient to constitute independent consideration" as a matter of law. Opinion at 14.

Simplicity's Brief never cites *Labriola*. It does mention consideration, but it never cites any authority or makes any reasoned argument. Simplicity's Brief at 2, 6, 7. Judge Hill's orders never mention consideration either. This is an argument that the Court of Appeals developed on its own.

c. Injurious Falsehood.

With respect to the injurious falsehood claim, the Court of Appeals said that "Allyis has not alleged any action by Simplicity that would meet

the elements." Opinion at 15. But neither Simplicity nor the trial court ever identified or discussed any element of the claim. *See* Simplicity's Brief at 9, 23. Allyis never had a reason to present an argument on evidence that was not raised. Once again, the Court of Appeals made its own arguments.

d. Trade Secrets Act.

The same is true for the Trade Secrets Act. Simplicity referred to the claim twice in lists of the claims, but never discussed or argued them. As it did with the other claims, the Court of Appeals said that the Trade Secrets Act claim was frivolous because Allyis "did not provide any additional information in declarations or through discovery that would support its allegation that Simplicity used confidential information to recruit Allyis employees." Opinion at 17.

e. Consumer Protection Act.

The Court of Appeals said that the Consumer Protection Act claim was derivative of the others and failed for the same reasons. Opinion at 17. Simplicity again mentioned the claim twice in lists. Simplicity's Brief at 9, 23. Judge Hill's global findings are set forth above.

2. RCW 4.84.185.

Division One then moved to the question of RCW 4.84.185. The court noted that "Before fees may be awarded under this statute, the trial court must enter findings that the action in its entirety is frivolous." The court noted that the trial court's findings on RCW 4.84.185 dealt with the other claims asserted by Allyis "collectively" and then said that it would do the

same. Opinion at 19. Although a significant part of petitioners' argument was that trial courts cannot treat claims collectively, the Court of Appeals never addressed that question. It then relied on its discussion above for each of the claims. *Id.*

3. Frivolous Appeal.

For good measure, Division One then held that Allyis' appeal itself was frivolous. Opinion at 23. It could not even find a single debatable issue.

VI. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

RAP 13.4(b) sets forth the grounds for accepting review. This petition is based on RAP 13.4(b)(1) and (2).

A. The Court of Appeals Opinion Conflicts With This Court's Decisions (RAP 13.4(b)(1)).

The Court of Appeals decision directly contradicts numerous decisions of this Court.

1. *State v. Studd*, 137 Wn.2d 533, 973 P.2d 1049 (1999).

Division One's Opinion reads more like a brief than a judicial decision. The court scoured the entire record for anything to support Judge Hill's decision, but it did not even give serious consideration to the arguments raised by petitioners. Instead of discussing the adequacy of the trial court's findings, Division One made its own. Courts "are not in the business of inventing unbriefed arguments for parties *sua sponte*." *State v. Studd*, 137 Wn.2d 533, 547, 973 P.2d 1049, 1055 (1999); *State v. Saintcalle*, 178 Wn.2d 34, 52, 309 P.3d 326, 338 (2013); *State v. Schaler*, 169 Wn.2d 274, 291, 236 P.3d 858, 867 (2010). *See Riley v. Sturdevant*,

12 Wn.App. 808, 811, 532 P.2d 640, 643 (1975) ("it is not appropriate for this court to assume the role of advocate for respondents in addition to being arbiter of the case and we will not do so"). This Court should grant review and disapprove that treatment of appeals.

2. *Young v. Young*, 164 Wn.2d 477, 191 P.3d 1258 (2007).

Substantively, Division One's opinion flatly contradicts this Court's holding in *Young*. Division One said that: "Under Young, Allyis had to show that it conferred a benefit on Simplicity, and the circumstances made it unjust for Simplicity to retain the benefit without paying." Opinion at 11. That is not what this Court said in *Young*. It said: "the received benefit is at the plaintiff's expense." *Young*, 164 Wn.2d at 484-85. Neither the trial court nor the Court of Appeals ever denied that Allyis' claim satisfied that standard.

Young described unjust enrichment in broad terms: "Unjust enrichment is the method of recovery for the value of the benefit retained absent any contractual relationship because notions of fairness and justice require it." *Id.* at 484. Similarly, in *Chemical Bank v. Washington Public Power Supply System*, 102 Wn.2d 874, 904, 691 P.2d 524 (1984), the Court pointed out that: "Just as the term 'estoppel' has been used widely to describe a variety of legal actions, the term "unjust enrichment" is equally amorphous." The *Chemical* Bank court then used the same wording as *Young*: "a party must make restitution when he has been **unjustly enriched at the expense of another**." *Id.* at 909.

Unjust enrichment came before this Court again in 2013 when it decided *Nat'l Surety. Corp. v. Immunex Corp.*, 176 Wn.2d 872, 899, 297

P.3d 688, 701 (2013). *National Surety* was a 5-4 decision, and the majority did not reach the unjust enrichment issue. However, Justice Wiggins wrote a dissent in which he was joined by Justices James Johnson, Madsen and Justice Pro Tem Quinn-Brintnall. The dissent examined unjust enrichment at length and stated the element as *Young* did: "the received benefit is at the plaintiff's expense." *Id.* at 899, Wiggins, J., dissenting.

So many Washington cases have authorized unjust enrichment claims when the plaintiff did not directly confer a benefit on the defendant over the years that no serious argument to the contrary could be made.

In *Olwell v. Nye & Nissen Co.*, 26 Wn.2d 282, 283, 173 P.2d 652, 652 (1946), the defendant converted the uses of an egg washing machine belonging to another person, but the use did not damage the equipment. However, the Court held that "The theory of unjust enrichment is applicable" because of the defendant's "wrongful invasion of the respondent's property right to exclusive use." *Id.* at 286.

Somewhat ironically, the very case in which the "plaintiff confers a benefit" wording originated was itself a case where the plaintiff did not confer the benefit. In *Bailie Commc'ns, Ltd. v. Trend Bus. Sys., Inc.*, 61 Wn.App. 151, 153, 810 P.2d 12, 14 (1991), a tenant in common of a property co-signed a note for a loan against the property and was supposed to receive some of the proceeds, but they were wrongfully diverted to another party, and the property was later foreclosed. *Id.* at 153-156. After quoting *Black's Law Dictionary,* Division One held that "Trend received a

benefit in the form of money received. Trend had knowledge, through its sole stockholder Wosepka, that $175,000 of this money was to be paid to the Bailies." *Id.* at 160. That benefit was stolen, not conferred.

In *Irwin Concrete, Inc. v. Sun Coast Properties, Inc.*, 33 Wn.App. 190, 653 P.2d 1331, 1334 (1982), a contractor sought to foreclose a lien against lender who had foreclosed on its loan for a project, but the lien claims were dismissed. However, the court affirmed the award for unjust enrichment despite the lack of any connection between the contractor and the lender. *Id.* at 193-94.

In *Mill & Logging Supply Co. v. W. Tenino Lumber Co.*, 44 Wn.2d 102, 113, 265 P.2d 807, 813 (1954), this Court explained that quasi-contract and unjust enrichment are the same thing and then said that "Want of privity between parties is no obstacle to recovery under quasi-contract." *Id.* at 112.

In *Bill v. Gattavara*, 34 Wn.2d 645, 651, 209 P.2d 457, 460 (1949), this Court held that timber trespass by a neighbor would support a claim for unjust enrichment, but denied the claim because the owner had already brought a tort claim.

The unjust enrichment claim was never frivolous in any way. This Court should rule that the elements of unjust enrichment are: "(1) the defendant receives a benefit, (2) the received benefit is at the plaintiff's expense, and (3) the circumstances make it unjust for the defendant to retain the benefit without payment. *Young*, 164 Wn.2d at 48485. It

therefore should rule that the unjust enrichment claim was not frivolous and reverse the Court of Appeals and trial court decisions.

3. *Biggs v. Vail*, 119 Wn.2d 129, 830 P.2d 350 (1992) (*Biggs I*)

In *Biggs I,* this Court held that a trial court awarding sanctions must "specify the sanctionable conduct in its order." *Biggs*, 124 Wn.2d at 201. Courts must also consider "both CR 11's purpose of deterring baseless claims as well as the potential chilling effect CR 11 may have on those seeking to advance meritorious claims." *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 219, 829 P.2d 1099, 1104 (1992). Judge Hill could not specify any conduct because she had no evidence. Davis tried repeatedly to get a hearing on the sanctions, but Judge Hill refused every request. *See, e.g.*, CP 497. Instead of specifying conduct, Judge Hill "inferred" misconduct because the actions of Davis were not "consistent with a claim filed in good faith." CP 520-21. Beyond that, Judge Hill just made perfunctory findings because she had no idea what Davis did or did not do. CP 522-23 at ¶¶ 22-28.

4. *Biggs v. Vail,* 124 Wn.2d 193, 876 P.2d 448 (1994) ("Biggs II)

Whether Allyis could prove its claim was never the question in this case. The court, however, made repeated statements to the effect that appellants had failed to persuade it on the merits of the claims alleged. It said, "Nor are we persuaded by Allyis's argument that a valid business expectancy existed here;" "Allyis never specified what false information Schroder gave to other Allyis employees;" "Allyis did not provide any additional information in declarations or through discovery that would

support its allegation that Simplicity used confidential information to recruit Allyis employees." Opinion at 12, 16, 17.

Those are the statements of a trial court that is not persuaded by a plaintiff's case, not the statements of an appellate court reviewing an order for sanctions. The burden of persuasion rested with Simplicity, not Allyis, and its burden was to demonstrate that the claims were frivolous. It instead said nothing at all. "The fact that a complaint does not prevail on its merits is by no means dispositive of the question of CR 11 sanctions." *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 220, 829 P.2d 1099, 1105 (1992). Imposing sanctions for failing to prove claims contradicts *Biggs II* and *Bryant.*

5. *Labriola v. Pollard* Grp., *Inc.*, 152 Wn.2d 828, 100 P.3d 791 (2004).

Division One acknowledged that Allyis presented arguments about the business expectancy element of the tortious interference claim, but said that the claim was frivolous because "Allyis never elicited evidence that could establish the other four elements of tortious interference." Opinion at 12. That may be true but only because Simplicity never raised or argued the issue below or in its Brief. It is an argument that Division One made up out of thin air. In doing so, the panel is acting as an advocate against appellants, not as impartial judges.

The Court of Appeals then said that *Labriola v. Pollard Grp., Inc.*, 152 Wn.2d 828, 100 P.3d 791 (2004) "makes clear that later training and continued employment alone are not sufficient to constitute independent consideration." Opinion at 14. In *Labriola*, the question presented was: "Is

there consideration for the formation of a contract when an employee, already employed by the employer, executes a noncompete agreement **but receives no new benefit** and the employer incurs no further obligations?" *Id.* at 833. The Supreme Court answered that question in the negative under the facts of that case.

Labriola also said that "continued employment and/or continued training **may serve as sufficient consideration,**" but did not under the facts of the case. *Id.* at 838. "We hold that continued employment **in this case** did not serve as consideration by Employer in exchange for Employee's promise not to compete." *Id.* at 836.

The *Labriola* court went to great lengths to emphasize that its decision was based on the specific facts of the case, and that each case had to be decided on its own facts.

> **In the present case**, Employer contends that continued employment served as consideration for the 2002 noncompete agreement. However, *Racine* and *Schneller* do not support Employer's contention. We found in *Racine,* the repeated signing of a warranty not to compete every week for 260 weeks served, operated as a promise in exchange for prospective employment and therefore was adequate consideration. **In the present case**, Employee signed only one subsequent noncompete agreement, nearly five years after beginning work for Employer. The conduct of Employer and Employee **in this case** does not support the conclusion that continued employment served as consideration, **as it did in *Racine***.

Id. at 835-36. Justice Madsen concurred in the result to argue that continued employment "is never independently sufficient" consideration and objected to the majority's case-by-case rule. *Id.* at 843. She wrote separately because the majority held otherwise.

B. Division One's Opinion Conflicts with Its Own Precedent (RAP 13.4(b)(3).

The Court of Appeals decision in this case flatly contradicts three of its own published decisions. However, the court neither acknowledged that fact nor modified its prior opinions.

1. *North Coast Electric Co. v. Selig*, 136 Wn.App. 636, 151 P.3d 211 (2007) (RCW 4.14.185 and CR 11).

In *North Coast Electric Co. v. Selig*, 136 Wn.App. 636, 650, 151 P.3d 211 (2007), Division One reversed the trial court's award of attorney fees under RCW 4.84.185 and CR 11 for failing to enter specific findings about exactly why the claims were frivolous.

> However, before awarding attorney fees under RCW 4.84.185, **the court must make written findings that the lawsuit in its entirety is frivolous and advanced without reasonable cause**. Again, the court **summarily found that Selig's counterclaims were frivolous and advanced without reasonable cause**. It did not **specify why the counterclaims were baseless**. Without some explanation, we are unable to determine whether the trial court abused its discretion in granting attorney fees under this statute.
>
> If a complaint lacks a factual or legal basis, the trial court can impose CR 11 sanctions if it finds that the attorney who signed and filed the complaint failed to conduct a reasonable inquiry into the factual and legal basis of the claim. But **the court must make explicit findings as to which pleadings violated CR 11 and as to how such pleadings constituted a violation of CR 11**. The court must specify the sanctionable conduct in its order.
>
> Although the court summarily found that Selig's counterclaims were not, after reasonable inquiry, well grounded in fact and warranted under existing law, it did not **state with specificity Selig's sanctionable conduct**. For example, it did not make **findings regarding the steps taken by Selig's attorney in inquiring into the claims** or **specifically address each claim and explain why it was not well grounded in fact or law**.

Id. at 649 (footnotes omitted and emphasis added). Division One's opinion here makes no attempt to meet its own *North Coast* standard.

2. *Norcon Builders, LLC v. GMP Homes VG, LLC*, 161 Wn.App. 474, 254 P.3d 835 (2011) and *Bailie Commc'ns, Ltd. v. Trend Bus. Sys., Inc.*, 61 Wn.App. 151, 810 P.2d 12 (1991) (Unjust Enrichment).

Few things about this case are harder to explain than Division One's treatment of its own prior decision in *Norcon Builders, LLC v. GMP Homes VG, LLC*, 161 Wn.App. 474, 254 P.3d 835, 844 (2011). More than three years after *Young* was decided, the court heard the appeal from a bench trial of an unjust enrichment claim. When it stated the elements of the claim, it used the same wording as *Young*.

It would seem quite impossible for Division One to explain why that statement of the elements of unjust enrichment was frivolous without saying that *Norcon* was incorrect, but it purported to do just that. The court said that because unjust enrichment also requires the retention of the benefit without payment to be unjust, the decision actually is "consistent with a requirement that the plaintiff confers a benefit to the defendant." Opinion at 10.

Even if that statement made sense in some theoretical way, it could not make sense in the context of the case, because the party asserting the claim in *Norcon* did not confer any benefit on the other. In *Norcon*, condominium purchasers asserted an unjust enrichment claim against builder's lender for indirect benefits it received from their payments on their own mortgages. *Id.* at 490-91. *Norcon* also said that "A person is unjustly enriched when he or she profits or enriches himself or herself **at the expense of another** contrary to equity." *Id.*

Similarly, in *Bailie*, Division One upheld an unjust enrichment claim against a third party to whom the plaintiff's property was wrongfully

diverted, not conferred. *Bailie*, 61 Wn.App. at 160. Both decisions squarely conflict with the Court's decision in this case.

3. *Puget Sound Security Patrol, Inc. v. Bates*, 197 Wn.App. 461, 389 P.3d 709 (2017) (Direct Benefit and Noncompete Agreement).

As set forth above, two months before it decided this case, Division One held that an employer "arguably pleaded the first two elements [of unjust enrichment] by alleging [the former employee] had 'unfair earnings' and that [his wife] benefitted from those earnings." *Puget Sound*, 197 Wn.App. at 475. It is unthinkable that the same court could issue that opinion and then find the same claim frivolous two months later. It is indefensible when the same judge signs one of those orders and then writes the next, but that is what happened here.

VII. CONCLUSION

The claims asserted by Allyis in the case were not frivolous in any respect. When courts impose $60,000 of sanctions for filing a claim that is not frivolous, this Court has a duty to act. Review should be granted.

Respectfully submitted,

BRACEPOINT LAW P.S.

Matthew F. Davis, WSBA No. 20939

CERTIFICATE OF SERVICE

I, Melani R. Anderson, certify under penalty of perjury under the laws of the State of Washington that on April 27, 2017, I caused the document to which this is attached, Petition for Review, to be served on the parties listed below via email pursuant to the agreement of counsel.

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DATED this 27th day of April, 2017.

Melani R. Anderson

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Apr 27, 2017
Court of Appeals
Division I
State of Washington

NO.

COURT OF APPEALS NO. 74511-5-I

SUPREME COURT

OF THE STATE OF WASHINGTON

ALLYIS, INC.

Petitioner,

v.

SIMPLICITY CONSULTING INCORPORATED,

Respondent,

and

JEREMY AND NICOLE SCHRODER,

Defendants

APPENDIX TO PETITION FOR REVIEW

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ALLYIS, INC., a Washington corporation,

Appellant,

v.

JEREMY AND NICOLE SCHRODER,

Defendants,

SIMPLICITY CONSULTING INC., a Washington corporation,

Respondent,

MATTHEW F. DAVIS, attorney for Allyis, Inc.,

Appellant.

No. 74511-5-I

DIVISION ONE

UNPUBLISHED OPINION

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STATE OF WASHINGTON
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FILED: February 27, 2017

APPELWICK, J. — Allyis sued its former employee and his new employer, Simplicity, for breach of a noncompete agreement. The court dismissed Allyis's case with prejudice. It awarded attorney fees and costs under RCW 4.84.185 for a frivolous case and CR 11 sanctions for Allyis's failure to perform a reasonable inquiry before filing the complaint. Allyis and its counsel appeal. We affirm.

CR 11 relates to the signing of pleadings, motions, and legal memoranda. It states,

> The signature of a party or of an attorney constitutes a certificate by that party or attorney that the party or attorney has read the pleading, motion, or legal memorandum, and that to the best of the party's or attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact; (2) it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

CR 11(a). Where a party or an attorney violates this rule, the court may impose appropriate sanctions upon the party or person who signed the pleading, motion, or legal memorandum, or both. Id.

CR 11 envisions two violations of the rule: filings that are not well grounded in fact and warranted by law, and filings that are made for an improper purpose. Bryant v. Joseph Tree, Inc., 119 Wn.2d 210, 217, 829 P.2d 1099 (1992). Before imposing CR 11 sanctions for a baseless filing, the court must find that the attorney failed to conduct a reasonable inquiry into the factual and legal basis of the claim. Id. at 220. Courts use an objective standard in determining whether the attorney engaged in an appropriate inquiry. Stiles v. Kearney, 168 Wn. App. 250, 261-62, 277 P.3d 9 (2012). The court must make findings that specify the actionable conduct to impose CR 11 sanctions for a baseless complaint. Id. at 262. Namely, the court must make a finding that either (1) the claim was not grounded in fact or law and the attorney failed to perform a reasonable inquiry into the law or facts, or

(2) the filing was made for an improper purpose. Biggs v. Vail, 124 Wn.2d 193, 201, 876 P.2d 448 (1994).

In this case, the trial court found that Allyis and Davis violated CR 11 and therefore imposed CR 11 sanctions jointly and severally against Allyis and Davis. It did so after finding that neither the unjust enrichment claim nor the original four claims were well grounded in fact or warranted by existing law or a good faith argument to modify the law. Consequently, it found that Allyis and Davis failed to perform a reasonable inquiry prior to filing the original complaint and the amended complaint. The court noted that Davis's conduct throughout the lawsuit was not consistent with a claim filed in good faith. And, it inferred that Allyis and Davis filed the original and amended complaints for an improper purpose: to bring and keep Simplicity's presumably deep pockets into the litigation.

Allyis contends that the trial court erred by sanctioning both it and its attorney, failing to enter the required findings, and entering findings that were not supported by the record. As discussed below, we conclude that the trial court did not abuse its discretion in imposing CR 11 sanctions.

A. Joint and Several Liability

Allyis argues that the trial court erred in entering CR 11 sanctions jointly and severally against it and its attorney. It suggests that CR 11 sanctions can be imposed against only the attorney, not the client. But, CR 11(a) specifically states, "If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction." The rule gives

broad discretion for the trial court to determine who should be sanctioned. In re Cooke, 93 Wn. App. 526, 529, 969 P.2d 127 (1999). Sanctions directly on a party are permissible where the party is responsible for the frivolous filing. Id. at 529-30. Here, counsel for Allyis signed the original complaint and the amended complaint. Allyis's chief financial officer, Rakesh Garg, signed the verification attached to the original complaint, verifying that its contents were accurate. Thus, both Allyis itself and its counsel were responsible for the filing, and could be sanctioned under CR 11.

B. Necessary Findings

Allyis contends that the trial court failed to enter the required findings to support CR 11 sanctions. And, it argues that the findings that were entered do not support the judgment. We disagree. The trial court made not one, but both Biggs findings: that the claims were not grounded in fact or law and Allyis and Davis failed to perform a reasonable inquiry before filing the original and amended complaints, and that the claims were filed for the improper purpose of bringing Simplicity's deep pockets into the litigation. Further, as discussed below, we conclude that the court's findings on all of Allyis's claims support the CR 11 sanctions.

1. Unjust Enrichment

In its amended complaint, Allyis argued that Schroder's breach of the noncompete and confidentiality agreements conferred a financial benefit on Simplicity: namely, profits from employees and clients who were wrongfully recruited from Allyis. Allyis contended that Simplicity was aware of the benefit it would obtain from Schroder's actions and intended to obtain it. And, it asserted

that Schroder breached the noncompete and confidentiality agreements on behalf of Simplicity and as Simplicity's agent. During the course of litigation, Allyis did not comply with Simplicity's discovery requests to obtain more information about this claim.

On appeal, Allyis and Simplicity continue to dispute the correct legal standard for an unjust enrichment claim under Young v. Young, 164 Wn.2d 477, 191 P.3d 1258 (2008).[3] Allyis argues that under Young, unjust enrichment requires only that the defendant received a benefit at the plaintiff's expense. Simplicity argues that Young requires that the plaintiff conferred a benefit on the defendant.

In Young, the plaintiff sued for quiet title of property. 164 Wn.2d at 480. The defendants counterclaimed, arguing that the plaintiff had been unjustly enriched by improvements they made to the property. Id. The trial court awarded the defendants the market value of the improvements, but subtracted general contractor's costs. Id. at 482.

The only issue on appeal was the appropriate measure of recovery. Id. at 483, 487. To answer this question, the court had to resolve whether the measure of recovery was unjust enrichment or quantum meruit. Id. at 483. It defined unjust enrichment as, "the method of recovery for the value of the benefit retained absent any contractual relationship because notions of fairness and justice require it." Id.

[3] In Simplicity's motion for fees and costs pursuant to RCW 4.84.185, it argued that Allyis's unjust enrichment claim was advanced without reasonable cause, because Allyis never conferred any benefit on Simplicity. Allyis responded that Simplicity's interpretation of the doctrine of unjust enrichment was too narrow, and that Simplicity misinterpreted Young.

at 484. Quoting a Court of Appeals case, the court listed the elements of unjust enrichment: " 'a benefit conferred upon the defendant by the plaintiff; an appreciation or knowledge by the defendant of the benefit; and the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without the payment of its value.' " Id. at 484 (emphasis added) (quoting Baile Commc'ns, Ltd. v. Trend Bus. Sys., Inc., 61 Wn. App. 151, 159-60, 810 P.2d 12, 814 P.2d 699 (1991)). The court then put these elements in its own words: "(1) the defendant receives a benefit, (2) the received benefit is at the plaintiff's expense, and (3) the circumstances make it unjust for the defendant to retain the benefit without payment." Id. at 484-85 (emphasis added).

Allyis claims that the trial court erroneously interpreted Young as requiring the plaintiff to directly confer a benefit on the defendant for an unjust enrichment claim to succeed. It argues that the Young court did not approve this element, and instead required the defendant to receive a benefit at the plaintiff's expense.

Since Young, Washington courts have clarified the first element of unjust enrichment. See, e.g., Austin v. Ettl, 171 Wn. App. 82, 92, 286 P.3d 85 (2012) ("a plaintiff conferred a benefit upon the defendant"); Nat'l Sur. Corp. v. Immunex Corp., 162 Wn. App. 762, 778 n.11, 256 P.3d 439 (2011) ("a party must show a benefit conferred upon the defendant by the plaintiff"), aff'd, 176 Wn.2d 872, 297 P.2d 688 (2013); Cox v. O'Brien, 150 Wn. App. 24, 37, 206 P.3d 682 (2009) ("one party must have conferred a benefit to the other"). But, Allyis argues that Washington courts have still not clarified this element. It cites Norcon Builders,

LLC v. GMP Homes VG, LLC, 161 Wn. App. 474, 254 P.3d 835 (2011) to contend that this court has adopted the defendant must receive a benefit test, not the plaintiff conferred a benefit test.

Norcon phrased the first element of unjust enrichment as "the defendant receives a benefit." Id. at 490. However, the court also specifically noted, "The mere fact that a defendant has received a benefit from the plaintiff is insufficient alone to justify recovery. The doctrine of unjust enrichment applies only if the circumstances of the benefits received or retained make it unjust for the defendant to keep the benefit without paying." Id. Thus, we disagree with Allyis's reading of that case. Norcon is consistent with a requirement that the plaintiff confers a benefit to the defendant. That courts have phrased this requirement in different ways does not create two competing tests, but a single test explained in several ways.

Considering that other courts have applied the same elements of unjust enrichment as the trial court did here, we conclude that the court did not apply an incorrect legal standard. Therefore, the trial court did not err in finding that the unjust enrichment claim is not warranted by existing law or a good faith argument to modify the law.[4]

Allyis further argues that the trial court's findings of fact regarding the unjust enrichment claim are not supported by substantial evidence. It challenges finding of fact 7, which stated, "At no point did Allyis present evidence showing that it

[4] Allyis never argued that the rule announced in Young should be extended, modified, or reversed—instead, it argued for an interpretation of the case that is not supported by the law.

conferred a benefit on Simplicity, nor did plaintiff present compelling or persuasive argument suggesting that the law as articulated in Young and its progeny did not apply here. Thus, Allyis's unjust enrichment claim was not well grounded in fact or warranted by existing law." It also challenges findings of fact 25 and 26, that the unjust enrichment claim was not well grounded in fact or warranted by either existing law or an argument to modify the law.

We review findings of fact for substantial evidence. Robinson v. Safeway Stores, Inc., 113 Wn.2d 154, 157-58, 776 P.2d 676 (1989). Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the premise. Id. If substantial evidence supports the findings, we review whether the findings support the trial court's conclusions of law and judgment. Id.

Under Young, Allyis had to show that it conferred a benefit on Simplicity, and the circumstances made it unjust for Simplicity to retain the benefit without paying. 164 Wn.2d at 484-85. Allyis never argued that it conferred a benefit on Simplicity, contending instead that Schroder improperly bestowed profits from Allyis employees and clients on Simplicity. Given these allegations, we conclude that substantial evidence supports the trial court's findings that Allyis's unjust enrichment claim was not well grounded in fact or warranted by existing law or a good faith argument to modify the law.

2. Tortious Interference

Allyis contends that its tortious interference claim was supported by current Washington law. It argues that while an issue existed as to consideration, the claim was at least arguable. In its original complaint, Allyis alleged that Simplicity

knowingly interfered with the noncompete and confidentiality agreements between Allyis and Schroder. It contended that Simplicity used improper means to solicit and encourage a breach of these agreements.

Relying on Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc., 86 Wn. App. 732, 935 P.2d 628 (1997), Allyis argues that this tortious interference claim was supported by the law. Goodyear set out the elements of tortious interference: "(1) the existence of a valid business expectancy; (2) defendant's knowledge of that expectancy; (3) defendant's intentional interference with that expectancy; (4) defendant's improper purpose or use of improper means in so interfering; and (5) the plaintiff's resultant damages." Id. at 745.

Allyis rests its argument on the first element, whether a valid business expectancy existed. But, Allyis never elicited evidence that could establish the other four elements of tortious interference. It did not produce any evidence that Simplicity intentionally induced a breach of these agreements, that it did so for an improper purpose or utilized improper means, and that Allyis had resulting damages. See Goodyear, 86 Wn. App.at 745. Even if the first element was met, the remaining elements were not.

Nor are we persuaded by Allyis's argument that a valid business expectancy existed here. For Allyis to have had a potential claim on this theory, it needed to show the existence of a valid contract. See Newton Ins. Agency & Brokerage, Inc. v. Caledonian Ins. Grp., Inc., 114 Wn. App. 151, 158, 52 P.3d 30 (2002) ("A valid business expectancy includes any prospective contractual or business relationship that would be of pecuniary value."). A noncompete agreement may be enforceable

if it is validly formed and reasonable. Labriola v. Pollard Grp., Inc., 152 Wn.2d 828, 833, 100 P.3d 791 (2004). Generally, consideration for such an agreement exists if the employee enters into the noncompete agreement when he or she is first hired. Id. at 834. A noncompete agreement entered into after the employee begins employment will be enforced only if supported by independent consideration. Id. Independent consideration means that the parties make additional promises or take on additional obligations. Id. For example, the employee may receive additional wages, a promotion, or a bonus in exchange for signing the agreement. Id.

Allyis asserted that two agreements originally contained in its employee handbook, the noncompete agreement and the confidentiality agreement, established a contract between Allyis and Schroder. The noncompete agreement provides that Schroder would not "engage in a business similar to or in competition with the business of [Allyis]" during his employment or for a period of five years afterward. The confidentiality agreement provides that Schroder would not disclose any confidential information for three years after the term of the agreement. Both agreements were signed by Schroder on July 23, 2002.

Schroder had already begun his employment with Allyis by that time. He was hired on May 10, 2002. Therefore, these agreements lacked consideration, unless Schroder received an additional benefit in exchange for his promises. See Labriola, 152 Wn.2d at 834. Allyis suggests that there was a debatable issue as to consideration, because Schroder continued to be employed with Allyis and was promoted from an entry position to management.

But, the Labriola court rejected a similar argument. There, the employee sought a declaratory judgment that the noncompete agreement was null and void. 152 Wn.2d at 832. The employer argued that continued employment served as consideration for the noncompete agreement, which was signed after the employee began work for the employer. Id. at 835-36. The court held that because the employer did not incur any additional duties or obligations from the noncompete agreement, continued employment did not serve as consideration. Id. at 836. The employer also argued that training received after the employee signed the noncompete agreement functioned as consideration. Id. The court rejected this argument as well, noting that the noncompete agreement did not mention any additional training that would serve as consideration for the employee's promise not to compete. Id. at 836-37.

Here, nothing in the noncompete agreement or Schroder's circumstances of employment suggests that he continued to be employed or that he was promoted as a result of his promise not to compete. Labriola makes clear that later training and continued employment alone are not sufficient to constitute independent consideration. Nothing in the record would support an inference, let alone a conclusion, that Schroder's later promotion was given as consideration for a noncompete agreement. Thus, Allyis never alleged any facts that would support an inference of independent consideration. Without a valid noncompete agreement, there can be no basis for the tortious interference claim as pleaded.

There was no legal or factual basis for Allyis's tortious interference claim. Consequently, the trial court did not err in finding that this claim was not well

grounded in fact or warranted by existing law or a good faith argument to modify the law.

3. Injurious Falsehood

Allyis asserts that its injurious falsehood claim was supported by the law and the facts. In the original complaint, Allyis stated that Schroder conveyed false and misleading information about Allyis's status and business plans to Allyis employees. And, it stated that this false and misleading information was conveyed to and used by Simplicity in an attempt to harm Allyis. On appeal, Allyis argues that while this claim was based on hearsay statements, a lawsuit may be based on hearsay evidence.

Allyis argues that Washington recognizes the tort of injurious falsehood. It cites the Restatement (Second) of Torts § 623A (Am. Law Inst. 1977) for the elements of injurious falsehood, recognizing that it has not been adopted in Washington. Those elements are:

> One who publishes a false statement harmful to the interests of another is subject to liability for pecuniary loss resulting to the other if
>
> (a) he intends for publication of the statement to result in harm to interests of the other having a pecuniary value, or either recognizes or should recognize that it is likely to do so, and
>
> (b) he knows that the statement is false or acts in reckless disregard of its truth or falsity.

Id.

Even assuming that Washington law supports a claim of injurious falsehood, Allyis has not alleged any action by Simplicity that would meet the elements. While

Allyis asserted that Simplicity used false information to harm Allyis, Allyis never specified what false information Schroder gave to other Allyis employees. Nor did it specify how Simplicity used this information. Allyis did not file any declarations or provide any information via discovery to clarify the factual basis for this claim prior to withdrawing it.[5] We conclude that the trial court did not err in finding that Allyis's injurious falsehood claim was not well grounded in fact or warranted by law or a good faith argument to modify existing law.

4. Uniform Trade Secrets Act

Allyis also argues that the trial court had no basis to find its UTSA claim to be frivolous. In its original complaint, Allyis alleged that Simplicity and Schroder had violated the UTSA. It claimed that Allyis's employee and compensation information were trade secrets that Simplicity had acquired through Schroder. And, it stated that Schroder and Simplicity used this confidential information to recruit Allyis employees for Simplicity. Allyis alleged that Simplicity knew or had reason to know that these trade secrets were acquired by improper means.

Under the UTSA, actual or threatened misappropriation of trade secrets may be enjoined, or a complainant may recover damages for actual loss caused by misappropriation. RCW 19.108.020(1), .030(1). Misappropriation means the acquisition of a trade secret by a person who knows or has reason to know that it was acquired by improper means, or disclosure or use of another's trade secret

[5] Simplicity attempted to elicit information about this claim in its discovery requests. But, shortly before Simplicity served its discovery requests on Allyis, Allyis amended its complaint to withdraw its original claims against Simplicity, replacing them with the unjust enrichment claim.

without express or implied consent, where the person used improper means to learn of the trade secret. RCW 19.108.010(2). A trade secret is information that derives independent economic value from not being generally known and that is protected by reasonable efforts to maintain secrecy. RCW 19.108.010(4).

Before it withdrew this claim, Allyis did not provide any additional information in declarations or through discovery that would support its allegation that Simplicity used confidential information to recruit Allyis employees. Given the lack of a factual basis for this claim, the trial court did not err in finding that Allyis's UTSA claim was not well grounded in fact or warranted by existing law or a good faith argument to modify the law.

5. Consumer Protection Act

Allyis argues that it stated a claim for a CPA violation due to its tortious interference claim. In the original complaint, Allyis alleged that Simplicity's and Schroder's actions constituted unfair and deceptive acts and practices in the conduct of trade or commerce.

RCW 19.86.020 provides that unfair methods of competition and unfair or deceptive acts in trade or commerce are unlawful. Allyis's CPA claim rested on the alleged actions that constituted its other claims, discussed above. Because we conclude that these claims were not well grounded in fact or warranted by existing law or a good faith argument to modify the law, it follows that the same is true for Allyis's CPA claim.

None of the claims Allyis brought against Simplicity were well grounded in fact or existing law or a good faith argument to modify the law. From this, we infer

that Davis did not perform a reasonable inquiry before filing the original or amended complaint—otherwise, he would have discovered that these claims were not supported by the law or facts. The trial court's findings of fact relating to CR 11 sanctions[6] are supported by substantial evidence in the record. Therefore, we conclude that the trial court did not abuse its discretion in ordering CR 11 sanctions jointly and severally against Allyis and Davis.

II. RCW 4.84.185 Attorney Fees

Allyis also challenges the trial court's award of attorney fees and costs under RCW 4.84.185. It contends that the court's findings underlying this award—findings of fact 4, 7, 9, 22, 31, and 33—are not supported by substantial evidence.

The decision to award attorney fees under RCW 4.84.185 is within the trial court's discretion. Timson v. Pierce County Fire Dist. No. 15, 136 Wn. App. 376, 386, 149 P.3d 427 (2006). This court will not disturb such an award absent a clear showing of abuse. Highland Sch. Dist. No. 203 v. Racy, 149 Wn. App. 307, 312, 202 P.3d 1024 (2009). Thus, we must ask whether the trial court exercised its discretion in a manner that was manifestly unreasonable or based on untenable grounds or reasons. Tiger Oil Corp. v. Dep't of Licensing, 88 Wn. App. 925, 938, 946 P.2d 1235 (1997).

RCW 4.84.185 permits the trial court to require the nonprevailing party to pay the prevailing party's reasonable expenses incurred in opposing a claim that was frivolous and advanced without reasonable cause. A frivolous action is one that cannot be supported by any rational argument on the law or facts. Goldmark

[6] Specifically, findings 7, 8, 10, 23, 24, 25, 26, 27, 28, and 29.

v. McKenna, 172 Wn.2d 568, 582, 259 P.3d 1095 (2011). Before fees may be awarded under this statute, the trial court must enter findings that the action in its entirety is frivolous. Biggs v. Vail, 119 Wn.2d 129, 131, 830 P.2d 350 (1992).

As a preliminary matter, Allyis challenges finding of fact 4, which found that counsel for Simplicity told Davis that Allyis's claims against Simplicity were frivolous on multiple occasions. Allyis argues that this finding treated the statements of counsel as proof that the claims were frivolous. But, nothing in the finding states that the court was drawing such an inference. Rather, it appears to be a correct statement of the facts from the record: counsel for Simplicity told counsel for Allyis on multiple occasions that he believed the claims were frivolous. This finding is supported by substantial evidence.

The trial court's findings on RCW 4.84.185 treated the unjust enrichment claim individually and the original four claims collectively. Given the detailed analysis of the original four claims in section I, this section treats those claims as a collective.

A. Unjust Enrichment

Allyis argues that the unjust enrichment claim was not frivolous or advanced without reasonable cause. It challenges the trial court's finding of fact 7, finding that this claim was frivolous in part because Allyis has never had any interaction with Simplicity outside of this lawsuit. It argues that Simplicity interacted with Allyis via Schroder when Schroder solicited an Allyis employee with Simplicity's permission and on its behalf.

During the deposition of Simplicity representative Annie Gleason, Allyis asked whether Schroder ever contacted his former co-workers at Allyis to recruit them for Simplicity. Gleason responded that Schroder did contact one person to recruit her for Simplicity. But, that person's contract was ending and she was looking for new work. Schroder told Gleason that this person was looking for a new role and had a skill set that Simplicity needed. Gleason stated that she did not tell Schroder to do anything to recruit this person, but responded along the lines of, " '[O]h, okay. Great.' "

Allyis's unjust enrichment claim was based on Schroder's wrongful recruitment of Allyis employees and clients[7] for Simplicity. Allyis appears to argue that this claim was not frivolous, because Gleason's deposition shows that Schroder, acting as Simplicity's agent, recruited at least one Allyis employee to work for Simplicity. However, even assuming that this Allyis employee was ultimately hired by Simplicity, Allyis does not dispute that Gleason stated that this employee's contract was about to expire.[8] Nor does it challenge Simplicity's assertion that the employee was looking for work elsewhere before her contract expired or that she started work for Simplicity after her contract expired. Nor does it assert that it wished to retain this employee. This evidence supports the trial court's finding that Allyis did not confer a benefit on Simplicity.

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[7] Although Allyis claimed that Schroder recruited Allyis employees to work for Simplicity and bring their clients with them, it never identified any clients that Simplicity gained from Allyis.

[8] At oral argument, Allyis contended that while Gleason said this, that does not necessarily make it true.

As discussed in section I.A.1, Allyis's unjust enrichment claim was not grounded in fact or warranted by the law. Consequently, we conclude that Allyis's unjust enrichment claim cannot be supported by a rational argument on the law or facts and thus is frivolous.

B. Original Claims

Allyis also argues that the four claims in its original complaint were not frivolous or advanced without reasonable cause. It challenges the trial court's findings of fact 9 and 22, which found that these claims were frivolous and inferred that Allyis filed them to bring Simplicity into the lawsuit and drive a settlement.

Allyis suggests it was illogical for the trial court to infer that Allyis filed the original claims because it believed Simplicity would pay a settlement. But, given the dearth of evidence that Simplicity took any actions that merited being sued, this inference is not illogical. Davis's constant refusals to engage in discovery combined with his requests that Simplicity compromise could be read as supporting the trial court's inference—that Davis did not believe he had a case against Simplicity and wanted to push for a settlement.

Because Allyis failed to ever specify the conduct supporting its unjust enrichment, tortious interference, injurious falsehood, UTSA, or CPA claims, there was substantial evidence that these claims were frivolous and advanced without reasonable cause. The trial court's findings of fact 4, 7, 9, and 22 are supported by substantial evidence.

III. Amended Order

After Allyis moved for reconsideration of the trial court's initial order awarding attorney fees and CR 11 sanctions, the court entered an amended order. The amended order contained additional findings, including several that addressed the propriety of the original order. Finding of fact 31 provides that the evidence and reasonable inferences therefrom support the original order. Finding of fact 33 states that due to Allyis's and its attorney's conduct throughout litigation, including filing frivolous claims, the original order did substantial justice in compensating Simplicity for having to defend against these claims.

Allyis challenges these findings, arguing that there was no evidence to support finding of fact 31, and that finding of fact 33 demonstrates that the trial court was motivated by something other than the record.[9] Both findings are better construed as conclusions of law, and we treat them accordingly. See Grundy v. Brack Family Trust, 151 Wn. App. 557, 567, 213 P.3d 619 (2009) ("We review conclusions of law mislabeled as findings of fact de novo as conclusions of law."). The trial court's findings pertaining to CR 11 sanctions and RCW 4.84.185 support both conclusions. Because Allyis's claims were not well grounded in fact or law or a good faith argument to modify existing law, and they were advanced without reasonable cause, the trial court's original order imposing CR 11 sanctions and awarding attorney fees under RCW 4.84.185 was justified. The trial court did not err in entering findings of fact 31 and 33 in its amended order.

[9] We note that Allyis challenges whether any sanctions should have been imposed, not the amount of the sanctions.

IV. Attorney Fees on Appeal

Simplicity argues that it is entitled to attorney fees on appeal, because the appeal was necessary to recover payment from Allyis and because the appeal was frivolous. This court may award attorney fees for a frivolous appeal. RAP 18.1; RAP 18.9(a). An appeal is frivolous where it presents no debatable issues or legitimate arguments for an extension of law. Harrington v. Pailthorp, 67 Wn. App. 901, 913, 841 P.2d 1258 (1992). Here, Allyis pursued claims against Simplicity that were not supported by the facts or the law. It has not presented any debatable issues on appeal. We conclude that Simplicity is entitled to attorney fees and costs on appeal.

We affirm.

WE CONCUR:

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

ALLYIS, INC., a Washington corporation, Appellant, v. JEREMY AND NICOLE SCHRODER, Defendants, SIMPLICITY CONSULTING INC., a Washington corporation, Respondent, MATTHEW F. DAVIS, attorney for Allyis, Inc., Appellant.	No. 74511-5-I ORDER DENYING MOTION TO RECONSIDER

The appellants, Allyis Inc. and Matthew Davis, have filed a motion to reconsider. A majority of the panel has determined that the motion should be denied. Now, therefore, it is hereby

ORDERED, that the motion for reconsideration is denied.

DATED this 28th day of March, 2017.

Judge

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STATE OF WASHINGTON
2017 MAR 28 PM 1:32

197 Wash.App. 1022

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington,
Division 1.

Steve Swinger, Appellant,
v.
Douglas J. Vanderpol, Respondent.

No. 74703–7–I
|
FILED: December 27, 2016

Appeal from Whatcom County Superior Court, No: 15–2–02282–9, Honorable Ira J. Uhrig, J.

Attorneys and Law Firms

Steve Swinger, Lynden, WA, pro se.

Mark J. Lee, Brownlie Wolf & Lee LLP, Bellingham, WA, for Respondent.

UNPUBLISHED OPINION

Becker, J.

***1** This is an appeal from an order of summary judgment resolving a dispute between neighboring landowners concerning a boundary set by the meandering Nooksack River. Because appellant's claims are barred on procedural grounds and unsupported by the record, we affirm.

Respondent Douglas Vanderpol owns land in Lynden on the east bank of the Nooksack River. Appellant Steve Swinger owns a plot of land on the other side of the river, to the north and west of Vanderpol's property. Swinger applied to participate in the federal Conservation Reserve Enhancement Program. The program pays property owners to commit their land for preservation efforts, such as planting vegetation along rivers to restore and protect fish habitat.

The Whatcom Conservation District, which administers the program locally, began developing a plan for preservation work on Swinger's property. The District created a map detailing where planting would occur. This map showed planting on the Nooksack's east bank, across the river from Swinger's plot. Swinger claims to own an area of land on the east bank through avulsion, a process that occurs when a river rapidly changes course. Property boundaries remain in the center of the old river channel following avulsion. According to Swinger, the Nooksack abruptly changed course many years ago, causing land that was previously connected to his plot to become part of the east bank.

In December 2011, Vanderpol sent a letter to the District through his attorney, asserting that the land on the east bank that Swinger was attempting to commit for preservation belonged to Vanderpol. Whereas Swinger claimed to own the land through avulsion, Vanderpol claimed to own the same area through accretion or reliction. Both terms describe gradual additions to the land bordering on a river due to slow changes in the river's course. Vanderpol explained in his letter that if accretion or reliction occurs, "the boundary line of the property abutting the river also changes with the river course." He claimed he had been the "sole person occupying, maintaining and making use of the entire property at issue since 1989 when he first started using this area for a pasture area for his cows." He asserted that a survey was necessary to determine property boundaries.

The District suspended Swinger's application and did not proceed with the proposed planting. The District informed Swinger that he would not receive funding for preservation work on the east bank until the ownership issue was resolved. Vanderpol sent a second letter to the District in February 2012, reasserting that he owned the area on the east bank that Swinger was attempting to commit to the program.

Around the same time, Swinger was involved in a lawsuit he had filed against his title insurance company. He claimed, "Three acres of the property east of the river are not accessible by vehicle or pedestrian access. No notification of this covered risk was provided in the title report." The court dismissed this claim on the title company's motion for partial summary judgment on October 14, 2011, because Swinger did not present facts that would prove his ownership of the three acres in question. Swinger did not attempt to obtain review of this ruling. The entire lawsuit against the title company was dismissed in March 2012, and Swinger expressly waived his right to appeal.

*2 In May 2012, Vanderpol commenced a quiet title action in federal court to determine ownership of the area in dispute on the east bank. Vanderpol named Swinger and the United States as parties. The United States owns property next to Vanderpol's, and Vanderpol believed the ownership interests of the United States were also affected by changes in the Nooksack's course.

Vanderpol conceded that the disputed area was previously connected to Swinger's plot. He argued that through accretion or reliction, either he or the United States was the current owner. In the alternative, he argued ownership by adverse possession. Swinger denied Vanderpol's ownership. He asserted a counterclaim for unjust enrichment based on Vanderpol's use of the disputed area.

The federal district court determined it had subject matter jurisdiction under 28 U.S.C. § 1346(f), which grants district courts original jurisdiction over quiet title actions "in which an interest is claimed by the United States." On Vanderpol's motion for summary judgment, the court concluded that Swinger was estopped from relitigating whether he owned land on the east bank because the issue was decided in his suit against the title insurance company. Vanderpol and the United States entered into a stipulation regarding their boundary lines.

Swinger appealed. The Ninth Circuit Court of Appeals concluded that subject matter jurisdiction was lacking because the United States never claimed an interest in the disputed land, as required under 28 U.S.C. § 1346(f). The court vacated the summary judgment order and remanded with instructions to dismiss.

Acting pro se, Swinger then filed the current action against Vanderpol in Whatcom County Superior Court. The complaint alleges unjust enrichment, tortious interference with a contract, and abuse of process. Vanderpol moved for summary judgment, seeking dismissal of Swinger's claims. After a hearing on February 5, 2016, the court granted Vanderpol's motion. Swinger's claims were dismissed with prejudice and Vanderpol was awarded attorney fees and statutory damages. Swinger appeals.

We review summary judgment orders de novo. Lybbert v. Grant County, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). All facts and any reasonable inferences therefrom are viewed in the light most favorable to the nonmoving party. Lybbert, 141 Wn.2d at 34. Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Lybbert, 141 Wn.2d at 34.

We begin with Swinger's claim for unjust enrichment. The trial court dismissed it upon finding it was collaterally estopped by the ruling in Swinger's earlier suit against his title insurance company. In that suit, the ruling was made on a motion for partial summary judgment to dismiss Swinger's claim of access to property on the east side of the river. The court's written order stated the claims were "dismissed based on Plaintiff's lack of ownership of such property."

Swinger maintains that he owns the land on the Nooksack's east bank and Vanderpol's use of this area for grazing his cows constitutes unjust enrichment. He requests restitution plus interest. Vanderpol responds that the court properly dismissed the unjust enrichment claim based on collateral estoppel.

A party claiming unjust enrichment must demonstrate: (1) the defendant received a benefit, (2) the benefit was received at the plaintiff's expense, and (3) the circumstances make it unjust for the defendant to retain the benefit without payment. Young v. Young, 164 Wn.2d 477, 484–85, 191 P.3d 1258 (2008). Here, Swinger's unjust enrichment claim relies on the premise that he owns property on the Nooksack's east bank. If he does not own the disputed area, he cannot demonstrate that Vanderpol received a benefit—using another's land without payment —at *Swinger's* expense.

*3 The doctrine of collateral estoppel prevents Swinger from relitigating whether he owns land on the east bank if he already had a full and fair opportunity to present his case on this issue. Pederson v. Potter, 103 Wn. App. 62, 69, 11 P.3d 833 (2000), review denied, 143 Wn.2d 1006 (2001). The requirements for collateral estoppel are: (1) the issue decided in the prior action is identical to the issue in the second action, (2) the prior action ended in a final judgment on the merits, (3) the party to be estopped was a party or in privity with a party in the prior action, and (4) application of the doctrine would not work an injustice. Pederson, 103 Wn. App. at 69, citing Hanson v. City of Snohomish, 121 Wn.2d 552, 561, 852 P.2d 295 (1993).

In Swinger's suit against the title insurance company, the court determined Swinger lacked evidence to prove his asserted ownership interest in "property lying across the Nooksack River to the east of Plaintiff's property." This issue is identical to the issue raised in the present case: whether Swinger can prove he owns the land on the east bank, such that he can claim unjust enrichment against Vanderpol for using that land.

Swinger contends the issue in his prior suit was "whether the title company had failed to disclose defects in title, including an easement on the property on the east side of the river," whereas the issue here is "whether Vanderpol benefited by the use of Swingers property without payment." Brief of Appellant at 12. While it is true that the cause of action was different, each lawsuit depended on Swinger's ability to prove the same factual issue: his ownership of land on the east bank. The first element of collateral estoppel is satisfied.

Regarding the second element of collateral estoppel, a reviewing court must determine whether the prior judgment is sufficiently firm. "Factors for a court to consider in determining whether the requisite firmness is present include whether the prior decision was adequately deliberated, whether it was firm rather than tentative, whether the parties were fully heard, whether the court supported its decision with a reasoned opinion, and whether the decision was subject to appeal or in fact was reviewed on appeal." Cunningham v. State, 61 Wn. App. 562, 567, 811 P.2d 225 (1991).

Swinger and the title insurance company submitted thorough briefing on Swinger's claim of ownership on the east bank. The transcript of oral argument on the company's motion for partial summary judgment shows that the court informed Swinger he had failed to prove ownership:

> [THE COURT:] I don't think that I have any evidence here that I can look at that's reliable that this Court could determine that that property belongs to you.
>
> ....
>
> Again, I don't think there's sufficient evidence, and I think that the only option that this Court has at this point in time is to deny any further motions to amend the pleadings to add new claims or to include that property across the river. There's no basis for it....
>
> MR. SWINGER: Do I not own that property then? Is that what the Court is saying?
>
> THE COURT: You haven't proven to me that you do. You may, but you haven't proven to me, you haven't given to me anything ... that's reliable evidence that I can look at that says you do. You don't have a document with a legal description that includes that property....
>
> ....
>
> ... nobody sold you anything on the east side of the river. There's no documents when you purchased the property that indicate that you purchased anything other than that property on the north side of the river. That's how your legal description reads.
>
> ***4** MR. SWINGER: But that legal description was made a hundred years ago when that river was somewhere else.
>
> THE COURT: I don't know that. I have no testimony to that effect at all. I have the legal description in your deed. That's all I have.

The written order on partial summary judgment, issued October 14, 2011, was firm: The court denied Swinger's claim based on his "lack of ownership" of property across the river. And it was not tentative. On March 1, 2012, the court reviewed and approved a stipulation for dismissal entered into between the parties, and dismissed the entire complaint with a written order stating:

> 1. All of Plaintiff Steve Swinger's claims that have been asserted and/or that could have been asserted in this cause are hereby dismissed with prejudice and without costs;
>
> 2. Plaintiff Steven Swinger hereby waives any right of appeal that may arise out of these proceedings;
>
> 3. That each party shall bear their own attorney's fees and costs incurred herein;
>
> 4. That the Court's Order awarding attorney fees dated August 27, 2010 is hereby vacated.

Swinger contends dismissal of the action against the title company on March 1, 2012, was the result of a settlement. Swinger asserts that because he settled with the title insurance company, his failure to appeal did not preclude

him from raising the same issue of ownership in the present lawsuit against Vanderpol. See Marquardt v. Fed. Old Line Ins. Co., 33 Wn. App. 685, 689, 658 P.2d 20 (1983) ("collateral estoppel should not be applied to judgments of dismissal... when based on settlement agreements.") The reason settlement agreements are ordinarily not preclusive is that "the parties could settle for myriad reasons not related to the resolution of the issues they are litigating." Marquardt, 33 Wn. App. at 689.

Other than the order quoted above, the record contains no evidence that the title company lawsuit was dismissed due to a settlement. Approval of a stipulation does not necessarily mean the parties settled. We might reasonably assume that the order of dismissal reflects an undisclosed settlement whereby Swinger, in exchange for being excused from liability for the title company's attorney fees, agreed to give up his right of appeal as well as a remaining claim for damages under the policy that is mentioned in the summary judgment order of October 14, 2011. But even if that is what happened, the rule stated in Marquardt is not controlling. The estoppel operating in the present case does not come from the final judgment entered in the title company case on March 1, 2012. The estoppel comes from the order on partial summary judgment entered on October 14, 2011.

Finality for the purposes of collateral estoppel, which is designed to prevent more than one trial on the same claim, is different from finality for the purposes of appeal, which is intended to discourage the piecemeal review of an action. Cunningham, 61 Wn. App. at 568. An order on partial summary judgment may be sufficiently final for collateral estoppel purposes even if it is not appealable. Cunningham, 61 Wn. App. at 570. That is the case here. The order of October 14, 2011, firmly dismissed the claims requiring proof of Swinger's ownership. The final order on March 1, 2012, did not change that. The order of October 14, 2011, was sufficiently final to satisfy the second element of collateral estoppel.

***5** The third element is also satisfied. Swinger, the party to be estopped, was a party to the earlier action.

In assessing the fourth element, whether application of collateral estoppel would work an injustice, reviewing courts focus on whether the parties to the earlier action were afforded a full and fair opportunity to litigate their claim in a neutral forum. Nielson v. Spanaway Gen. Med. Clinic, Inc., 135 Wn.2d 255, 264–65, 956 P.2d 312 (1998).

Swinger contends he was denied the opportunity to introduce evidence against the title insurance company. He also claims to have lacked sufficient motivation to litigate that action vigorously because he did not foresee the collateral estoppel consequences. Swinger states, "The court did not advise or take extra care in advising me of the implications of not providing all documents supporting my ownership of the disputed area." Brief of Appellant at 14.

The court was not obligated to advise Swinger of the consequences of not bringing an appeal. The role Swinger describes is that of a lawyer, not a judge. Swinger chose to act pro se in bringing this lawsuit and the action against the title company. In undertaking the role of a lawyer, pro se litigants assume the duties and responsibilities of a lawyer and are held accountable to the same standard of legal knowledge. Batten v. Abrams, 28 Wn. App. 737, 739 n.1, 626 P.2d 984, review denied, 95 Wn.2d 1033 (1981).

The superior court was a neutral forum for Swinger's case against the title company. The court considered thorough briefing by the parties and heard oral argument. Swinger had a full and fair opportunity to litigate his claim that he owned the property on the east bank, and it was decided against him.

The elements of collateral estoppel are met here. The trial court properly dismissed Swinger's unjust enrichment claim as precluded by the decision in the previous case.

We turn next to Swinger's assertion of a claim that it was an abuse of process for Vanderpol to file the federal lawsuit. He requests reimbursement for the expenses he incurred in result of that litigation. The trial court dismissed Swinger's abuse of process claim for lack of evidentiary support.

To prove an abuse of process, the claimant must demonstrate: (1) an ulterior purpose to accomplish an object not within the proper scope of the process and (2) an act not proper in the regular prosecution of proceedings. Fite v. Lee, 11 Wn. App. 21, 27, 521 P.2d 964, review denied, 84 Wn.2d 1005 (1974). For instance, an abuse of process occurs when a party files numerous improper motions and discovery requests for the purpose

of harassing another party. Hough v. Stockbridge, 152 Wn. App. 328, 346–47, 216 P.3d 1077 (2009), review denied, 168 Wn.2d 1043 (2010). "The mere institution of a legal proceeding even with a malicious motive does not constitute an abuse of process." Fite, 11 Wn. App. at 27–28; see also Abrams, 28 Wn. App. at 749 ("filing a lawsuit, although baseless or vexatious, is not misusing process.") "There is no liability if nothing is done with the lawsuit other than carrying it to its regular conclusion." Abrams, 28 Wn. App. at 749.

*6 Swinger first argues Vanderpol's filing of the federal suit was an abuse of process because the court lacked subject matter jurisdiction. Filing suit in a court that lacks jurisdiction does not by itself satisfy either element of an abuse of process claim. There is no evidence that Vanderpol had an ulterior motive. The lawsuit was carried to a regular conclusion when the appellate court dismissed it for lack of jurisdiction.

Swinger next argues it was an abuse of process for Vanderpol to include an adverse possession claim in his federal court lawsuit when he had not paid the taxes on the subject property. Again, Swinger fails to identify evidence satisfying the elements of an abuse of process claim. Assuming for the sake of argument that Vanderpol filed the adverse possession claim without the evidence needed to prove it, that would make his claim baseless, but it would not establish an abuse of process. The trial court properly dismissed the abuse of process claim.

Next, we address Swinger's claim that Vanderpol, through his communications with the District, is liable for a tortious interference with contract. Swinger argues that Vanderpol interfered with Swinger's contract with the Conservation Reserve Enhancement Program. Vanderpol's December 2011 letter to the District asserted that if planting occurred on his property without his consent, he would "pursue his full legal rights and remedies with regards to such an intentional trespass." In his February 2012 letter, he reiterated that he would seek legal recourse if a trespass occurred. Swinger asserts that Vanderpol's "criticism and litigation threat letter" constitutes a tortious interference. He claims damages of $54,370, the amount he would have received for participating in the program.

The information Vanderpol communicated to the District —that he allegedly owned the property Swinger was attempting to commit for preservation—was relevant to the District's decision whether to proceed with a project on Swinger's property. The District is a government agency. See RCW 89.08.020. The trial court properly dismissed Swinger's interference claim because Vanderpol has a statutory immunity from a suit based on his communications with a government agency. "A person who communicates a complaint or information to any branch or agency of federal, state, or local government... is immune from civil liability for claims based upon the communication to the agency or organization regarding any matter reasonably of concern to that agency or organization." RCW 4.24.510. The purpose of this statute is "to protect individuals who make good-faith reports to appropriate governmental bodies," based on a finding that "the threat of a civil action for damages can act as a deterrent to citizens who wish to report information to federal, state, or local agencies." RCW 4.24.500.

The tortious interference claim was properly dismissed for an additional reason. One element of a tortious interference claim is the existence of a valid contract. Calbom v. Knudtzon, 65 Wn.2d 157, 162, 396 P.2d 148 (1964). Swinger's interference claim depends on his having a valid contract with the District. As discussed above in connection with the unjust enrichment claim, Swinger is precluded from asserting that he owns land on the east bank. Swinger cannot prove he has a valid contract with the District as to property on the east bank because he cannot prove he owns that property.

*7 Last, we consider the issue of attorney fees and costs. Relying on RCW 4.24.510, the trial court awarded Vanderpol $10,000 in statutory damages as well as the attorney fees he incurred in obtaining dismissal of Swinger's claim of tortious interference with contract. Vanderpol requests an award of attorney fees and costs for this appeal under the same statute.

A person immune from suit under RCW 4.24.510 "is entitled to recover expenses and reasonable attorneys' fees incurred in establishing the defense and in addition shall receive statutory damages of ten thousand dollars. Statutory damages may be denied if the court finds that the complaint or information was communicated in bad faith." RCW 4.24.510.

Swinger contends it was error for the trial court to award damages and fees under the statute. He cites

Gontmakher v. City of Bellevue, 120 Wn. App. 365, 366, 85 P.3d 926 (2004), for the proposition that for RCW 4.24.510 to apply, the information communicated to an agency must concern "potential wrongdoing." He contends that Vanderpol "did not flag" potential wrongdoing by Swinger when he communicated with the District.

The phrase "potential wrongdoing" occurs in Gontmakher, where the opinion explains the background of the statute by quoting legislative findings. Gontmakher, 120 Wn. App. at 371. The legislative findings are stated in RCW 4.24.500:

> Information provided by citizens concerning potential wrongdoing is vital to effective law enforcement and the efficient operation of government. The legislature finds that the threat of a civil action for damages can act as a deterrent to citizens who wish to report information to federal, state, or local agencies. The costs of defending against such suits can be severely burdensome. The purpose of RCW 4.24.500 through 4.24.520 is to protect individuals who make good-faith reports to appropriate governmental bodies.

The quoted language explains why the legislature saw fit to enact the statute; it does not create a requirement or element. The operative language concerning immunity and attorney fees is found in the next section of the statute, RCW 4.24.510. This section does not require that the "complaint or information" communicated by the speaker must concern wrongdoing in order for immunity to attach.

As discussed above, Vanderpol is immune from suit under RCW 4.24.510 with respect to the tortious interference claim. The court did not find that Vanderpol communicated information to the District in bad faith. Therefore, the trial court did not err in awarding to Vanderpol the mandatory damages of $10,000 as well as the expenses and reasonable attorney fees he incurred to establish the defense of immunity. Subject to compliance with RAP 18.1, Vanderpol is entitled to an award of the attorney fees and costs he incurred in this appeal that are related to the immunity defense under RCW 4.24.510.

Affirmed.

WE CONCUR:

Trickey, J.

Verellen, C.J.

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NOTE: UNPUBLISHED OPINION,
SEE WA R GEN GR 14.1

Court of Appeals of Washington,
Division 1.

Joseph Mojarrad and Nicole Ching Lin Lu, husband and wife, Appellants,

v.

Ron Walden and Jane Doe Walden, husband and wife; Ron Walden, as personal representative for the Estate of Gilbert Walden, a probate estate, Defendants, Lorraine Walden and John Doe Walden, husband and wife, Respondents.

No. 74546–8–I
|
(consolidated with 74768–1)
|
FILED: December 19, 2016

Appeal from Skagit Superior Court, David R. Needy, J.

Attorneys and Law Firms

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UNPUBLISHED OPINION

BECKER, J.

***1** This appeal concerns a claim for breach of the warranty of quiet possession of a gravel driveway that runs across a parcel of rural property. In 2005, the seller gave the buyer a statutory warranty deed to the parcel, including the driveway. The buyer claims that at closing, he was unaware that a neighbor had acquired title to the driveway by adverse possession decades earlier. In 2010, the buyer found he was unable to use the driveway because the neighbor had gated it. On summary judgment, the trial court held that the alleged breach of the warranty of quiet possession occurred at the time of conveyance in 2005, necessitating dismissal of the claim as beyond the statute of limitations. We reverse. A jury could find that the breach did not occur until the buyer encountered the blocked driveway in 2010.

We review a summary judgment order de novo, considering the evidence in the light most favorable to the nonmoving party. Mastro v. Kumakichi Corp., 90 Wn. App. 157, 162, 951 P.2d 817, review denied, 136 Wn.2d 1015 (1998). Summary judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. See CR 56(c).

FACTS

From 1952 until his death in 2009, Gilbert Walden owned and lived on property in rural Skagit County just off Butler Creek Road. To get from the road to the residence and shop on his property, he used a driveway that extends some 30 to 50 feet past the residence.

Respondent Lorraine Walden is a widow in her late 60s. She was married to Gilbert's brother, Melroy. Lorraine and Melroy lived in Seattle and regularly drove up to Skagit County to visit Gilbert. Melroy was interested in buying property as an investment. Gilbert recommended the purchase of the property that adjoined his to the north, an undeveloped plot of land of 20 acres between Butler Creek on the west and Butler Creek Road on the east. Melroy and Lorraine bought this property in 1965. They received a warranty deed that was recorded in March 1967. The driveway is near the boundary line of the two properties.

According to Lorraine, she and Melroy did not go onto their property and they were not interested in developing it. They did not believe the driveway was included in their property; they always thought it belonged to Gilbert, who exclusively used it, as had his predecessors. They used the driveway only when they visited Gilbert.

Gilbert at one time raised cattle on his property and maintained a fence on the north side of the driveway. Sometime in the 1960s, he moved his cattle, and from then on, he had no reason to keep the fence repaired. At present, the barbed wire remnants of the fence can be found only by picking through brush.

Melroy died in 1990. Lorraine continued to live in Seattle, where she worked until her retirement in 2013. She drove up from time to time to visit Gilbert. She thought of her property as an asset that she could sell for cash when she needed money to live on.

Around 1992, Lorraine decided to acquire a narrow two-acre pie-shaped piece of land between the eastern boundary of her property and the Butler Creek Road. Lorraine understood that acquisition of this parcel was necessary to prevent her parcel from being landlocked. To facilitate the purchase, she commissioned a survey by AARAY Consultants. The survey is dated October 5, 1992.

***2** The AARAY survey showed the driveway as being on Lorraine's property. Gilbert and Lorraine discussed this and "laughed" about what they considered to be a mistake. Gilbert believed the surveyor had started from the wrong post. The surveyor refused Lorraine's request to make a correction. Lorraine left it at that. She had spent $5,000 on the survey. "I didn't want to spend money on something I knew that was useless. I knew where my line was." She knew all along Gilbert had owned the driveway since 1952 or 1953. Lorraine received title to the 2–acre parcel in April 2004. With that addition, the property she sold to Mojarrad now consists of 22 acres.

In 2005, Lorraine decided to offer the property for sale. At the same time, Mojarrad and his wife, who live in Texas, were looking for rural acreage in Washington as a possible place to move and build a house for retirement. The Mojarrads did not meet Lorraine personally. Their agent, Mike Trojan, showed them Lorraine's property. They walked along the driveway, "way down to the west side," to the west corner "that was a little like a fish creek," until they got to an area so crowded by trees it was impassable. In doing so, they walked by Gilbert's house. They did not see a fence or a ditch.

On September 30, 2005, the Mojarrads signed a purchase and sale agreement offering to purchase the property for $175,000. Lorraine signed her acceptance on October 1, 2005. On October 4, the Mojarrads obtained a seller disclosure statement and a copy of the 1992 AARAY survey. The seller disclosure statement, initialed by Lorraine on October 3, represented that there were no "rights of way, easements, or access limitations that may affect the Buyer's use of the property," no "encroachments, boundary agreements, or boundary disputes," and no "covenants, conditions, or restrictions which affect the property."

Closing occurred on October 19, 2005. The Mojarrads did not attend the closing. The real estate agent for Lorraine was there, and Mojarrad's agent was present also, at least by speaker phone. According to Lorraine, Gilbert accompanied her to the escrow "to make it absolutely crystal clear that whatever the survey showed was not a true reflection of ownership or possession." She said that Gilbert "made it very clear" to the realtors and others present at the escrow that it was always understood that he owned the driveway "to the north side of the ditch where the fence ran." According to Lorraine, Mojarrad's agent said, "Yes, they know that."

The record does not conclusively establish that the message delivered by Gilbert at closing was relayed to Mojarrad. The record does not contain testimony from either of the real estate agents. According to Mojarrad, "We relied upon Lorraine Walden's seller disclosure statement and survey and closed the purchase of the Property. Lorraine Walden did not notify us that any other person claimed to own or possess any interest in any portion of the Property." Lorraine admits she took no other steps to inform the Mojarrads that the driveway was not included in the sale.

In 2009, Gilbert died and his property passed to his estate. Gilbert's son Ron Walden took over as the personal representative of Gilbert's estate in 2010. Initially, he went to the residence on a daily basis to clean up the property. He said after cleanup was complete, he shut the gate but continued to drive by regularly.

In 2009, Mojarrad visited his property and walked down the driveway. He saw no gate. He did see some "junk" on the driveway—"cable, old battery, tire," and perhaps a travel trailer. Mojarrad claims he had a telephone conversation with Ron in which he requested that these items be moved, and he said Ron agreed to move them. Ron says he does not recall this conversation.

***3** Mojarrad hired Matthew Mahaffie, a wetland ecologist, to do a wetland study. According to Mahaffie, he advised Mojarrad "that much of his property was considered a wetland upon which a house could be built only at an excruciating expense." He told Mojarrad that

to build in the southwest corner would require using the driveway and then going across the Walden estate property. Mahaffie declared that Mojarrad "did not know where his property corners were" and "did not know that the driveway servicing the Walden estate property was within his boundary lines." Mahaffie advised Mojarrad that the only suitable building site fronted Butler Creek Road. He said Mojarrad did not want to build that close to the road.

Ron and Mojarrad both recall an encounter in 2010 when Mojarrad and his wife were visiting the property. According to Mojarrad, this was the first time he found the driveway gated. He flagged Ron down on Butler Creek Road. Ron opened the gate, and they walked down the driveway. Mojarrad demanded removal of the gate. He said he showed Ron the survey depicting the driveway as being on his property, and Ron said, "I don't care what the survey shows. I take this driveway anyhow."

Ron recalls that Mojarrad "told me that the driveway was his and I needed to move everything that was on his property immediately." Ron surmised that Mojarrad "assumed the property line was on the north side of the driveway when he made the purchase" but had since found out that it would be too expensive to build a new road into his property. "It was cheaper for him to take that driveway and because of the survey, he would take it." Ron said he threatened to call the sheriff because Mojarrad "got rather assertive" at this point.

Ron's son Jeffrey Walden was also present at this conversation in 2010. He recalls that Ron explained how the property line was determined by a government section marker on the east side of Butler Creek Road. According to Jeffrey, Mojarrad "admitted that he was aware that the driveway was not included as access when he purchased the property but said he was going to take it now because his property was nearly all wetland and he needed it to get access to the only building site on his property which was in the southwest corner of the property he had purchased."

Mojarrad visited the property in 2012 and again found the driveway blocked. He discovered that Ron had heavy equipment digging on the driveway.

In September 2012, Mojarrad received a letter from attorney John Hicks, who was representing Gilbert's estate. Hicks asserted that the estate owned the driveway. His letter offered that the Walden estate would "conduct a survey sufficient to set the line along the fence line and cause a Deed to be prepared for your signature to clear up any issues concerning the boundary." Attached to the letter was a declaration from Lorraine stating that she told Gilbert after the 1992 survey that no matter what the survey showed, the true property line was north of the ditch.

On October 25, 2012, and November 15, 2012, Mojarrad's attorney sent letters to Lorraine. Each had the heading, "Tender of Defense of Mojarrad/Butler Creek property." The letters demanded that Lorraine defend Mojarrad's title against the estate's claim of ownership of the driveway. Otherwise, "my clients will commence defense of their own title immediately and will pursue you for indemnification of their losses, costs, and reasonable attorney fees." Lorraine did not respond.

In March 2014, Mojarrad filed suit against Ron Walden, the estate of Gilbert Walden, and Lorraine Walden. Against Ron and the estate, Mojarrad sought to quiet title to the driveway. Against Lorraine, Mojarrad alleged breach of deed warranties, unjust enrichment, equitable estoppel, negligent misrepresentation, and equitable indemnity. The defendants filed an answer, alleging that Gilbert had acquired the driveway by adverse possession.

***4** Attorney Garl Long, representing the Walden estate, wrote to Mojarrad in February 2015, asserting that the estate's claim of adverse possession of the driveway was incontestable, based on Lorraine's declaration, aerial photos, and the driveway serving only Gilbert's residence. The letter threatened a motion for summary judgment, and it mentioned that attorney fees are recoverable by the prevailing party in an adverse possession case under RCW 7.28.083. He proposed that Mojarrad should settle his quiet title action against the estate by cooperating in a boundary line adjustment. Gilbert's estate had commissioned an "occupation survey" in 2014, known as the Lisser survey, with a legal description of the driveway portion of Mojarrad's property that would need to be conveyed to the Walden estate to accomplish a boundary line adjustment properly reflecting Gilbert's adverse possession.

Depositions of Mojarrad, Lorraine, Ron, and other witnesses were taken at the end of May 2015. On July 20, 2015, Mojarrad and the estate settled and entered into a

CR 2A stipulation for a boundary line adjustment as in the Lisser survey and a decree quieting title to the driveway in the estate. Mojarrad had advised Lorraine, by letter dated June 26, 2015, of his intent to enter into this stipulation.

The estate and Ron were dismissed from the lawsuit. Only Mojarrad's claims against Lorraine remained. Mojarrad moved for summary judgment against Lorraine for breach of the warranty of quiet enjoyment. Lorraine moved for summary judgment dismissing all of Mojarrad's claims.

After a hearing on December 10, 2015, the court denied Mojarrad's motion for summary judgment and granted Lorraine's. Mojarrad appeals both of these decisions.

Lorraine moved for attorney fees as the prevailing party. On January 19, 2016, the court denied her request for attorney fees. Lorraine's brief requests reversal of this decision.

WARRANTY OF QUIET ENJOYMENT

Lorraine's motion for summary judgment

The trial court ruled that Mojarrad's claim for breach of the warranty of quiet possession was barred by the six-year statute of limitations. See RCW 4.16.040(1); Erickson v. Chase, 156 Wn. App. 151, 157, 231 P.3d 1261 (2010), review denied, 170 Wn.2d 1018 (2011). The court reasoned that when Gilbert represented to Mojarrad's agent at closing in 2005 that the driveway was not part of the property being sold, Mojarrad was put on notice of the estate's claim of paramount title and the statute of limitations began to run.

The warranty of quiet enjoyment, also known as quiet possession, "warrants to the grantee, his or her heirs and assigns, the quiet and peaceable possession" of premises conveyed by a statutory warranty deed. RCW 64.04.030. This is a future warranty. Erickson, 156 Wn. App. at 158. As a general rule, the warranty of quiet possession is not breached until the buyer experiences an actual or constructive eviction by one who holds a paramount title existing at the time of the conveyance. Foley v. Smith, 14 Wn. App. 285, 291, 539 P.2d 874 (1975); W. Coast Mfg. & Inv. Co. v. W. Coast Improvement Co., 25 Wash. 627, 643, 66 P. 97 (1901).

Mojarrad argues for application of the general rule. He contends that his right to quiet possession of the driveway was not disturbed until 2010 at the earliest, when he first encountered the driveway blocked by a gate. Mojarrad views the gate as Gilbert's estate's first effort to assert its paramount title to the driveway and evict him. Because this incident occurred less than six years before he filed suit in March 2014, Mojarrad contends the trial court erred in ruling that the statute of limitations had already run on his claim for breach of the warranty of quiet enjoyment.

The general rule has an exception that applies when the holder of the paramount title is in possession of the disputed property at the time the seller conveys the warranty deed to the buyer. Whatcom Timber Co. v. Wright, 102 Wash. 566, 568, 173 P. 724 (1918). "Appellant did not obtain possession, and, therefore, the general rule, that the warranty is not broken until eviction or some substantial interference with the possession, is not applicable in this case.... If, at the time the deed is executed the premises are in the possession of third persons claiming under a superior title and grantee cannot be put into possession, the covenant of warranty is broken when made, without any further acts of the parties." Whatcom Timber, 102 Wash. at 568.

***5** Relying on the exception stated in Whatcom Timber, Lorraine contends that the record establishes beyond dispute both that Gilbert had a paramount title to the driveway and also that he was in possession of the driveway when the deed was executed in 2005, and therefore the statute of limitations began to run at that time.

It is by now undisputed that Gilbert had a paramount title to the driveway. The parties agree that at the time Lorraine conveyed the 22–acre parcel to Mojarrad, Gilbert had already acquired a paramount title to the driveway by adverse possession decades before. The fact that Gilbert had not obtained a record title is not important. "Title does not necessarily depend upon record proof. Adverse possession is sufficient to support title, and when sustained by proofs collateral to, or in defiance of, the record title, is potent to overcome a record title. Possession, adverse and hostile for the statutory period, and not the record, supports the fee." Hoyt v. Rothe, 95 Wash. 369, 374, 163 P. 925 (1917); see also Gorman v. City of Woodinville, 175 Wn.2d 68, 74, 283 P.2d 1082 (2012).

To establish the exception to the general rule under Whatcom Timber, Lorraine also had to prove that at the time the deed was executed, the driveway was "in the possession" of Gilbert, the holder of superior title, and that the grantee, Mojarrad, could not be "put into possession." Whatcom Timber, 102 Wash. at 568.

If Mojarrad's claim of breach of the warranty of quiet possession goes to trial, the trier of fact will have to decide whether the driveway was "in the possession" of Gilbert in 2005, such that Mojarrad could not "be put into possession." Yet Lorraine's brief does not address what is meant by "possession" in this context.

Whatcom Timber does not answer the question because, there, it was undisputed that the third parties with paramount title were in possession of the disputed tracts of forested land. The complaint of the plaintiff timber company alleged as much. Whatcom Timber, 102 Wash. at 567, 568. The court was not asked to decide what evidence is sufficient to prove possession when the holder of the paramount title does not have a paper title. The opinion is silent on this topic.

Lorraine relies primarily on the undisputed fact of Gilbert's adverse possession against Lorraine in the years leading up to 2005, as well as his use of the driveway after Mojarrad received the deed. Without more, these facts are not sufficient to support applying the exception to the general rule because they do not establish that Gilbert's "possession" of the driveway was manifested in such a way that Mojarrad could not be "put into possession" of it after he received the deed.

The trial court concluded the exception to the general rule in Whatcom Timber was decisively established by the conversation between Gilbert and the real estate agent at the time of closing when, according to Lorraine's testimony, Gilbert clearly stated that "he owned the driveway." The law does not support that conclusion. Even if the agent relayed Gilbert's statement to Mojarrad, the statement was limited to a claim of paramount title. Gilbert's statement did not establish that Gilbert was in "possession" or that Mojarrad could not be "put into possession."

The trial court also believed that the statute of limitations began to run at closing because Mojarrad was put on inquiry notice by Gilbert's stated claim of ownership. "I will find that because of the representation to the agent at the time of sale that the driveway was not part of the driveway being sold. That that in fact put Mr. Mojarrad on notice." The law does not support that conclusion either. A grantee "does not waive the covenants of a deed by having knowledge of a defect." Edmonson v. Popchoi, 172 Wn.2d 272, 283, 256 P.3d 1223 (2011). Knowledge by the grantee at the time of the conveyance of a defect in the grantor's title does not control the force and effect of the express covenants in the deed or affect the question of breach. West Coast Mfg., 25 Wash. at 637–38. Purchasers " 'often take warranties knowing of defects in the title.' " West Coast Mfg., 25 Wash. at 637–38, quoting 8 Am. & ENG. ENC. LAW 86–88 (2d ed. 1898).

***6** We return to the question left unanswered by Whatcom Timber: What evidence, other than a paper title, is sufficient to prove the holder of paramount title is in "possession" of the property conveyed to the grantee such that the grantee cannot be "put into possession"? *Washington Practice* contains an informative discussion that is cited by both parties:

> This covenant [of quiet enjoyment] represents that the grantee's possession will not be disturbed by any third person who has a superior right to possession founded upon a right that existed at the time of conveyance. Therefore, while the third person will be someone who claims under a paramount right that existed at the time of conveyance, the covenant is not breached until that person actually disturbs the grantee in possession. In Washington a disturbance of possession may occur, not only by a third person's physical entry, but also by constructive eviction by that person's proving his superior right and prevailing in an action for possession. Also, though the covenant is considered a "future" covenant, it may be breached at the moment of conveyance if a third person, such as the holder of an easement or an adverse possessor

> who has already perfected title, is then in possession.

18 WILLIAM B. STOEBUCK & JOHN W. WEAVER, WASHINGTON PRACTICE: REAL ESTATE: TRANSACTIONS § 14.3 (2d ed. 2004) (footnote omitted). The passage quoted above indicates that if the third party holds a paramount title but has not obtained record title before the seller conveys the deed to the grantee, breach of the covenant does not occur until there is some kind of "physical entry" or "disturbance" by the third party.

When Lorraine conveyed the property to Mojarrad in 2005, the AARAY survey showed the driveway as being on Lorraine's property. Gilbert had not yet perfected his title to the driveway or prevailed in any action against Lorraine for possession of it. And other than Gilbert's continued use of the driveway, the record furnishes no evidence of a physical act by Gilbert disturbing Mojarrad's possession or otherwise manifesting Gilbert's possession of the driveway in a way that amounted to eviction of Mojarrad. Mojarrad declares that when he visited his property in 2005 and 2009, he encountered no impediment to his use of the driveway. The old fence on the north side of the driveway was obscured by brush, and Mojarrad said he did not see a gate across the driveway until 2010. The record does not establish beyond dispute that Gilbert or his successors denied Mojarrad the ability to take exclusive possession of the driveway before 2010. So far as the record reveals, Mojarrad could have fenced the driveway so as to exclude all others, if he had been inclined to do so.

Under these circumstances, we conclude that summary judgment for Lorraine was improperly granted.

Mojarrad's motion for summary judgment

Mojarrad's motion for summary judgment asked the court to declare as a matter of law that Lorraine breached the warranty of quiet enjoyment and that rescission was the appropriate remedy. As discussed above, he contends the trial court erred by relying on the statute of limitations to deny his motion.

A threshold issue is appealability, though neither party addresses it. Generally, a denial of a summary judgment order is not appealable. See, e.g., Zimny v. Lovric, 59 Wn. App. 737, 739, 801 P.2d 259. This court may, however, choose to grant review of a summary judgment denial if the issue will remain in the case on remand. See, e.g., Ruff v. King County, 72 Wn. App. 289, 300–01, 865 P.2d 5 (1993) (in a personal injury case, reversing grant of summary judgment to defendant on issue of causation; also reviewing and affirming denial of the plaintiff's motion for summary judgment declaring him to be free of contributory negligence). That is the case here. Because Mojarrad's claim will remain in the case, we exercise our discretion to review the denial of his motion for summary judgment.

*7 We cannot conclude that the existing record compels a ruling for Mojarrad as a matter of law on his claim of breach of quiet enjoyment. Neither Lorraine nor Mojarrad has articulated a test or instruction a fact finder could use to decide whether Gilbert was in "possession" of the driveway when Mojarrad received the deed in 2005 such that Mojarrad could not be "put in possession." Lorraine claims it is uncontested that Gilbert was in "possession" of the driveway in 2005 because he was an adverse possessor. Mojarrad responds by reciting some of the elements of adverse possession—it must be exclusive, actual and uninterrupted, and open and notorious. Chaplin v. Sanders, 100 Wn.2d 853, 857, 676 P.2d 431 (1984). Mojarrad contends that while these elements may have been present earlier, in 2005 Gilbert's possession was no longer exclusive, actual, and open because there was no gate and no visible fence.

The briefing at this point is inadequate to support a holding that "possession" in this context is legally defined either by the elements of adverse possession, or—as argued in Mojarrad's reply brief below—that "possession" means conduct that evicts or excludes the grantee from the property at the time of conveyance. The trial court has not yet definitively ruled on this issue. We conclude the issue would benefit from further legal and factual development as the case moves toward trial. We affirm the trial court's denial of Mojarrad's motion for summary judgment.

WARRANTY TO DEFEND TITLE

Mojarrad's complaint also alleged that Lorraine breached the warranty to defend title. He contends that the court erred in dismissing this claim on summary judgment.

A warranty deed in Washington carries the statutory covenant that the grantor "will defend the title thereto against all persons who may lawfully claim the same." RCW 64.04.030. Damages for a grantor's breach are the fees and costs that the grantee incurred in defending title. Mastro, 90 Wn. App. at 163.

The warranty to defend title is a future warranty. Erickson, 156 Wn. App. at 158. A future warranty can be breached after conveyance. Erickson, 156 Wn. App. at 158. Lorraine's brief below concedes that the claim was brought within the statute of limitations.

Lorraine argues that Mojarrad did not make an effective tender of defense, a prerequisite for recovery under the warranty to defend title. Mastro, 90 Wn. App. at 164.

In 2012, Mojarrad sent Lorraine two letters demanding she defend his title against the estate's claim of ownership. Lorraine contends these letters did not qualify as an effective tender because they purported to tender defense of claims which had yet to be brought against him. She contends a tender is effective only if made after a suit against the grantee is already pending. See Dixon v. Flat–Roosevelt Motors, Inc., 8 Wn. App. 689, 692, 509 P.2d 86 (1973).

Mastro and Erickson cite Dixon as setting forth the factors to evaluate whether proper tender has been made. Mastro, 90 Wn. App. at 164–65; Erickson, 156 Wn. App. at 158. In Dixon, the court identified four elements of a tender of defense by borrowing from the common law:

> The tender of defense spoken of is equivalent to "vouching in", a common-law device by which a defendant notifies another (1) *of the pendency of the suit against him*, (2) that if liability is found, the defendant will look to the vouchee for indemnity, (3) that the notice constitutes a formal tender of the right to defend the action, and (4) that if the vouchee refuses to defend, it will be bound in a subsequent litigation between them to the factual determination necessary to the original judgment.

Dixon, 8 Wn. App. at 692 (emphasis added).

Dixon does not make the pendency of a lawsuit an absolute prerequisite for an effective tender, and Lorraine does not cite any cases that apply the first Dixon factor in that way. In Mastro and Erickson, third parties asserting a paramount claim to the land had brought suit to quiet title before the grantees tendered defense. Mastro, 90 Wn. App. at 161; Erickson, 156 Wn. App. at 157. Thus, these cases did not decide that notice of controversy short of a lawsuit will not suffice. Mastro states that a third party's claim of superior title is "usually" established in a lawsuit "between" the grantee and the third party. Mastro, 90 Wn. App. at 164.

***8** At the time Mojarrad sent the letters to Lorraine demanding that she defend his title, Lorraine knew the estate claimed ownership of the driveway she had conveyed to Mojarrad. She had signed a declaration in 2012 supporting the estate's claim to the driveway. Although the estate had not filed a quiet title lawsuit, the potential for a lawsuit was clear. Mojarrad did not file suit until 2014, so Lorraine had two years to step in and defend Mojarrad's title. The statute says the grantor must "defend the title"—it does not say "defend the lawsuit." There was no requirement, under these circumstances, that a lawsuit actually be pending before Mojarrad was entitled to assert his statutory right to have Lorraine defend his title.

Lorraine also argues that under CR 11, she did not have a duty to defend Mojarrad's title from the estate's claim because she could not have advanced a defense in good faith. Lorraine's argument is unpersuasive. A grantor's duty to defend title is not eliminated when the third party asserts a claim the grantor knows or believes to be valid. Because Lorraine did not respond to Mojarrad's tender of defense, Mojarrad was alone in facing the estate's claim of superior title, and he incurred fees and costs to resolve the situation. We conclude that summary judgment for Lorraine was improperly granted.

NEGLIGENT MISREPRESENTATION, EQUITABLE INDEMNITY, AND UNJUST ENRICHMENT

The trial granted summary judgment dismissal of Mojarrad's claims for negligent misrepresentation, equitable indemnity, and unjust enrichment, on the ground that all three claims were untimely. These claims

are subject to three-year statutes of limitations. RCW 4.16.080; Sabey v. Howard Johnson & Co., 101 Wn. App. 575, 593, 5 P.3d 730 (2000) (claim of negligent misrepresentation is subject to three-year statute of limitations); Geranios v. Annex Invs., Inc., 45 Wn.2d 233, 273 P.2d 793 (1954) (unjust enrichment claim subject to three-year statute of limitations under RCW 4.16.080(3)); Universal Underwriters Ins. Co. v. Sec. Indus., Inc., 391 F. Supp. 326, 328 (W.D. Wash. 1974) (under RCW 4.16.080(3), statute of limitations for an indemnity claim is three years).

Mojarrad assigns error to the dismissal of these three claims. He argues that the statute of limitations on these claims began to run in 2012 when he received the estate's letter claiming ownership of the driveway. He claims that when he read Lorraine's declaration that was attached to the letter, he discovered for the first time that Lorraine always knew the driveway was not hers to convey.

A statute of limitations does not begin to run until the cause of action accrues—that is, when the plaintiff has a right to seek relief in courts. Sabey, 101 Wn. App. at 592–93. Under the discovery rule, the statute of limitations does not begin to run until a plaintiff discovers or reasonably could have discovered all the essential elements of the cause of action. See Allyn v. Boe, 87 Wn. App. 722, 943 P.2d 364 (1997), review denied, 134 Wn.2d 1020 (1998).

Negligent misrepresentation

The essential elements of the tort of negligent misrepresentation in Washington are (1) the defendant supplied information for the guidance of others in their business transactions that was false, (2) the defendant knew or should have known that the information was supplied to guide the plaintiff in his or her business transactions, (3) the defendant was negligent in obtaining or communicating the false information, (4) the plaintiff relied on the false information, (5) the plaintiff's reliance was reasonable, and (6) the false information proximately caused the plaintiff damages. Ross v. Kirner, 162 Wn.2d 493, 499, 172 P.3d 701 (2007).

For a negligent misrepresentation claim to accrue, the plaintiff must have discovered (or, in the exercise of due diligence, should have discovered) the misrepresentation. Sabey, 101 Wn. App. at 593. Even taking the facts in the light most favorable to Mojarrad, he discovered, or in the exercise of due diligence should have discovered, Lorraine's misrepresentation at least in 2010, when he first found the driveway blocked by a gate and Ron told him that the estate owned the driveway. Mojarrad did not bring his negligent misrepresentation claim until March 2014, so this claim is barred by the three-year statute of limitations. The trial court did not err in dismissing it.

Equitable indemnity

***9** The elements of equitable indemnity are (1) a wrongful act or omission by A toward B, (2) such act or omission exposes or involves B in litigation with C, and (3) C was not connected with the initial transaction or event. Tradewell Group, Inc. v. Mavis, 71 Wn. App. 120, 126, 857 P.2d 1053 (1993). An indemnity action accrues when the party seeking indemnity pays or is legally adjudged obligated to pay damages to the third party. Sabey, 101 Wn. App. at 593; Cent. Wash. Refrigeration, Inc. v. Barbee, 133 Wn.2d 509, 517, 946 P.2d 760 (1997).

Mojarrad filed the complaint alleging an equitable indemnity claim against Lorraine in March 2014. The stipulated judgment and decree quieting title in the driveway to the estate was entered the next year on August 7, 2015. Mojarrad seeks damages and costs, including reasonable attorney fees. He contends the equitable indemnity claim is not untimely because the estate did not even threaten litigation until 2012.

Lorraine relies on a general argument that the statute of limitations on all of Mojarrad's claims began running on the closing date in 2005 when Lorraine and Gilbert advised his agent that the driveway was not included in the sale. Even assuming Mojarrad was aware of this communication, it is not clear that he knew or should have known in 2005 that Lorraine's misrepresentation had exposed him to litigation with the estate.

Because Lorraine does not adequately explain why the equitable indemnity claim is untimely, we reverse the order of dismissal and reinstate the claim. Whether there is sufficient proof of the elements of the claim is not at issue in this appeal; we hold only that there is a genuine issue of material fact as to timeliness.

Unjust enrichment

A claim of unjust enrichment requires proof of three elements: (1) the defendant receives a benefit, (2) the

received benefit is at the plaintiff's expense, and (3) the circumstances make it unjust for the defendant to retain the benefit without payment. Young v. Young, 164 Wn.2d 477, 484–85, 191 P.3d 1258 (2008).

Lorraine contends Mojarrad knew the elements of this claim at closing in 2005 as a result of the statements made to Mojarrad's realtor about Gilbert's ownership of the driveway. Mojarrad disputes that he ever received this information from the realtor. Mojarrad contends his cause of action for unjust enrichment did not accrue until 2012, when he discovered by reading Lorraine's declaration that she always knew the driveway was not hers, making it unjust for her to retain the benefit of the sale price.

Taking the evidence in the light most favorable to Mojarrad, the statute of limitations began to run in 2012 and his 2014 complaint was timely. The trial court erred in dismissing Mojarrad's unjust enrichment claim as barred by the statute of limitations.

ATTORNEY FEES

Lorraine requested an award of attorney fees from the trial court. Her request was based on a clause in the purchase and sale agreement stating that if either party initiates suit against the other concerning the purchase and sale agreement, the prevailing party is entitled to reasonable attorney fees and expenses. The trial court denied this request. Lorraine contends the trial court should have awarded fees to her as the prevailing party.

Setting aside the question of whether this issue is properly before us in the absence of a notice of cross appeal, RAP 5.1(d), we hold that the clause in the purchase and sale agreement does not provide a basis for an award of attorney fees to either party. When Lorraine conveyed the land to Mojarrad via statutory warranty deed, the purchase and sale agreement merged into the statutory warranty deed. See Barber v. Peringer, 75 Wn. App. 248, 253, 877 P.2d 223 (1994). At that point, there were no contractual rights for either party to enforce. Under Barber, the attorney fees provision was restricted to enforcing rights under the purchase and sale agreement. The parties' right to attorney fees for prevailing in an action under the purchase and sale agreement "ended when the deed was executed and accepted." Barber, 75 Wn. App. at 254.

***10** We reverse the dismissal of Mojarrad's claims for breach of the warranty of quiet enjoyment, breach of the duty to defend, unjust enrichment and equitable indemnity. We remand for reinstatement of those claims. We affirm the order denying Mojarrad's motion for summary judgment. The dismissal of Mojarrad's claim of negligent misrepresentation is also affirmed.

WE CONCUR:

J. Leach

Ronald Cox

All Citations

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NOTE: UNPUBLISHED OPINION,
SEE WA R GEN GR 14.1

UNPUBLISHED OPINION
Court of Appeals of Washington,
Division 1.

THOMAS DUTCHER, a single person, and DIANE DUTCHER, a single person, Respondents,
v.
WYNDEN HOLMAN and JAMIE HOLMAN, a married couple, Appellants.

No. 74976-5-I
|
FILED: April 10, 2017

Opinion

LEACH, J.

*1 Wynden Holman appeals the trial court's summary judgment decision in favor of Thomas Dutcher. Dutcher agreed to sell land to the Lummi Tribe of the Lummi Reservation, (Lummi Nation). Twelve days before closing, Holman recorded a lien against the property. Dutcher paid Holman $11,550 to clear the title and ensure the transaction with the Lummi Nation could close on time. Later, Dutcher filed this lawsuit against Holman, disputing the lien and seeking damages for unjust enrichment, slander of title, and a violation of the Consumer Protection Act (CPA). [1]

Because Dutcher affirmatively established each element of the unjust enrichment and slander of title claims and Holman does not identify an issue of fact to preclude summary judgment, the trial court properly granted Dutcher summary judgment on those claims. But because questions of fact exist about the public interest impact element of the CPA claim, summary judgment on that claim is inappropriate. Thus, we affirm summary judgment on the unjust enrichment and slander of title claims and reverse summary judgment on the CPA claim and remand for further proceedings related to that claim. In addition, we affirm the award of fees on the slander of title claim and award Dutcher additional fees incurred in connection with that claim on appeal.

FACTS

In 2008, Holman's brother, Darin Holman, and Darin's now former wife, Kristen, acquired certain property in Bellingham, Washington. On the property, they established and operated a manufactured home sales business.

At some point after he acquired the property, Darin asked Holman to assist with various projects at the property. Holman provided funds and general assistance in getting the business up and running at the property. In April 2012, Holman recorded a lien against the property. Holman is a real estate broker. The lien stated it was for "Real Estate Services" Holman performed having a value of $18,354, $16,500 of which remained unpaid. In discovery, Holman could not identify any document supporting the lien.

From 2008 through August 2012, Kristen's father, Thomas Dutcher, loaned Darin and Kristen about $800,000 to finance their business and living expenses. In June 2012, to repay part of this loan, Darin and Kristen signed and delivered to Dutcher a warranty deed conveying the property to him. But Dutcher did not record the deed.

In June 2013, the Lummi Nation agreed to buy the property. Because Dutcher had not recorded the warranty deed, the county records showed Darin as the owner. After Dutcher recorded the deed on June 27, 2013, he and the Lummi Nation signed a second purchase and sale agreement, identifying Dutcher as the seller of the property. The agreement set a closing date of July 31, 2013.

Twelve days before closing, Holman filed a second lien for "[s]ign installation / septic installation / permits and associated fees / real estate services." The second lien claim stated that these services had a value of $18,454, with $16,600 still owed. It also stated that Darin Holman owned the property. In deposition, Holman admitted that he knew that Dutcher owned the property when he signed and recorded the lien.

*2 Dutcher asked Holman to release the second lien claim. Holman refused but agreed to accept a reduced payment of $11,550. Dutcher knew that the Lummi Nation was unwilling to delay the closing date. To avoid losing the sale, Dutcher paid Holman the $11,550 out of the sale proceeds. The property sale closed on July 30, 2013.

In 2014, Dutcher sued Holman. He alleged claims of unjust enrichment, slander of title, and violation of the CPA. Holman moved for partial summary judgment, seeking dismissal of Dutcher's slander of title and CPA claims. Dutcher moved for summary judgment on all claims. The trial court denied Holman's motion, granted Dutcher's, and entered a judgment awarding $75,331.39 to Dutcher.

Holman appeals the trial court's decision on both summary judgment motions.

STANDARD OF REVIEW

This court reviews a grant of summary judgment de novo, engaging in the same inquiry as the trial court and viewing the facts and reasonable inferences from those facts in the light most favorable to the nonmoving party. [2] Still, "[t]he nonmoving party must set forth specific facts showing a genuine issue and cannot rest on mere allegations." [3] Summary judgment is appropriate where "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." [4]

ANALYSIS

Unjust Enrichment

First, Holman contends that the trial court erred in granting summary judgment on Dutcher's unjust enrichment claim. "Unjust enrichment is the method of recovery for the value of the benefit retained absent any contractual relationship because notions of fairness and justice require it." [5] The elements of unjust enrichment are "(1)the defendant receives a benefit, (2) the received benefit is at the plaintiff's expense, and (3) the circumstances make it unjust for the defendant to retain the benefit." [6] Holman claims issues of fact exist as to the third element.

Holman asserts that he performed services and provided money that went to improve the property and, therefore, it is not inequitable for him to retain the payment from the proceeds of the sale. He values his services at $18,454 but does not include any documentation to support this claim or show how he calculated this sum. No evidence shows that he is entitled to the $11,550 payment. Thus, no evidence creates a question of fact about whether it was unjust for Holman to retain this payment.

Holman claims that Dutcher's voluntary payment of the $11,550 to Holman precludes Dutcher from now claiming unjust enrichment. Under the voluntary payment doctrine, "money voluntarily paid under a claim of right to the payment, and with knowledge by the payor of the facts on which the claim is based, cannot be recovered on the ground that the claim was illegal, or that there was no liability to pay in the first instance." [7] But this principle does not apply to a payment made under coercive circumstances. [8] At oral argument, Holman's counsel conceded that Dutcher did not have time to judicially contest Holman's claim before the closing date. Dutcher paid Holman under the reasonable belief that he would lose the sale to the Lummi Nation if he contested Holman's claim. Therefore, the payment cannot be considered voluntary.

*3 Because Holman has not shown a question of fact about the inequity of his retention of the payment, summary judgment for Dutcher is appropriate.

CPA Claim

Next, Holman challenges the trial court's granting summary judgment on Dutcher's CPA claim. To prevail on a CPA claim, a plaintiff must show (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) a public interest impact, (4) injury to the plaintiff in his or her business or property, and (5) a causal link between the unfair or deceptive act and the injury. [9] Holman claims that Dutcher has failed to establish the trade or commerce and public interest impact elements. He also claims that no facts show a public interest impact and the CPA claim should have been dismissed.

Trade or Commerce

First, we consider whether the transaction took place in trade or commerce. Holman contends that private transactions among family members do not occur in trade or commerce. We disagree with this categorical view. Here, Holman rested the lien claims upon the alleged provision of real estate services. Because he is a real estate broker and the lien purportedly secured payment for real estate services, his conduct occurred in his trade or business.

Holman also claims that his conduct was not in trade or commerce because he did not act in furtherance of his business or career. Trade or commerce " 'includes only the entrepreneurial or commercial aspects of professional services, not the substantive quality of services provided.' " [10] "Claims directed at the competence of and strategies employed by a professional amount to allegations of negligence and are exempt from the Consumer Protection Act." [11] Here, however, Dutcher's claims do not involve allegations of professional malpractice or negligence. Rather, they involve the misuse of Holman's profession as a real estate broker. Holman cannot rely on cases involving allegations of negligence to avoid liability under the CPA.

Public Interest Impact

Next, we consider whether Holman's actions have a public interest impact. A plaintiff can show a public interest impact in two ways. "[A] claimant may establish that the act or practice is injurious to the public interest because it ... (a) [i]njured other persons; (b) had the capacity to injure other persons; or (c) has the capacity to injure other persons." [12] Or a plaintiff can show a per se public interest impact if the conduct violates a statute that contains a legislative declaration that the conduct impacts the public interest. [13] Dutcher claims that he met this element under either test.

First, Dutcher asserts that Holman's actions constitute a per se public interest impact because Holman violated the contractor registration act. [14] Indeed, a violation of the contractor registration act constitutes a public interest impact. [15] But Dutcher does not show a violation of the contractor registration act. Dutcher asserts that because Holman was not a licensed contractor, his lien claims for contracting services constituted a violation of the contractor registration act. [16] While Holman admits that he is not and never has been a licensed contractor, Dutcher does not show that Holman ever acted as a contractor. Dutcher contends that Holman held himself out as a contractor by filing a material and mechanic's lien. But the form that Holman used does not reference the contractor registration act. Nor do the claims of lien state that Holman was doing contracting work. Because Dutcher has not established that Holman violated the contractor registration act, he has not established a per se violation of the CPA. [17]

***4** Second, Dutcher asserts that Holman's conduct impacts the public interest because it has the capacity to injure others. "When the transaction is a private dispute ... and not a consumer transaction, it is more difficult to show public interest in the subject matter. There must be a likelihood additional persons have been or will be injured in the same fashion." [18] Factors indicating public interest in the context of a private dispute include: "(1) Were the alleged acts committed in the course of defendant's business? (2) Did defendant advertise to the public in general? (3) Did defendant actively solicit this particular plaintiff, indicating potential solicitation of others? (4) Did plaintiff and defendant occupy unequal bargaining positions?" [19] These factors "represent indicia of an effect on public interest from which a trier of fact could reasonably find public interest impact." [20]

Considering these factors, Dutcher does not establish a public interest impact as a matter of law. Dutcher relies on the fact that Holman twice recorded a baseless lien to show that this action is likely to affect additional plaintiffs. But both claims of lien relied on the same set of services that Holman insists that he provided, and both claims of lien relate to the same property. No evidence shows that Holman advertised his services or solicited Dutcher's business. While Dutcher has presented evidence from which a reasonable jury could conclude that Holman's conduct did impact the public interest, that jury could also reach the opposite conclusion. [21]

Thus, we also reject Holman's assertion that no evidence shows a public interest impact and that he is entitled to summary judgment on the CPA claim. As noted above, Holman twice recorded a baseless lien and appeared to use

his position as a real estate broker to do so. A reasonable jury could find this conduct is likely to injure additional plaintiffs in the same fashion. [22]

In sum, although the evidence is sufficient to support a fact finder's conclusion that there was a public interest impact, it is insufficient to establish a public interest impact as a matter of law.

Dutcher has established four elements of the CPA claim as a matter of law, but he has not shown that he is entitled to summary judgment on the public interest impact element. So Holman has not shown that he is entitled to summary judgment on his CPA claim.

Slander of Title

We next consider Dutcher's slander of title claim. To prevail on a slander of title claim, a claimant must show that words concerning the property (1) are false, (2) were maliciously published, (3) were spoken with reference to some pending sale or purchase of property, (4) go to defeat plaintiff's title, and (5) resulted in plaintiff's pecuniary loss. [23] Holman first claims that issues of fact exist about the malice and pecuniary loss elements. He also asserts that as a matter of law, because the liens did not defeat Dutcher's title, the trial court should have granted Holman's motion for summary judgment on this claim.

As a preliminary matter, Holman claims that a plaintiff making a slander of title claim has a heightened burden of proof. Holman asserts that because a slander of title claim includes "malice" as an element, the claimant must prove this claim by "clear, cogent, and convincing evidence." Holman relies on Duc Tan v. Le, [24] which applies this heightened standard to malice in a defamation case. But Holman cites no case applying this standard outside of the First Amendment context, and we assume there is none. [25] Holman does not persuade this court that more than the preponderance of the evidence standard should apply to slander of title claims. [26] Besides, Holman can show no issue of fact under either standard.

Malice

***5** Holman maintains that a question of fact exists about whether he acted with malice. "The element of malice is met when the slanderous statement is not made in good faith or is not prompted by a reasonable belief in its veracity." [27]

This case is like Rorvig v. Douglas. [28] In Rorvig, the court held that defendants acted with malice by recording a memorandum of agreement to prevent a proposed sale when they knew no agreement had been reached. [29] Similarly here, Holman admitted in deposition testimony that he knew of no legal authority giving him the right to assert the liens:

> Q What ... information or authority were you relying on to support the conclusion that under the laws of the State of Washington, you could assert—you could record a lien that would be an encumbrance on this property?
>
> A None.
>
> Q Even though you swore that you had the right under the laws of the State of Washington; right?
>
> A Yes.

He further admits that no contract existed for his alleged services or claimed compensation. Finally, Holman acknowledges that he knew that Dutcher owned the property when Holman recorded the lien. These undisputed facts establish that Holman acted with malice.

Holman attempts to show an issue of fact by asserting that Dutcher acknowledged the debt and negotiated a payoff. We disagree. Dutcher never acknowledged the lien's validity. Dutcher paid Holman not because he thought the lien was valid, but because he needed to clear the title so the sale to the Lummi Nation could close. That Dutcher negotiated a payoff does not change the fact that Holman maliciously filed baseless claims of lien.

Pecuniary Loss

Holman also maintains that a question of fact exists about the pecuniary loss element.

> "(1) The pecuniary loss for which a publisher of injurious falsehoods is subject to liability is restricted to
>
> (a) the pecuniary loss that results directly and immediately from the effect of the conduct of third

persons, including impairment of vendibility or value caused by disparagement, and

(b) the expense of measures reasonably necessary to counteract the publication, including litigation to remove the doubt cast upon vendibility or value by disparagement." [30]

Holman argues that the lien did not impair vendibility because Dutcher sold the property at the time he paid the lien. But this argument lacks merit. The false lien compelled Dutcher to pay $11,550 in order to sell the property. This sufficiently shows a pecuniary loss.

Goes To Defeat Plaintiff's Title

Next, Holman contends that the trial court should have dismissed the slander of title claim because the false publication did not defeat Dutcher's title. Holman relies on Black's Law Dictionary definitions of "defeat" and "title." To "defeat" is "[t]o annul or render (something) void <to defeat title>." [31] "Title" is "[t]he union of all elements (as ownership, possession, and custody) constituting the legal right to control and dispose of property." [32] Relying on these definitions, Holman asserts that a mere monetary encumbrance does not impact any elements of title in such a way as to render it void. Because the lien did not void Dutcher's title, Holman argues, it did not defeat Dutcher's title. We disagree.

***6** Slander of title does not require that the false publication in fact defeats the plaintiff's title, only that it goes to defeat the plaintiff's title. Here, Holman does not dispute that if Dutcher had not negotiated the release of Holman's lien, Dutcher could not have conveyed clear title to his buyer, preventing the sale to the Lummi Nation. Thus, under the facts of this case, the false publication interfered with Dutcher's ownership rights, specifically, his right to dispose of the property. [33] Slander of title does not require that the false publication entirely and permanently annul the plaintiff's title. A cloud that impairs a sale goes to defeat plaintiff's title. Accordingly, we conclude that as a matter of law, Holman's liens did go to defeat Dutcher's title.

Because Dutcher establishes every element of the slander of title claim and Holman identifies no issue of fact, the trial court properly granted summary judgment for Dutcher on this claim.

Special Damages for Slander of Title

Holman also claims that any damages awarded to Dutcher on his slander of title claim should not include attorney fees. Generally, "absent a contract, statute, or recognized ground of equity, the prevailing party does not recover attorney fees as costs of litigation." [34] But Rorvig held that "attorney fees are recoverable as special damages in a slander of title action." [35] Our Supreme Court reasoned that "actual damages are difficult to establish and often times are minimal in slander of title. Fairness requires the plaintiff to have some recourse against the intentional malicious acts of the defendant." [36]

Holman attempts to distinguish Rorvig by citing Rorvig's statement that "[a]ttorney fees incurred in removing the cloud from the title and restoring vendibility are necessary expenses of counteracting the effects of the slander." [37] Relying on this language, Holman claims Dutcher cannot recover attorney fees because he did not incur fees in "removing the cloud from the title" and "restoring vendibility."

But our Supreme Court has clearly recognized that attorney fees can be recovered as special damages in slander of title actions. [38] The court noted that the defendant in these actions leaves the plaintiff with one course of action, litigation. [39] No case limits this recovery to those fees incurred removing the stain of the slander. Moreover, Dutcher's choice to pay a negotiated sum to release the lien rather than litigate to clear the title likely mitigated his damages by avoiding the loss of the sale. Dutcher should not lose his right to recover attorney fees because he chose to mitigate his damages and then litigate with Holman. The same policy reasons for allowing the recovery of fees are present whether Dutcher sued to clear title or sued to recover the money Holman forced him to pay to clear title.

The trial court properly awarded attorney fees on the slander of title claim.

Attorney Fees

Dutcher requests an award of attorney fees incurred in this appeal.[40] "Attorney fees and other legal costs incurred in clearing a slandered title are recoverable as damages," both at trial and on appeal.[41] The CPA also permits award of reasonable attorney fees in a successful appeal.[42] Because Dutcher is the prevailing party on the slander of title claim, he is entitled to recover attorney fees incurred for that claim. However, because his CPA claim remains to be decided in the trial court on remand, any decision on this fee claim is premature. We grant Dutcher's request for fees in part.

CONCLUSION

*7 We affirm in part and reverse in part. Dutcher has established, by undisputed facts, each element of his slander of title and unjust enrichment claims. Because Holman does not identify an issue of fact on either, we affirm summary judgment for Dutcher on those claims. We also affirm the trial court's decision to award attorney fees to Dutcher and award additional fees incurred in this appeal.

A question of fact about the public interest impact element exists for Dutcher's CPA claim. For this reason, summary judgment in favor of either party on this claim is inappropriate. We reverse summary judgment on the CPA claim.

We remand this case to the trial court for further proceedings consistent with this opinion.

WE CONCUR:

All Citations

Not Reported in P.3d, 2017 WL 1324270

Footnotes

1 Ch. 19.86 RCW.

2 McGowan v. State, 148 Wn.2d 278, 289, 60 P.3d 67 (2002).

3 Baldwin v. Sisters of Providence in Wash., Inc., 112 Wn.2d 127, 132, 769 P.2d 298 (1989).

4 CR 56(c).

5 Young v. Young, 164 Wn.2d 477, 484, 191 P.3d 1258 (2008).

6 Young, 164 Wn.2d at 484-85.

7 Hawkinson v. Conniff, 53 Wn.2d 454, 458, 334 P.2d 540 (1959).

8 See Hawkinson, 53 Wn.2d at 458.

9 Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 780, 719 P.2d 531 (1986).

10 Michael v. Mosquera-Lacy, 165 Wn.2d 595, 602-03, 200 P.3d 695 (2009) (quoting Ramos v. Arnold, 141 Wn. App. 11, 20, 169 P.3d 482 (2007)); see also Quinn v. Connelly, 63 Wn. App. 733, 742, 821 P.2d 1256 (1992).

11 Ramos, 141 Wn. App. at 20.

12 RCW 19.86.093.

13 Hangman Ridge, 105 Wn.2d at 791.

14 Ch. 18.27 RCW.

15 RCW 18.27.350 ("The fact that a contractor is found to have committed a misdemeanor or infraction under [the contractor registration act] shall be deemed to affect the public interest and shall constitute a violation of chapter 19.86 RCW.").

16 RCW 18.27.080 ("No person ... acting in the capacity of a contractor may bring or maintain any action in any court of this state for the collection of compensation for the performance of any work ... for which registration is required under this chapter without alleging and proving that he or she was a duly registered contractor ... at the time he or she contracted for the performance of such work.").

17 Dutcher cites Bowers v. Transamerica Title Ins. Co., 100 Wn.2d 581, 675 P.2d 193 (1983), for the proposition that providing professional services without a license gives rise to a per se CPA violation. Bowers found that unauthorized practice of law had a public interest impact. But Bowers did not say that this conduct had a per se public interest impact. Rather, it found the public interest impact element was met because the practice was capable of repetition. Bowers, 100 Wn.2d at 592. See also State v. Pac. Health Ctr., Inc., 135 Wn. App. 149, 172-73, 143 P.3d 618 (2006).

18 Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc., 86 Wn. App. 732, 744-45, 935 P.2d 628 (1997).

19 Hangman Ridge, 105 Wn.2d at 790-91.
20 Hangman Ridge, 105 Wn.2d at 791.
21 See Hangman Ridge, 105 Wn.2d at 789-90 (stating that "whether the public has an interest in any given action is to be determined by the trier of fact from several factors").
22 See Hangman Ridge, 105 Wn.2d at 790.
23 Rorvig v. Douglas, 123 Wn.2d 854, 859, 873 P.2d 492 (1994) (citing Pay 'N Save Corp. v. Eads, 53 Wn. App. 443, 448, 767 P.2d 592 (1989)).
24 177 Wn.2d 649, 668, 300 P.3d 356 (2013).
25 Duc Tan, 177 Wn.2d at 668.
26 Further, even if Holman could show that the clear and convincing standard applies in this case, Washington case law suggests that the standard would apply only to the malice element, not each element as Holman asserts. See Duc Tan, 177 Wn.2d at 668 & n.5.
27 Rorvig, 123 Wn.2d at 860.
28 123 Wn.2d 854, 873 P.2d 492 (1994).
29 Rorvig, 123 Wn.2d at 860-61.
30 Rorvig, 123 Wn.2d at 863 (emphasis omitted) (quoting RESTATEMENT (SECOND) OF TORTS § 633 (AM. LAW INST. 1977)).
31 BLACK'S LAW DICTIONARY 507 (10th ed. 2014).
32 BLACK'S at 1712.
33 See Guimont v. Clarke, 121 Wn.2d 586, 602, 854 P.2d 1 (1993) (identifying the right to dispose of property as a fundamental attribute of property ownership).
34 Rorvig, 123 Wn.2d at 861.
35 Rorvig, 123 Wn.2d at 861.
36 Rorvig, 123 Wn.2d at 862.
37 Rorvig, 123 Wn.2d at 863.
38 City of Seattle v. McCready, 131 Wn.2d 266, 275, 278, 931 P.2d 156 (1997) (recognizing Rorvig's holding that attorney fees as damages are available in slander of title actions and declining to extend the rule to actions brought for the quashing of warrants).
39 Rorvig, 123 Wn.2d at 862.
40 RAP 18.1.
41 Amresco Indep. Funding, Inc., v. SPS Props., LLC, 129 Wn. App. 532, 540, 119 P.3d 884 (2005).
42 Evergreen Collectors v. Holt, 60 Wn. App. 151, 157, 803 P.2d 10 (1991).

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CERTIFICATE OF SERVICE

I, Melani R. Anderson, certify under penalty of perjury under the laws of the State of Washington that on April 27, 2017, I caused the document to which this is attached, Appendix to Petition for Review, to be served on the parties listed below via email pursuant to the agreement of counsel.

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