

63574-3

63574-3

FILED
CLERK OF SUPERIOR COURT
STATE OF WASHINGTON
2009 SEP -1 AM 10:16

~~FILED
CLERK OF SUPERIOR COURT
STATE OF WASHINGTON
2009 AUG 32 AM 8:37
No. 63574-3-I~~

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

SUE SHERMAN,

Appellant,

v.

DENNIS DIEDRICH,

Respondent.

APPEAL FROM THE SUPERIOR COURT
OF SKAGIT COUNTY
CAUSE NO. 08-2-00439-5

BRIEF OF RESPONDENT

DAVID L. DAY, WSBA 8361
Attorney for Respondent

P.O. Box 526
Burlington, WA 98233
(360) 755-0611

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	ASSIGNMENTS OF ERROR	1
III.	ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	2
IV.	PROCEDURAL HISTORY	2
V.	ARGUMENT	3
	A. The Contempt Claim	4
	B. The Negligence Claim	4
	C. Partition	5
VI.	SUMMARY AND CONCLUSION	7

STATEMENT OF AUTHORITIES

CASES

<u>Friend v. Friend</u> , 92 Wash. App. 799, 802, 964 P.2d 1212, 1221 (Wash. App. Div. 2, 1998.)	5
<u>McGill v. Hill</u> , 31 Wash. App. 542, 644 P.2d 680 (1982)	6

STATUTES

RCW 7.52.010	6
RCW 7.52.080	6

RULES

RAP 9.6	3
RAP 9.6(a)	4
RAP 10.3(a)(8)	4

OTHER AUTHORITIES

17 Washington Practice, Stoebuck and Weaver § 1.32	6
WPI 10.07	4

APPENDIX

RCW 7.52.010	A-1
RCW 7.52.080	A-1
RAP 9.6(a)	A-1
RAP 10.3(a)(8)	A-2
WPI 10.07	A-2
17 Washington Practice, Stoebuck and Weaver § 1.32	A-2

I. INTRODUCTION

This appeal stems from a grant of partial summary judgment in the above case wherein Appellant seeks partition which was granted by the trial court), and also claimed negligence and contempt against respondent (which claims were dismissed by the trial court as part of the summary judgment.

II. ASSIGNMENTS OF ERROR

The brief of Appellant alleges that the following are errors which are to be considered by the court:

1. Failure to allow Plaintiff, Sherman her rights to a jury trial under CR 38 (even though she paid for one).
2. Failure to hold the Defendant in this case in contempt of court for not complying with judgment order dated May 18, 1998.
3. Failure of finding the Defendant Diedrich in gross negligence on the great loss he caused the Plaintiff Sherman.
4. Ordering the sale of the 40 acres in question and showing great prejudice against the Plaintiff.
5. Granting the motions by the court on behalf of the Defendant which should not have been granted and putting Plaintiff in a position of have to have them vacate or overturn.
6. Ordering a Referee to sale (sic) the property in question that is a personal friend of Defendant's attorney.
7. By the court to have Defendant spend the eleven thousand dollars alleged alleged (sic) by the court to subdivision the property in question as order in the judgment order dated May 18, 1998.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

The legal issues before this court are whether or not the Plaintiff showed a reason based on facts to deny the requested summary judgment by Defendant.

IV. PROCEDURAL HISTORY

This case was filed in March of 2008 in Skagit County Superior Court. A copy of the Complaint is in the Clerk's papers. CP3-6.

On March 16, 2009 the court granted partial summary judgment to Defendant Diedrich which effectively dismissed the claims of negligence and contempt against Diedrich and ordered partition by sale in lieu of division of the property. CP176-178.

Plaintiff properly requested reconsideration of the ruling and filed a motion for reconsideration on or about March 23, 2009 CP179-180. The court denied the motion for reconsideration in an order on reconsideration filed with the trial court on April 17, 2009 CP220-221. This appeal appears to have stemmed from the denial of reconsideration on that date.

A review of the Appellant's brief together with the documents appended to the brief as exhibits shows that Appellant attempts to expand the scope of the appeal beyond the order entered on April 17, 2009 which denied reconsideration of the Summary Judgment. This is substantiated by a review of a number of pleadings shown as exhibits to the Brief of Appellant. These exhibits in the Appendix deal, in part, with the after effects of the grant of Partial Summary Judgment ordering the sale of the property. A number of hearings have been held to appoint referees, as required by statute; and to strike the trial date which had been re-

calendared by the Plaintiff at the time of Summary Judgment. Few, if any, of the exhibits comport with RAP 10.3(a)(8).

This brief will focus on the appealable issues which are properly before this court and will not devote substantial time to other subsequent hearings which have occurred since the time of the appeal.

V. ARGUMENT

The pertinent issues before this court are only whether or not it was error for the court to grant summary judgment. Appellant makes much of the events which have occurred since the final order denying reconsideration was entered, however, these are, as stated above the inevitable consequences of the grant of Partial Summary Judgment. To the extent there is extraneous material which was not part of the record at the time of the grant of Partial Summary Judgment and to the extent Appellant has failed to perfect the record with respect to these matters, Respondent objects.

The initial case dealt with three issues: 1. Partition; 2. Negligence; 3. Contempt. CP3-6

The court disposed of the second and third issues and granted partial relief respecting partition by ordering the property be sold. Appellant has submitted nothing to support her contention that the court's ruling on March 16, 2009 was error. No authorities have been submitted and the briefs and other materials that were before the court have not been provided such that this court can make a proper ruling. RAP 9.6

A substantial number of documents have been supplied in the Appendix as exhibits, most of which have absolutely no relation to the issues before this court. The exception might be items 2, 3 and 15 and to the extent they were or may have been supplied to the court in opposition

to Defendant's Summary Judgment, Respondent does not object to consideration by the court. However, a vast number of other materials have been submitted which are not pertinent in any way whatsoever. RAP 10.3(a)(8) These include extensive transcripts of various hearings which appear to be totally unrelated or, at best, tangential to the issues before this court. As previously stated, these exhibits do not meet the requirements of RAP 10.3(a)(8).

Respondent herewith has designated additional clerk's papers pursuant to RAP 9.6(a) contemporaneous with this brief. They are initial moving papers for the summary judgment which is the subject of this appeal. CP 234, 235—240, 241—249

A. The Contempt Claim

It appears the trial court considered the claim for contempt in the Complaint. Throughout the proceedings, no evidence was submitted which would substantiate any claim for contempt and no hearings were conducted to result in a finding of contempt such that the court could either rule on the claim of contempt or make a finding of contempt. As a consequence, the trial court dismissed the contempt claim. CP176-178

B. The Negligence Claim

The negligence claim was bolstered only by a copy of Washington Pattern Instruction 10.07 "gross negligence-definition". Throughout the proceedings relating to summary judgment the Appellant failed to submit any evidence which would constitute negligence or a violation of any duty, either statutory or common law, relating to Appellant's claims. The

trial court had no difficulty finding that the record did not substantiate a negligence claim and that claim was dismissed as well on the same date.

C. Partition

The partition action was initiated because the Appellant and Respondent are co-owners of a 40 acre tract of land located in the extreme south of Skagit County. The record shows a map was submitted in the exhibits to a declaration for summary judgment and it is apparent from the map the property in question bounds on the southern county line between Skagit and Snohomish counties. CP 241-249

The exhibits also included copies of the zoning code showing the present zoning is 40 acres. The exhibits also showed that a subdivision could not be accomplished by any means in compliance with County Code because of the minimum 40 acre lot size. CP 241-249

Appellant submits documents from a 1998 trial (most pertinent are documents of a ruling by a judge in Snohomish Superior Court) whereby the property in question was to have been subdivided. It appears that between the time when the property was ordered subdivided and the commencement of this action in Skagit County for partition (March 2008) ten years elapsed. The zoning density for subdivision had changed, rendering the ability to make the subject property into two 20 acre lots an impossibility. Stated another way, the County had down-zoned the property from 20 acre minimum lot size to 40 acre minimum lot size. As a consequence, the previous court order in Snohomish County could not be enforced.

The submittals to the trial court included a recitation in the brief to a case which is exactly on point. This case is Friend v. Friend, 92 Wash. App. 799, 802, 964 P.2d 1212, 1221 (Wash. App. Div. 2, 1998.) As is

apparent from RCW 7.52.010 and 7.52.080, the court was compelled to find from the undisputed facts that Sherman and Diedrich are co-owners of the subject property and that as such that the right of partition arose. Thereafter it became a question of whether or not partition could be accomplished by sale or by physical division. As stated above, the County had prohibited the subdivision of tracts in this particular area where each tract would be less than 40 acres. This property could not be subdivided and sale is the inevitable consequence. RCW 7.52.080.

Applying the rule in *Friend*, recited above, at 802, it is apparent the court was left with no choice but to order partition by sale.

Sherman claims expenses in her management and care for the property. This is seeming justification for opposing the partition. This position is premature.

From a review of the report of proceedings it is apparent that the court was mindful of the right to a final accounting after the sale of the property. RP14L15—RP15L5 A reference was made in the briefing to 17 Washington Practice, Stoebuck & Weaver §132 (the summary judgment brief erroneously referenced the article as Sect 132 as authored by Falknor) where final accounting is a remedy once the property sells.

In addition, although no mention was made in the summary judgment hearing, Appellant apparently feels she was somehow denied the right to a jury trial. Although it is an extraneous issue, the court was aware of McGill v. Hill, 31 Wash. App. 542, 644 P.2d 680 (1982), which holds that partition is equitable in nature. Presumably, the court inferred from this reference that a jury trial would not be permissible. Rather, a

bench trial inevitably must occur once the property sells in order to sort out the various accounting issues. RP 14L23—RP 15L5¹

VI. SUMMARY AND CONCLUSION

In all, this case was a proper grant of summary judgment under the circumstances. The Appellant failed to substantiate the negligence and contempt claims, and herself initiated the claim for partition. The court gave her the relief requested in form of an order for partition. This Court should affirm the Summary Judgment of March 16, 2009.

Respectfully submitted this 31 day of August, 2009


DAVID L. DAY, WSBA #8361
Attorney for Respondent
P.O. Box 526
Burlington, WA 98233
(360) 755-0611

¹ The reporter erroneously names Appellant as Ms. Diedrich. To our knowledge they have never been married.

APPENDIX

RCW 7.52.010

When several persons hold and are in possession of real property as tenants in common, in which one or more of them have an estate of inheritance, or for life or years, an action may be maintained by one or more of such persons, for a partition thereof, according to the respective rights of the persons interested therein, and for sale of such property, or a part of it, if it appear that a partition cannot be made without great prejudice to the owners.

RCW 7.52.080

If it be alleged in the complaint and established by evidence, or if it appear by the evidence without such allegation in the complaint, to the satisfaction of the court, that the property or any part of it, is so situated that partition cannot be made without great prejudice to the owners, the court may order a sale thereof, and for that purpose may appoint one or more referees. Otherwise, upon the requisite proofs being made, it shall decree a partition according to the respective rights of the parties as ascertained by the court, and appoint three referees, therefore, and shall designate the portion to remain undivided for the owners whose interests remain unknown or are not ascertained.

RAP 9.6

(a) Generally. The party seeking review should, within 30 days after the notice of appeal is filed or discretionary review is granted, serve on all other parties and file with the trial court clerk and the appellate court clerk a designation of those clerk's papers and exhibits the party wants the trial court clerk to transmit to the appellate court. Any party may supplement the designation of clerk's papers and exhibits prior to or with the filing of the party's last brief. Thereafter, a party may supplement the designation only by order of the appellate court, upon motion. Each party is encouraged to designate only clerk's papers and exhibits needed to review the issues presented to the appellate court.

RAP 10.3(a)(8)

(a) Brief of Appellant or Petitioner. The brief of the appellant or petitioner should contain under appropriate headings and in the order here indicated:

(8) *Appendix.* An appendix to the brief if deemed appropriate by the party submitting the brief. An appendix may not include materials not contained in the record on review without permission from the appellate court, except as provided in rule 10.4(c).

WPI 10.07 Gross Negligence—Definition

Gross negligence is the failure to exercise slight care. It is negligence that is substantially greater than ordinary negligence. Failure to exercise slight care does not mean the total absence of care but care substantially less than ordinary care.

17 Washington Practice, Stoebuck and Weaver § 1.32

A final accounting among the co-tenants is a part of a partition action. Something has already been said of this. A co-tenant may recover any sums that could be recovered in an accounting in a contribution action, principally the other co-tenants' prorata shares of money the co-tenant has paid beyond his share for taxes, mortgage debt payments, and necessary repairs. In addition, according to the rule in most American jurisdictions, sums paid for improvements may be recovered to the extent they enhanced the land's value only in a partition action, not in a contribution action. While it must be true in Washington that such sums could, to that extent, be recovered in a final accounting, it is not clear whether they might also have been recovered in a contribution action. In the absence of a special agreement, a co-tenant cannot recover compensation for his personal services in the care and management of the common property.

~~FILED
CLERK OF SUPERIOR COURT
STATE OF WASHINGTON
2009 AUG 32 AM 8:37~~

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

SUE SHERMAN,)	No. 63574-3
)	
Appellant,)	Skagit County Superior Court
)	Case No.: 08-2-00439-5
vs.)	
)	DECLARATION OF
DENNIS DIEDRICH,)	MAILING
)	
Respondent.)	

Barbara J. Hanger, under penalty of perjury declares the following:
That on the 31st day of August, 2009, she caused to be deposited in the United States mail at Burlington, Washington, postage prepaid, a copy of the Brief of Respondent and a copy of (this) Declaration of mailing addressed to the following:

Sue Sherman
614 106th Pl. SW
Everett, WA 98204

FILED
CLERK OF SUPERIOR COURT
STATE OF WASHINGTON
2009 SEP -1 AM 10:16

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 31st day of August, 2009, at Burlington, Washington.



Barbara J. Hanger, Paralegal

Fairhaven Legal Associates, P.S
P.O. Box 526
Burlington, WA 98233
(360) 755-0611