

65604-0

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No. 65604-0

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

Jamie Jensen, Appellant,

vs.

Fredric B. Anderson, et al, Respondent

BRIEF OF APPELLANT

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COURT OF APPEALS
DIVISION ONE
STATE OF WASHINGTON
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I INTRODUCTION

The Superior Court awarded \$5,000 in Rule 11 sanctions against Appellant attorney Jensen and client Todd Chase because the court determined that they had falsely claimed in pleadings that Todd Chase was an owner of a parcel of real property. In fact Todd Chase was the record owner of the property at the time of the claim. And such error, if it existed, was harmless because Todd Chase was the owner at the time of the damage and therefore had standing to bring the case anyway.

II. ASSIGNMENTS OF ERROR

1. The court erroneously awarded judgment against Jensen without due process to, or service on, Jensen.
2. The court erroneously found that Todd Chase was not an owner of the subject property at the time the pleadings were filed.
3. The Court, then, by extension of its rulings, erroneously found that Todd Chase had no standing to bring this action because he had disposed of the property prior to filing this action.
4. The court erroneously awarded Rule 11 sanctions since Jensen and Chase's position was well grounded in fact,

warranted by existing law, and interposed for a proper purpose.

5. The court erred by allowing itself to be prejudiced by the improper presentation of inadmissible evidence by opposing counsel.

III ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Can the superior court award judgment against a party who has not been served with notice or given an opportunity to defend?
2. Can a divorce decree act the same as a deed to transfer ownership of real property, and if so, must it be filed to be effective?
3. If a person's property is negligently damaged must the person retain the damaged property up to and through litigation to recover for the damage?
4. Can Rule 11 sanctions be awarded for harmless error or for statements in pleadings that are correct?
5. Does the inclusion of inadmissible and prejudicial information about opposing counsel taint a case?

IV. STATEMENT OF THE CASE

For decades the Chase family has owned property on Puget Sound along Mukilteo Boulevard in Everett. Chris Chase owns a parcel of land along Ring and Merrill Creek in Everett. Chris's brother, Todd, owned a contiguous parcel along Ring and Merrill Creek with his wife, Leona Chase. The land has a significant slope. Chris's parcel has a building site but Todd and Leona's parcel was unbuildable. The parcels are referred to as "gully" lots.

Frederic and Holly Anderson own a home on land at the top of the gully and overlooking the Chase parcels. In June, 2009, the Andersons hired a contractor to come on to the Chase parcels and to cut down approximately 38 trees in order to improve the Anderson's view of Puget Sound. The Andersons had no permission to come on to the Chase properties, or to cut down the trees. The Andersons have acknowledged that they were cutting down trees. CP Pg.269. Appellant Jamie Jensen, an Attorney, was hired by the Chases to obtain compensation from the Andersons.

In September, 2009, Todd Chase was divorced from his wife Leona. In the decree the gully land that they owned together was awarded to Leona. No deed was filed nor was the decree filed with the County Auditor. Jensen did not represent any party to the dissolution

In November, 2009 the Chases, through Jensen, brought an action to obtain compensation from the Andersons. In the pleadings Todd Chase was listed as an owner of the property, which reflected the County Auditor's records. CP Pgs. 258-267. The county records at the time of the filing of the complaint in this matter show that Todd Chase was the owner of the gully property. CP Pg.21-53.

Without ever filing an answer the Andersons, through their attorney John Dippold, brought a motion to dismiss Todd Chase claiming that Todd had no standing to bring the complaint. The motion included a request for Rule 11 sanctions and attorney's fees. The Andersons alleged that although Todd owned the property at the time of the damage, his subsequent loss of the property in his divorce divested him of standing as though he had suffered no loss by the actions of the Andersons. CP 214 – 223.

In the same motion the Andersons, through their attorney, John Dippold, presented significant documentary evidence regarding the suspension of Appellant Jensen from the practice of law in Minnesota in 1996. (Jensen was readmitted in Minnesota). The evidence was used to claim that Jensen was acting in conformity with the action in Minnesota prior to 1996. CP Pg. 214 - 223. CP 201 – 213.

Jensen withdrew from representing the Chases to protect them from any damage due to Jensen's history. However, the Chases allowed him to prepare a motion striking the suspension evidence as inadmissible. The motion was prepared but never heard, at the request of Chase's new counsel.

The motion to dismiss Todd and for sanctions and fees was then dismissed or continued a number of times. CP Pg. 80. CP Pg. 75 – 77. No notice of the continuances was given to Jensen, nor was he presented with an opportunity to defend. A hearing was held, without notice to Jensen, and the court determined that Jensen had presented an improper claim regarding Todd Chase. The court determined it would award sanctions, but no fees against Jensen and Todd Chase. CP Pg. 67 - 70. CP Pg. 62 – 66. Jensen was not presented with these documents and did not sign them. Todd Chase, through his new counsel, had consented to dismissal and was dismissed without prejudice. CP Pg. 62 – 66.

Andersons then brought a motion claiming over \$11,000 in attorney's fees for the Rule 11 motion, even though the dismissal portion of the motion had not been opposed and Jensen had not been notified of hearings after December, 2009. CP Pg. 60 – 61. The amount claimed was later reduced to approximately \$9,000.00. The trial court apparently determined that it would not hear this part of the motion unless Jensen was

served. Jensen was served for the first time since December and opposed the motion. CP Pg. 58 - 59, and CP Pg.56 - 57. The trial court awarded \$5,000 in Rule 11 sanctions against Jensen and Todd Chase jointly and severally. Judgment 05-19-2010, CP Pgs. 18 - 20. Jensen appeals that award.

V. ARGUMENT

1. Lack of Jurisdiction. In order for the Superior Court to have jurisdiction over a party and to enter judgment against him that party must be served with process and be afforded an opportunity to be heard. Failure to comply with notice requirements defeats jurisdiction. The rule here is Rule 5(a)CR which states “Every pleading subsequent to the original complaint [and] every written motion . . . shall be served upon each of the parties.

Jensen was not served with process following his withdrawal from the case in December, 2009 until the hearing on the amount of damages was held the following May. The trial court went on during that time to hear motions against Jensen and to rule against Jensen. Only after a judgment had been entered against him was Jensen served with notice of a hearing as to the amount of the judgment.

Jensen, as counsel for the Chases, was subject to the courts jurisdiction by the nature of his status as counsel. However, when he withdrew as counsel he became a separate party. Failure of service upon him defeats the courts jurisdiction to order this judgment against Jensen. “CR 11 procedures obviously must comport with due process requirements.” Bryant v. Joseph Tree, Inc., 119 Wn.2d 210, 829 P.2d 1099 (Wash. 1992). Due process requires notice and an opportunity to be heard before a governmental deprivation of a property interest. Tom Growney Equip., Inc. v. Shelley Irrig. Dev., Inc., 834 F.2d 833, 835 (9th Cir.1987).

Since the Andersons failed to notify Jensen that they had cancelled or continued their hearing and failed to inform Jensen of a new date for the hearing they denied Jensen due process and an opportunity to be heard before judgment was rendered. Such judgment is void as against Jensen and cannot be the basis for a monetary award against him.

2. Ownership of Land. The sole basis for the judgment against Jensen is a finding by the trial court that Todd Chase was not the owner of the Gully property at the time that the Plaintiff’s filed their complaint. Jensen submits that Todd Chase was the owner of the subject property at the time that the pleadings were filed.

Todd Chase, and his then-wife Leona owned the subject gully parcel in June, 2009, when the damage was done to the property by the Andersons. Todd and Leona divorced in September, 2009, and the divorce decree awarded the gully property to Leona. The pleadings in this case were filed two months later, in November, 2009. The trial court held that since the divorce decree awarded the property to Todd's ex-wife that Todd could not bring this claim because he was completely devoid of title. That is not the law in Washington. Ownership of real property in the State of Washington is transferred by deed only, and not by decree of divorce. RCW 64.04.010. Any attempt at transferring title without a deed would be unavailing. A decree in dissolution is not the same as a deed and would not transfer title in Washington. Todd Chase eventually delivered the deed to the gully property to Leona Chase, but not until January, 2010. Up until that time Todd Chase was the owner of the gully property along with his ex-wife.

Additionally, the resulting apparent declaration by the trial court that a decree works the same as a deed would open up the land title rules to a whole new concept of using documents that are not deeds to be treated as deeds. That has not been shown to be the intent of the legislature. It would also open up the fairly predictable land title rules to new and

different influences. This court should not follow the direction of the trial court and find that a decree acts as a deed.

The Superior Court erred in finding that Todd Chase was not the owner of the gully property at the time that the complaint in this matter was filed.

3. Ownership at Time of Damage. The trial court issued sanctions against Todd Chase and Jensen for stating that Todd was the owner of the property when the pleadings were filed. Even if Todd was not an owner of the property at the time of the pleadings, that claim would have been a harmless error as Todd had standing to bring the action without proving that he owned the property at the time of the pleadings.

Ownership of the gully property is not necessary at the time of the filing of the pleadings, a relatively arbitrary date. Ownership of the gully property on the date of the damage controls standing. Todd was an owner of the gully property with his wife when the damage occurred so he had standing to bring this action.

The Appellate Court has labeled as “absurd” the idea presented by Anderson’s attorney at the Trial Court regarding ownership of an asset at the time of pleading. Todd Chase did not have to own the property at the time of the litigation and does not have to own the property today in order to present this case. He had to have owned the property at the time of loss.

Since he did own the property at the time of loss he is entitled to recovery and to bring this action.

In the case of Vance v. XXXL Development, LLC 150 Wash.App. 39 (Wash.App. Div. 2 2009), the court held that a former owner of property clearly retained standing to sue after he disposed of the property. The court stated that “Third, to hold that a former owner’s right to recover is extinguished on sale of property affected by a continuing nuisance creates absurd results” (at p. 45).

While we can find no law that requires that a litigant or claimant must retain ownership of a damaged property at the time of litigation, and neither the Andersons nor the trial court provided any, we do find significant law that states that a claimant must own, or have an insurable interest in, the land at the time of loss. “A claimant must have an insurable interest **at the time of the loss.**” GOSSETT v. FARMERS INS. CO. 133 Wn.2d 954, 948 P.2d 1264 (1997), quoting JOHN A. APPLEMAN & JEAN APPLEMAN, INSURANCE LAW AND PRACTICE § 2122, at 31 (1969). (Bold added) “A claimant is not entitled to insurance coverage for damage to property unless the claimant had an insurable interest in the property **at the time the damage occurred.** Id. (Bold added) “When goods of this character are destroyed, a proper method of arriving at their **value at the time of loss** is to take into consideration.” HERBERG v.

SWARTZ, 89 Wn.2d 916, 578 P.2d 17 (1978) (quoting from KIMBALL v. BETTS, 99 Wash. 348, 350-51, 169 P.2d 849 (1918)). (Bold added)

“While the measure of damages was not the original cost but the market value of the lost articles, yet original cost is an element to be considered with others in **ascertaining the market value at the time of loss.**”

ROBERT W. ANSTINE et al., Respondents, v. H. T. McWILLIAMS et al., Appellants, 24 Wn.2d 230, 163 P.2d 816 (1945).

We also find legal support for the premise that any post-damage activities, like transferring property after the damage, do not affect the claim. “In general, an insurable interest may not be established by acts or transactions that postdate the occurrence of the damage.” Gossett, *supra*

The fact that Todd Chase gave the property to his ex-wife as part of their dissolution three months after the damage has no bearing on his claim. The claim was set as of the date of the damage. The courts have even held that he may not even have to hold legal title to the property at any time. “Whether a party has an insurable interest in property does not depend on whether the party holds legal title thereto.” Gossett, *supra*.

Although the law on this matter is clear, regarding the date of the loss, it also makes abundant sense. No party should have to hold onto damaged property until a claim is settled. Take the case of an automobile accident in which a car is “totaled”. The owner is not required to retain

the car until a settlement is reached, perhaps months or years later. The value should be determined as soon after the incident as possible and the wreck should then be sent to recycling. Nothing is gained by retaining the car until litigation. A home owner whose house is lost to a fire is not required to retain the land until settlement is reached, but is allowed to rebuild or sell the property and move forward to make reasonable living arrangements. A boat owner may lose his boat to the bottom of the sea due to another parties' negligence. Under the Andersons' argument the boat owner could not bring an action since he no longer has the boat. This is an incorrect interpretation of the law. The ownership of the property at the date and time of the loss fixes the right to make a claim, not the retention of the asset.

The retention or disposal of a damaged asset has no bearing of any kind on standing. The disposal may set or affect the amount of the loss, but not the existence of a claim.

Todd Chase had and has standing to assert his claim and the trial court erred in finding that ownership of the gully property at the time of the filing of the complaint had any bearing on the case. Ownership at the time of damage controls standing.

4. **Rule 11 Sanctions** Rule 11 sanctions are appropriate when a party or his counsel present pleadings or positions before the court that are

not grounded in fact or that are presented for an improper purpose such as delay, harassment or to force added expense. Several cases that were researched on this issue all point to the case of Bryant v. Joseph Tree, Inc., supra, as the dispositive case on Rule 11 sanctions. That case held that “CR 11 (was) designed to reduce ‘delaying tactics, procedural harassment, and mounting legal costs’” and “requires attorneys to stop, think and investigate more carefully before serving and filing papers”. Id at 219. That court also held that this state is a notice pleading state. “Moreover, Washington's notice pleading rule does not require parties to state all of the facts supporting their claims in their initial complaint”. Id. And “a court should thus be reluctant to impose sanctions for factual errors or deficiencies in a complaint before there has been an opportunity for discovery.” Id. At 222.

In this case the assertions made by Todd Chase and Jensen were completely grounded in fact and existing law. Todd was the owner of the property at the time of the pleadings and, more importantly, Todd was the owner at the time of the damage. Rule 11 sanctions are not supported where the litigant is right.

5. Presentation of Inadmissible and Prejudicial Evidence It is Jensen’s position that this final issue is at the heart of why the trial court ruled as it did in this case. John Dippold, a long-tenured litigation

attorney, saw an opportunity to prejudice the court with inadmissible evidence that he had to know was improper. The evidence proved to be too tempting to him and he not only used the evidence but included all of the published opinions from Minnesota dating back from 1996 and earlier. Jensen believes that he was successful in prejudicing the court and in obtaining the result appealed from here.

The rule on this evidence is Rule 404(b), ER, which states that “evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” In presenting Jensen’s history Mr. Dippold stated:

Plaintiffs' counsel has been disciplined for this type of "harassing and frivolous litigation" in the past. *In re Petition for Disciplinary Action against R. James Jensen, Jr.*, No. C1-90-638 (Minnesota 1996); *In re Petition for Disciplinary Action against R. James Jensen, Jr.*, No. C1-90-638 (Minnesota 1991). similar to his actions in this matter, Mr. Jensen's misconduct that led to his suspension in Minnesota.
CP Pg.214 – 223.

It appears that Mr. Dippold presented this inadmissible evidence for that prohibited purpose, to show that Jensen was acting in conformity with activities that occurred nearly 15 years earlier in an unrelated case in Minnesota. Jensen was the attorney for the Chases and not even a litigant. This presentation by Mr. Dippold seems to be in violation of Rule 404(b),ER. With the amount of time that he has been an attorney and his

history as a litigation attorney, Mr. Dippold should have know this rule and should have avoided its violation.

In response the trial court should have seen and excluded the inadmissible evidence. The trial court erred in receiving and not excluding this evidence. Jensen cannot know what the court was thinking in this case but presumes that the court must have been significantly influenced by the inadmissible evidence.

In review, the trial court erred in awarding judgment against a party who was not before the court, based on the date of filing of litigation, apparently without reference to the rules on standing, and awarded \$5,000 in penalties for making a statement that was correct. This was an incorrect view of Washington law and the facts of the case. Therefore the trial court's judgment should be overturned.

Jensen has a further purpose for seeking a decision on this point. Jensen's history has been noted by other attorneys in other cases but no other attorney has ever found a way to use the history, due to Rule 404(b) ER. Jensen seeks a ruling from this court to determine how to proceed as an attorney. If Mr. Dippold's conduct is allowed then every other attorney could, and probably should, present Jensen's historical evidence to gain an advantage in a case. In that event Jensen should probably terminate his practice of law. If the conduct is not allowed then Jensen can present this

Court's decision to other counsel who may seek to use the historical evidence and thereby keep it out of the court files.

Jensen believes that the trial court was prejudiced against him and no amount of law or fact would have changed the outcome.

VI. CONCLUSION

Rule 11 sanctions should be ordered only when a party to a case has engaged in egregious conduct or has proceeded on a case without knowledge of actual facts or law. Parties are allowed to make mistakes in court proceeding but must only use the court system for just and lawful purposes. The Chase brothers and Jensen brought this case for just and lawful purposes and correctly stated the facts. The trial court should not have awarded Rule 11 sanctions.

Specifically, as a jurisdictional matter, Jensen was not before the court when the decisions about him were made. This is made clear from the various proofs of service that indicate that service was not made on Jensen.

Secondly, the court determined that since Todd and Leona's divorce decree awarded the subject property to Leona that Todd was fully and completely devoid of title to the property. Yet there is no rule of law that states that a divorce decree has the force of a deed. Todd remained in title as of the date that the pleadings were signed.

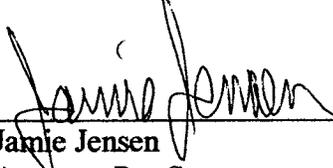
Third, the date of the pleadings is inconsequential. The date for standing is the date of the injury. Todd was unquestionably the owner of the property when it was damaged and therefore had standing to bring this case. Any perceived error in pleading was harmless error.

Fourth, the inadmissible and prejudicial evidence presented by the Andersons and Mr. Dippold should have been stricken. Jensen is entitled to have the judgment against him overturned.

Lastly, Jensen moves this court to award attorneys fees to Jensen and to consider Rule 11 sanctions against the Andersons and John Dippold for presenting Jensen's history in direct violation of the rules of evidence

Dated this 5th day of October, 2010

Respectfully submitted,



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