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No. 65968-5-1

COURT OF APPEALS  
OF THE STATE OF WASHINGTON,  
DIVISION ONE

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HAROLD BRUCE MAGNUSON,  
Appellant

v.

ARNAR ROY MAGNUSON & JACQUELINE MAGNUSON  
Respondent.

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ON APPEAL FROM THE SUPERIOR COURT  
FOR WHATCOM COUNTY  
THE HONORABLE CHARLES SNYDER  
#09-2-00572-5

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BRIEF OF RESPONDENTS

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## INTRODUCTION

This is a dispute between brothers. Bruce Magnusson lived on a ten-acre lot for some eleven years due to the generosity of his father, Sverrir Magnusson. When Sverrir became unable to continue supporting Bruce, Bruce's brother Roy took over the property.

Bruce and Roy then signed an agreement to the effect that the property would be sold and the proceeds divided between them. Bruce was to pay Roy \$712.91 per month, but Bruce never paid anything. Roy eventually put the property up for sale and asked Bruce to leave.

Bruce filed suit against Roy and did his best to upset the sale by removing appliances and locking the gate to keep prospective buyers out. Bruce eventually agreed that the sale could go through and at trial asked that the proceeds from the sale be partitioned between Roy and him.

Following the sale, the trial court held another hearing and partitioned the proceeds between Bruce and Roy. Bruce now appeals, arguing that his interest in the property was illegally forfeited and that the trial court underpaid him for his interest.

## ISSUES

1. What interest did Bruce have in the property?
2. Regardless of how Bruce's interest is characterized, did the trial court properly partition that interest?
3. Did the trial court abuse its discretion in allocating the sale proceeds between Bruce and Roy?

## STATEMENT OF THE CASE

1990 Purchase. In 1990, Bruce Magnusson purchased a ten acre parcel of undeveloped land located on Loomis Trial Road in Blaine. Bruce's credit was bad and he had no money, so his father, Sverrir Magnusson, loaned Bruce funds for the down payment. Bruce took title in his name.<sup>1</sup>

Quit Claim to Sverrir. In 1991, Bruce quitclaimed the property to Sverrir since he was unable to repay the down payment loan.<sup>2</sup> Sverrir paid off the balance owed Bruce's seller, and Bruce deeded the property to Sverrir.<sup>3</sup>

Mobile Home. In 1993, Sverrir financed Bruce's purchase of a mobile home by taking out a mortgage with Wells Fargo. Sverrir

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<sup>1</sup> CP 74, Finding of Fact No. 1.

<sup>2</sup> CP 75, Finding of Fact No. 2.

<sup>3</sup> CP 75, Findings of Fact Nos. 2 & 3.

agreed to pay the mortgage, with the understanding that Bruce would make regular payments to Sverrir to repay him for the mortgage payment, taxes, insurance, and so forth.<sup>4</sup> Bruce did not have good enough credit to purchase the mobile home and his possession of the property provided a home for him and his children.<sup>5</sup>

Sale to Roy. By 2002, Sverrir became unable to continue financing Bruce's occupation of the property and made arrangements to sell the property to his other son, Roy Magnusson. Roy paid Sverrir some \$47,100 and assumed the \$32,000 balance owed Wells Fargo. In return, Sverrir deeded the property to Roy.<sup>6</sup>

Agreement Between Brothers. At the same time, Roy was sent a written agreement ("Agreement") in the mail, which both brothers signed.<sup>7</sup> The Agreement was drafted by Bruce (or on Bruce's behalf).<sup>8</sup>

Nonpayment. Although the Agreement called for Bruce to pay Roy \$712.91 each month (the Wells Fargo mortgage payment), Bruce failed to do so. Roy phoned Bruce on many occasions

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<sup>4</sup> CP 75, Findings of Fact Nos. 2 & 3.

<sup>5</sup> 8/25/09 RP 44; 8/25/09 RP 68.

<sup>6</sup> CP 75-76, Findings of Fact Nos. 5, 6 & 9.

<sup>7</sup> CP 221; Copy of Agreement attached.

<sup>8</sup> CP 76, Finding of Fact No. 7.

asking that Bruce make payments, but Bruce paid nothing through 2008.<sup>9</sup>

Sale. Roy put the property up for sale in 2009, and Bruce attempted to interfere with the sale. Bruce cut off power to the well, put a lock on the gate, stripped appliances out of the home and damaged the property.<sup>10</sup>

Lawsuit. Bruce also sued Roy. Bruce's complaint alleged some interest in the property, but made no reference to any real estate contract.<sup>11</sup> Bruce's lawyers sent checks to Roy's lawyers, which were eventually returned.<sup>12</sup>

Partition. At trial, Bruce asked that the "ancient remedy of partition" be applied to compensate Bruce for his interest in the property.<sup>13</sup> Bruce agreed that the sale should go forward, but that the proceeds should be tendered into court.<sup>14</sup>

Sale and Subsequent Hearing. The property then sold, and a subsequent hearing was conducted to determine the amount to be allocated between Bruce and Roy. The trial court found that

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<sup>9</sup> Bruce did pay \$6,000 to Roy, but this had nothing to do with the property. CP 76, Finding of Fact Nos. 8 & 10.

<sup>10</sup> 8/25/09 RP 80-81; 8/25/09 RP 36; CP 147-48.

<sup>11</sup> CP 216-219.

<sup>12</sup> CP 77, Finding of Fact No. 17.

<sup>13</sup> 8/25/09 RP 12.

<sup>14</sup> 8/25/09 RP 12-13.

Bruce had contributed a total of \$32,200 towards the property but that the \$5,316 damage he did to the property while it was listed should be offset from this amount.<sup>15</sup> The trial court then offset Bruce's share of the real property taxes that had been paid by Roy, which amounted to \$11,736.<sup>16</sup> The trial court denied Bruce any interest on his contributions since that interest was offset by the rental value of the property occupied by Bruce for some 18 years.<sup>17</sup> This left a net of some \$15,200, and that amount was awarded Bruce.<sup>18</sup>

#### STANDARD OF REVIEW

Findings. A finding of fact erroneously described as a conclusion of law is reviewed as a finding. Willener v. Sweeting, 107 Wn.2d 388, 393-4, 730 P.2d 45 (1986). Individual findings of fact must be read in the context of other findings of fact and of the conclusions of law. In re Hews, 108 Wn.2d 579, 595, 741 P.2d 983 (1987). Unchallenged findings are verities on appeal. Nearing v. Golden State Foods Corp., 114 Wn.2d 817, 792 P.2d 500 (1990).

Conclusions. An unchallenged conclusion of law becomes

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<sup>15</sup> CP 23, Supplemental Findings of Fact Nos. 23 & 24.

<sup>16</sup> CP 24, Supplemental Conclusion of Law No. 13.

<sup>17</sup> 7/7/10 RP 56.

<sup>18</sup> CP 24, Supplemental Conclusion of Law No. 15.

the law of the case. King Aircraft v Lane, 68 Wn. App. 706, 716, 846 P.2d 550 (1993). Appellate review of a conclusion of law, based upon findings of fact, is limited to determining whether the findings are supported by substantial evidence, and if so, whether those findings support the conclusion. American Nursery Prods., Inc. v. Indian Wells Orchards, 115 Wn.2d 217, 222, 797 P.2d 477 (1990).

Alternate Grounds. A trial court may be affirmed on any grounds established by the pleadings and supported by the record. Truck Ins. Exch. v. Vanport Homes, 147 Wn.2d 751, 766, 59 P.3d 278 (2002).

## ARGUMENT

Issue No. 1. What interest did Bruce have in the property?

Error Alleged. Bruce claims that the Agreement is a real estate contract, that his interest in that contract was improperly forfeited, and that Bruce has a two-thirds interest in the property pursuant to the Agreement.

Standard of Review. Contract interpretation is generally a determination of fact. Durand v. HIMC Corp., 151 Wn. App 818, 829, 214 P.3d 189 (2009).

Discussion: Bruce argues that the Agreement is a real estate contract, which was improperly forfeited. There are at least three problems with this argument.

First, Bruce did not argue that the Agreement was a real estate contract (much less that it had been improperly forfeited under the Act) before the trial court. Bruce's complaint did not make this argument nor did his trial brief. He did mention in his opening statement that the Agreement could "be construed as a real estate contract, an equitable mortgage, or an equitable subordination."<sup>19</sup> Bruce then added that he was seeking partition and the appointment of a referee.<sup>20</sup> This was insufficient to preserve any alleged error for appeal. RAP 2.5. Herber v. Swartz, 89 Wn.2d 916, 578 P.2d 17 (1978).

Second, the Agreement does not contain the necessary elements of a real estate contract. The Supreme Court listed those elements in Kruse v. Hemp, 121 Wn.2d 715, 553 P.2d 1373 (1993), as follows:

In *Hubbell*, this court outlined 13 material terms of a real estate contract (a) time and manner for transferring title; (b) procedure for declaring forfeiture; (c) allocation of risk with respect to damage or destruction; (d) insurance provisions; (e)

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<sup>19</sup> 8/25/09 RP 10-11.

<sup>20</sup> 8/25/09 RP 12-13.

responsibilities for: (i) taxes, (ii) repairs, and (iii) water and utilities; (f) restrictions, if any, on (i) capital improvements, (ii) liens, (iii) removal or replacement of personal property, and (iv) types of use; (g) time and place for monthly payments; and (h) indemnification provisions.<sup>21</sup>

The Agreement lacks several of these elements.

Nevertheless, Bruce argues that the Agreement “satisfies the statutory requirements for a real estate contract” under the Real Estate Contract Forfeitures Act (“Act”). Bruce’s argument is that RCW 61.30.010(1) defines a real estate contract as “any written agreement for the sale of real property in which legal title to the property is retained by the seller as security for payment of the purchase price,” and that the Agreement satisfies this definition.<sup>22</sup>

This argument overlooks the fact that the Act is not a complete overhaul of the law regarding real estate contracts (REK’s). As Professors Stoebuck and Weaver said:

We need to bear in mind that the Act relates only to certain remedies under REK’s; it does not completely codify REK law. It defines a “contract” or “real estate contract” *for purposes of the Act* as a “written agreement.”<sup>23</sup>

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<sup>21</sup> 121 Wn.2d at 722.

<sup>22</sup> Opening Brief of Appellant at 16-17.

<sup>23</sup> 18 Wash. Practice, Real Estate: Transactions, §21.5 (2d Ed.)

Thus, the fact that the Agreement fits the definition of a real estate contract for purposes of the Act does not mean that the agreement is an enforceable real estate contract.

Third, Bruce argues that he was the vendee of a real estate contract by which Roy was selling him the south five acres of the property. But the south part of the property was never short platted out from the ten acre lot<sup>24</sup> and is therefore not a legal lot under the Subdivision Act (RCW 58.17).<sup>25</sup> Thus, the Agreement could not lawfully sell Bruce the 5-acre parcel he is now claiming. Bruce is in effect arguing for an illegal interpretation of the Agreement.

But if the Agreement is not a real estate contract, what is it? Although the trial court did not characterize the Agreement *per se*, it interpreted the Agreement as follows:

I don't find that the agreement is a purchase and sale agreement for property...[T]hey had pretty much abandoned the idea of going forward with the short plat, and I think they were of the opinion it was going to be very difficult if at all possible to divide the two pieces, and that's why I think the main focus of the agreement was on sale of the property after the mortgage had been paid off.<sup>26</sup>

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<sup>24</sup> CP 75, Finding of Fact No. 5; 8/25/09 RP 89.

<sup>25</sup> RCW 58.17.030 requires short subdivisions to go through the short plat approval process and to comply with local regulations. Whatcom County Code 21.11.010 makes it illegal to sell or transfer lots in a short plat which has not obtained final approval from the County. RCW 58.17.300 makes it a gross misdemeanor for any person to sell, offer for sale or transfer any tract in violation of the Subdivision Act.

<sup>26</sup> CP 135, emphasis supplied.

...[D]id they intend to sell it right away? It's really hard for me to tell, and the agreement doesn't tell us that, but I don't think it's an agreement to sell the property in the sense of a purchase and sale agreement, because I think they at that point recognized that they probably weren't going to be dividing the property, and therefore, couldn't sell it to Bruce Magnusson.<sup>27</sup>

There is an equitable interest in this property [in Bruce] by virtue of the arrangement he and his brother [Roy] made to try and find a way to divide up the value of the property that they couldn't divide up physically.<sup>28</sup>

The trial court's interpretation is consistent with the Agreement having set up a tenancy in common. In that regard, note RCW 64.28.020, which reads in part:

**RCW 64.28.020. Interest in favor of two or more is interest in common – Exceptions for joint tenancies, partnerships, trustees, etc. – Presumption of community property.**

(1) Every interest created in favor of two or more persons in their own right is an interest in common, unless acquired by them in partnership, for partnership purposes, or unless declared in its creation to be a joint tenancy, as provided in RCW 64.28.010, or unless acquired by executors or trustees.

Here, there is no evidence that Bruce and Roy were partners, nor is

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<sup>27</sup> CP 136, emphasis supplied.

<sup>28</sup> 12/11/09 RP 10.

there any joint tenancy language<sup>29</sup> contained in the Agreement. Bruce and Roy were therefore tenants in common. Reilly v. Sageser, 2 Wn. App. 6, 467 P.2d 358 (1970).

Issue No. 2. Regardless of how Bruce's interest is characterized, did the trial court properly partition that interest?

Error Alleged. Bruce argues that, regardless of how the Agreement is characterized, equity abhors a forfeiture and that Bruce should be given an opportunity to cure his default and reinstate the Agreement.<sup>30</sup>

Standard of Review. An appellate court reviews the authority of a trial court to fashion equitable remedies under the abuse of discretion standard. Sac Downtown Ltd. Partnership v. Kahn, 123 Wn.2d 197, 204, 867 P.2d 605 (1994). A trial court sitting in equity has broad discretion in fashioning remedies "to do substantial justice to the parties and put an end to litigation." Carpenter v. Folkerts, 29 Wn. App. 73, 78, 627 P.2d 559 (1981).

Discussion. Bruce requested partition of the proceeds from the sale of the property, and cannot now be heard to complain. Under the invited error doctrine, a party may not set up an error at trial and

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<sup>29</sup> See RCW 64.28.010.

<sup>30</sup> Opening Brief of Appellant at 18-20.

then complain of it on appeal. Lavigne v. Chase, Haskell, Hayes & Kalamon, P.S., 112 Wn. App. 677, 681, 50 P.3d 306, 308 (2002) (citing In re Pers. Restraint of Thompson, 141 Wash.2d 712, 723, 10 P.3d 380 (2000)). The doctrine applies when a party takes affirmative and voluntary action that induces the trial court to take an action that party later challenges on appeal. Id.

Moreover, RCW 7.52.010 reads as follows:

**RCW 7.52.010 Persons entitled to bring action**

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.

Any cotenant has the right to seek partition. Hegwald v. Neal, 28 Wn. App. 783, 787, 626 P.2d 535 *rev den* 95 Wn.2d 1029 (1981).

Here, Bruce requested partition, and the trial court followed that request. The trial court did not err in doing so.

Issue No. 3. Did the trial court abuse its discretion in allocating Bruce's interest?

Error Alleged. Bruce argues that the trial court should have partitioned the sale proceeds "based on the assessed value of the

property and improvements.” Bruce feels that *his* south 5-acres is worth more than *Roy’s* north 5-acres, and that the trial court should have allocated on that basis.

Standard of Review. Partition is equitable, and a trial court has “great flexibility in fashioning relief for the parties.” Cummings v. Anderson, 94 Wn.2d 135, 143, 614 P.2d 1283 (1980).

Discussion. RCW 7.52.220 reads as follows:

**RCW 7.52.220 Distribution of proceeds of sale**

The proceeds of the sale of the encumbered property shall be distributed by the decree of the court, as follows:

- (1) To pay its just proportion of the general costs of the suit.
- (2) To pay the costs of the reference.
- (3) To satisfy the several liens in their order of priority, by payment of the sums due, and to become due, according to the decree.
- (4) The residue among the owners of the property sold, according to their respective shares.<sup>31</sup>

A trial court has considerable discretion in determining a cotenant’s share of the property being partitioned. McKnight v. Basilides, 19 Wn.2d 391, 143 P.2d 307 (1943); Cummings v. Anderson, *supra*. For example, in McKnight, a trial court assessed the share of one of the cotenants with the reasonable rental value of the “big house” which he had occupied for a number of years.

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<sup>31</sup> Emphasis supplied.

This same cotenant argued for interest on taxes and assessments he paid on the property, but the trial court denied the request since the amounts claimed were less than the income from the property. On appeal, the Supreme Court affirmed.

Cummings v. Anderson, *supra*, is likewise instructive. There, in September 1973, Patty Cummings and Wally Anderson agreed to buy a purchaser's interest in a contract for the sale of a residence in Enumclaw on a 50/50 basis. They paid \$2,500, received the purchaser's assignment as tenants in common, and moved in together. Both parties contributed equally to the down payment and contributed equally to the monthly payments until Patty moved out in March 1975.

As of March 1975, the parties had paid \$2,828.92 toward the purchase and \$16,350.16 remained to be paid. Wally remained in the house and made the payments, together with the taxes and insurance premiums, for some years. Patty filed for partition, by which time Wally had the unpaid balance on the contract down to \$8,763.85.

Patty argued that she had a one-half interest in the property since that was her agreement with Wally. Wally argued that Patty had forfeited her interest in the property or, alternatively, that she

should be awarded an interest in the property “proportionate to her investment in the property, and she acquired no further interest thereafter.”<sup>32</sup>

The Supreme Court held that Patty should be paid proportionate to her investment in the property even though her agreement with Wally called for a one-half interest:

The intent of the parties at the inception of this understanding cannot be permitted to govern their rights at this juncture, since their original purpose has been frustrated by the change in their relationship to each other and to the property, a change for which [Wally] was not responsible. When the change occurred, [Patty] found it no longer practical or expedient to further pursue the acquisition of the property. Her actions manifested to [Wally] that she was abandoning her obligations, and warranted the conclusion that any further payments made by him would inure to his sole benefit...<sup>33</sup>

We conclude that [Patty] has an equity in the real property which bears the same ratio to the total equity as the ratio of her investment to the total investment of the parties. [Wally] is entitled to have offset against that interest a corresponding portion of the taxes and insurance premiums which he has paid.<sup>34</sup>

As in Cummings, the notion of a two-thirds/one-third arrangement cannot be permitted to govern Bruce and Roy’s rights at this juncture. That purpose has been frustrated by Bruce’s

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<sup>32</sup> 94 Wn.2d at 139.

<sup>33</sup> 94 Wn.2d at 143-144.

<sup>34</sup> 94 Wn.2d at 144.

failure to perform under the Agreement, and he would be unjustly enriched by allowing him a two-thirds interest. Rather, the trial court correctly determined Bruce's interest in proportion to his investment in the property. And, as in McKnight, the trial court offset any interest owed Bruce for his contributions to the property by the rental value of the property since Bruce occupied the home on the south part of the property for many years. The trial court acted well within its considerable discretion in doing so.

#### CONCLUSION

The trial court should be affirmed.

Respectfully submitted this 1 day of June 2011.

BELCHER SWANSON LAW FIRM, PLLC

  
\_\_\_\_\_  
JEFFERY J. SOLOMON, WSBA #29722  
Attorney for Respondents

## APPENDIX

Untitled agreement. CP 221.

"Exhibit A"

The following described parcel of land has been quit claimed by Sverrir H. Magnusson and Eria H. Magnusson, husband and wife, to Arnar Roy and Jacqueline Susan Magnusson, husband and wife,:

Legal: The east half of the west half of the northeast quarter of the southwest quarter of section 15, township 40 north, range 1 east of the W.M.

Since Harold Bruce Magnusson, a single person, has considerable interest in the south 5 acres of this 10 acre parcel, this contract is written between him and the new owners of the property, (Arnar Roy and Jacqueline Susan Magnusson).

1. There is a balance of about \$32,000 on a mortgage to Wells Fargo Home Mortgage, Inc., on the south 5 acres of the property to be paid by Bruce in monthly installments of about \$712.91. The payments are up to date as of this agreement. Since Bruce is in Alaska most of the time, Roy and Jacqueline will take care of those payments on behalf of Bruce and he will reimburse them monthly for the same.
2. Roy and Jacqueline will pay Sverrir and Eria Magnusson \$5,000 on behalf of Bruce to be charged to Bruce at the time of selling the property.
3. When the property is sold and the mortgage paid in full, Roy and Jacqueline should get paid the value of the north 5 acres along with any other expenses they may have incurred on behalf of Bruce, such as late or skipped monthly payments, etc.
4. Roy and Jacqueline should pay Bruce a reasonable portion of the taxes that he has and will be paying as the property is still taxed based on 10 acres and included in the mortgage payments, when the property is sold (based on raw land only). Bruce should then be issued ownership of the south 5 acres and the improvements thereon or the remaining funds from the sale.

There is no mortgage on the north 5 acres. It was released from the mortgage when we wanted to divide the 10 acres.

There are legal descriptions for each 5-acre parcel in the files. They include a 30' shared easement along the east line of the south 5 acres for ingress and egress to the north 5 acres.

Signed Harold Bruce Magnusson  
Harold Bruce Magnusson

Signed Arnar Roy Magnusson 7-25-02  
Arnar Roy Magnusson

Signed Jacqueline Susan Magnusson 7-25-02  
Jacqueline Susan Magnusson

