

NO. 35291-5-II

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

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STATE OF WASHINGTON
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ROBERT R. MITCHELL, LISA TALLMAN, MITCHELL FAMILY
LIVING TRUST, GARY GREINDAHL, JOANN GREINDAHL,
OLYMPIC CASCADE TIMBER, INC., a Washington Joint
Venture Partnership, ROBERT R. MITCHELL, INC., a
Washington Corporation; TIMOTHY JACOBSON, HILARY
GRENVILLE,

Appellants,

v.

MICHAEL A. PRICE and JANE DOE PRICE, husband and wife;
THOMAS W. PRICE and JANE DOE PRICE, husband and wife;
JAMES REID and SONJA REID, husband and wife; KEVIN M.
BYRNE and MARY BYRNE, husband and wife; THOMAS H.
OLDFIELD and JANE DOE OLDFIELD, husband and wife; NW,
LLC a Washington Limited Liability Company,

Respondents.

REPLY BRIEF (FINDINGS APPEAL)

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OLDFIELD SETTLEMENT

Since filing their Brief of Appellant in this findings appeal, appellants have settled with Respondents Thomas and Jane Doe Oldfield. The Oldfields have been dismissed from the case and issues pertaining only to the Oldfields are no longer relevant.

INTRODUCTION

In 300+ pages of briefing, it remains undisputed that the Mitchell plaintiffs lost millions of dollars when the defendants' company, NW, LLC, invested the plaintiffs' funds in subordinated loans to Graham Square, a project owned by the defendants through the Graham Square LLCs. SJBA 1, 4-8. It is also undisputed that these loans violated the Private Placement Memorandum the defendants used to convince the plaintiffs to invest in NW Commercial. *Id.* Plaintiffs presented ample evidence that defendant Byrne continued to reassure the plaintiffs that their investments were safe up until August 2001, when he finally admitted some of the truth to the plaintiffs. *Id.* 8-18.

The defendants' main argument against this web of lies and deceit is that a rational person could conclude that the Mitchell plaintiffs learned the truth as early as March, 2001, even as Byrne was lying to them and reassuring them that their investments were

safe. But of course, no rational person has ever been asked to decide this issue, because the trial court granted summary judgment on the mistaken theory that no rational person could believe that the plaintiffs were justified in believing Byrne's lies until Byrne finally told the truth. The summary judgment was error and the frivolous action fees severely compounded this error. The Mitchell plaintiffs ask this Court to reverse and permit their claims to proceed to trial.

REPLY TO RESPONDENTS' STATEMENTS OF FACT

Respondents Price suggest that the Court should uphold the Findings of Fact and Conclusions of Law because, "there was nothing submitted by the plaintiffs supporting Mitchells' argument that the Prices had committed any wrongdoing or that there was any basis for personal liability." Price Findings of Fact Brief of Respondent, p. 2 ("PFFBR").

Prices' statement is misleading on several levels. First, the trial court did not base summary judgment on the evidence of Prices' knowledge, but on the statute of limitations. RP 90-91 (5/19/06). Second, the Prices had the burden of proving their lack of knowledge, which they asserted in the most conclusory possible fashion:

Mike Price and Tom Price had no knowledge and had nothing to do with the assignment of loans from NW, LLC to NWCLF, LLC. More specifically, said defendants had nothing to do with the assignments of deeds and trusts and notes concerning Graham Square dated January 18, 1998, February 25, 1999, and November 22, 1999.

CP 1263. This artfully worded declaration mentions only three of the seven Graham Square loans assigned to NW Commercial. *Compare* CP 1263 *with* CP 669. This discrepancy makes it impossible to say whether the Prices had any knowledge or involvement of the other four loans. Third, the Prices knew about insider loans by NW Commercial to Graham Square at least by February 1, 2001. CP 1503-04. Fourth, at the time of the second summary judgment, the plaintiffs had not yet deposed the Prices and could not at that time know for certain the state of the Prices' knowledge.

REPLY TO ARGUMENT

Prices make the peculiar argument that this second appeal is somehow untimely because the Mitchell plaintiffs had already filed their opening brief in the first appeal. PFFBR 3. This argument makes no sense. The defendants only moved for the entry of findings and a judgment after the Mitchell plaintiffs filed their opening brief in the first appeal. Findings of Fact Brief of Appellant (FFBA) 1-2. The Mitchell plaintiffs timely appealed from

the defendants' tardily presented findings and judgments. Findings of Fact Appeal Clerk's Papers 1-38. This round of briefing addresses the specific errors in the findings and judgments.

A. Where a case has been dismissed on summary judgment, the findings of frivolousness must be based on the summary judgment standard, accepting as true all evidence and inferences supporting the non-moving party.

The plaintiffs pointed out in their opening brief that an action is frivolous only if it "cannot be supported by any rational argument on the law or facts," and that the only way to apply the standard following summary judgment is to apply it to the facts and evidence submitted by the non-moving party. FFBA 8.

Prices argue for a substantial evidence standard of review, "a quantum of evidence sufficient to persuade a rational, fair-minded person that the premise is true." PFFBR 4-5. Byrne/Reid similarly argue that they "have presented substantial evidence upon which a rational fair-minded person could conclude that Appellants filed their action *after* the statute of limitations had run." Byrne/Reid Findings of Fact Brief of Respondent (BRFFBR) 5 (emphasis in original). That is exactly the problem with this case—no "rational, fair-minded person" was ever asked to determine the truth. Instead, Judge Stolz decided that there was no factual dispute at

all, *i.e.*, that no rational, fair-minded person could believe the Mitchell plaintiffs' evidence and reach the contrary conclusion.

More fundamentally, the substantial evidence standard is a much lower standard than the required finding that the claims "cannot be supported by any rational argument on the law or facts." FFBA 8 (quoting CP 2612, CCL 2). On appeal, the issue is whether any evidence presented to the trial court by the Mitchell plaintiffs would support any rational argument for their claims. In other words, the standard is exactly the opposite of whether any substantial evidence supports the defendants; it is whether any substantial evidence supports the Mitchell plaintiffs. As shown in the Mitchell plaintiffs' briefs, there is clearly such evidence.

Almost all of the cases cited by defendants arose after trial and appropriately used the substantial evidence standard. Three cited cases do not apply the substantial evidence standard to fees for a frivolous action. ***Biggs v. Vail***, 119 Wn.2d 129, 135, 830 P.2d 350 (1992); ***Jeckle v. Crotty***, 120 Wn. App. 374, 387, 85 P.3d 931 (2004); ***Clarke v. Equinox Holdings, Ltd.***, 56 Wn. App. 125, 132, 783 P.2d 82, *rev. denied*, 113 Wn.2d 1001 (1989). Of these three cases, only ***Biggs*** even mentions "substantial evidence", and then only in the context of different issues, 119 Wn.2d at 133, not in the

context of the frivolous claims statute. Both **Biggs** and **Jeckle** reverse fee awards under the frivolous claims statute, and **Clarke** upholds a judgment under the statute without mentioning the substantial evidence standard. In short, none of the authorities cited by the defendants for the substantial evidence standard support their argument.

B. An action cannot be found frivolous without a finding that it was brought for spite, nuisance, or harassment.

Defendants argue that the frivolous claims statute is so clear and “plain on its face” that the Court cannot resort to Legislative history. BRFFBR 5-7; PFFBR 6-7. The defendants’ arguments are contrary to and fly in the face of **Biggs v. Vail**, in which the Supreme Court said that the statute was confusing and “arguably ambiguous” (119 Wn.2d at 134):

While the language of the statute seems to require with some clarity that the trial judge must find the "action . . . as a whole" to be frivolous and advanced without reasonable cause before attorneys' fees may be awarded to the prevailing party, this language has caused considerable confusion and is arguably ambiguous. It is instructive, therefore, in interpreting this statute to examine its legislative history.

The legislative history made clear that the statute was aimed at claims and defenses brought for harassment, delay, nuisance or spite (119 Wn.2d at 135, emphasis in original):

The courts in Washington are experiencing significant congestion. Such congestion might be reduced if lawsuits, claims and defenses brought *solely* for harassment, delay, nuisance or spite were eliminated. One method of eliminating such claims and defenses is to award attorneys' fees to the prevailing parties in frivolous and unreasonable lawsuits

The Court also considered the comments of the Washington State Bar Association that the purpose of the statute was to eliminate lawsuits brought "to harass and harangue" (*Id.*):

We believe that this proposal will relieve the courts and litigants from having to face and deal with spite lawsuits such as are brought simply to harass and harangue the other party and which obviously have no chance of success or merit.

In light of the legislative history, the frivolous claim statute should be interpreted to require an element of harassment, spite or nuisance.

C. CFF 3/2 is a conclusion of law, not a finding of fact, and it is erroneous both because it is based on incorrect facts and because it is based on the Bankruptcy Act of 1898, which was superseded 30 years ago by the Bankruptcy Code of 1978.

The Mitchell plaintiffs argued that listing the claims against "former members" was sufficient to give notice that NW Commercial had claims against the members of NW, LLC, that is Byrne/Reid and the Prices. FFBA 10-12. The defendants completely fail to respond to the Mitchell plaintiffs' argument, simply asserting that

the Mitchell plaintiffs “do not dispute” or “do not contest” that they failed to list their claims. BRFFBR 9, PFFBR 8. The defendants simply ignore the Mitchell plaintiffs’ argument, apparently because they have no answer.

With respect to the “invalid assignment” argument, Byrne/Reid seem to agree that this is a conclusion of law not a finding of fact. BRFFBR 7-8. Both defendants argue that the assignment was invalid as a matter of law, not as a matter of fact. BRFFBR 9-11, PFFBR 9-11. The Mitchell plaintiffs agree that it is appropriate to treat this as a conclusion of law, which is, accordingly, subject to de novo review by this Court.

The Mitchell plaintiffs showed in their earlier brief that the trial court considered the assignment of the NW Commercial claims to be invalid on the theory that the claim was not disclosed in NW’s Commercial’s bankruptcy schedules and accordingly did not vest in NW Commercial upon confirmation of the plan. FFBA 11. This conclusion is outdated because it is based on the Bankruptcy Act of 1898. SJ Reply 11-15, FFBA 11-12.

The defendants try to avoid the clear language of the Bankruptcy Code of 1978 by relying on two earlier cases cited in *In re JZ, LLC*, 371 B.R. 412 (9th Cir. B.A.P. 2007) – *Cusano v. Klein*,

264 F.3d 936, 946-49 (9th Cir. 2001); and *Hay v. First Interstate Bank of Kalispell, N.A.*, 978 F.2d 555, 557 (9th Cir. 1992). The defendants have somehow managed to entirely miss the point of *JZ*'s discussion of *Cusano* and *Hay*. In *JZ*, the Ninth Circuit Bankruptcy Appeals Panel held unequivocally that, "[r]egardless of whether scheduled, *all* property of the estate vests in the debtor upon plan confirmation: [quoting 11 USC § 1141(b)]." 371 BR at 419 (emphasis in original). But the Ninth Circuit cautioned in *JZ*:

Section 1141(b) vesting does not mean that a debtor necessarily has unfettered control over property of the estate. It neither authorizes nor condones mischief, such as omitting to schedule property. For that reason, equitable constraints may be imposed in order to preserve the integrity of the system. In principle, the full panoply of equitable remedies, from constructive trust through equitable and judicial estoppel, are available to assure that debtors do not overreach.

371 BR at 420. The Ninth Circuit then explained that its prior decisions in *Cusano* and *Hay* are more properly understood as based on judicial estoppel, not on the validity of the assignment. *Id.* at 419-21. The Court explained that judicial estoppel is flexible, and that each situation "needs to be evaluated on its own facts, with remedies fashioned in a way that does not punish innocent bystanders." *Id.* at 421.

Applying the principles of **JZ** to this case, any claims of NW Commercial against the defendants vested in NW Commercial upon confirmation of the plan. The assignment of the claims was valid. Under **JZ**, the issue is whether NW Commercial, or its assignees the Mitchell plaintiffs, should be judicially estopped from asserting the claims against the defendants. But the trial court did not find judicial estoppel, and there is no reason to estop the Mitchell plaintiffs. On this record, it is unclear whether anyone was potentially prejudiced when NW Commercial listed in its bankruptcy schedules claims against “former members” instead of “former managers.” Nor does this record contain any information whether any creditor suffered any loss as a result of this listing. The defendants simply failed to present facts necessary to judicial estoppel and the trial court made no finding of judicial estoppel.

Defendants Byrne/Reid argue that NW Commercial never moved to amend its bankruptcy schedules to reflect the identity of those against whom it had potential claims. BRFFBR 10. This is misleading, because Defendant Oldfield moved in the bankruptcy court to invalidate the assignment, but the bankruptcy court abstained and deferred to the superior court. CP 265-66. The superior court was never presented with sufficient findings to

support judicial estoppel and never made any such findings or conclusion.

D. CFF 4/3 is contrary to the evidence and unsupported by undisputed evidence.

The Mitchell plaintiffs argued that the evidence fails to support CFF 4/3 that “Plaintiffs and their representatives” met with Byrne and Oldfield in March 2001, pointing out that only Grendahl was present at the meeting. FFBA 12. The defendants make the circular argument that since Grendahl met with Byrne and Oldfield, it must be true that “Plaintiffs and their representatives” met with Byrne and Oldfield. BRFFBR 11-12, PFFBR 11. This is a classic *non sequitur*.

Instead of defending CFF 4/3, the defendants argue that if Grendahl met with Byrne and Oldfield, then the remaining plaintiffs “similarly discovered or should have discovered the facts upon which they based their allegations of fraud.” BRFFBR 12, PFFBR 11. This is another *non sequitur*. Grendahl wanted to meet with Byrne because he was concerned that the financial problems of T & W Leasing would affect NW, LLC or NW Commercial and because he wished to determine the status of his investment disbursement request. FFBA 14-15 (citing CP 1616-17). There is not the

slightest evidence in the record that any other plaintiff knew or should have known anything about T & W Leasing in March 2001, or that anyone other than Grendahl (and later Mitchell) requested a partial disbursement from their investment.

The Mitchell plaintiffs also argued in their earlier brief that Grendahl's meeting with Byrne did not concern "the same issues that were the subject of this litigation." FFBA 14. T & W Leasing and Grendahl's investment disbursement request are not "the same issues that were subject this litigation."

Defendants argue vaguely that Grendahl's meeting in March 2001 was to discuss "what was happening with the fund" and that the "fund" is the issue in this litigation. BRFFBR 12, PFFBR 12. These vague generalities are no substitute for analysis. Grendahl had no concern about the quality of the NW Commercial loans because Byrne assured him that all of the loans were secured by first position deeds of trust. SJBA 9. Grendahl had no idea that the Graham Square loans had been transferred to NW Commercial, contrary to the Private Placement Memorandum. *Id.* at 10. Byrne continued to reassure the plaintiffs that their investments were safe and would be paid out. *Id.* at 10-11. CFF 4/3 is not only unsupported by the evidence, it is contrary to the evidence.

- E. The plain language of the Woodell letter contradicts CFF 5/4 that the letter was written “on behalf of Plaintiffs” and that the letter “set[] forth substantially all of Plaintiffs’ claims.”**

The defendants have no answer to the fact that the language of the Woodell letter simply contradicts CFF 5/4. No further reply is necessary.

- F. OFF 2 is moot in light of the Oldfield settlement.**

The court need no longer consider the plaintiff’s arguments about OFF 2 because the plaintiffs have settled with Oldfield.

- G. The evidence fails to support PFF 2 that the plaintiffs knew when they filed this action that the Prices were not involved with the day to day operations of NW, LLC or that the plaintiffs knew the Prices had no knowledge of the 1999 Graham Square assignments of deeds of trust.**

The Mitchell plaintiffs pointed out in their opening brief that there is no evidence that when they filed their complaint, the plaintiffs knew that the Prices were not involved in the day-to-day operations of NW, LLC, and that the plaintiffs knew that the Prices had no knowledge of the 1999 Graham Square assignments of deeds of trust. FFBA 19. Instead of pointing to any evidence that the plaintiffs knew these things, the Prices argue that the plaintiffs had no knowledge of the Prices’ involvement. PFFBR 13-17. In other words, instead of proving that the plaintiffs had knowledge,

the Prices show that the plaintiffs did not have knowledge. The Prices' own brief establishes that PFF 2 is erroneous.

The Prices argue that the Declaration of Robert Coleman, attached to their brief as Appendix B (and included in the record as CP 1333-49) shows that they had no knowledge of the assignment of the Graham Square loans to NW Commercial because Coleman says very little about the Prices. PFFBR 15. Aside from the obvious illogic of this argument from silence, the Coleman declaration suggests to the contrary, that there is reason to believe that the Prices might have known more about the Graham Square loans. Coleman explains that the members of NW LLC, including the Prices, bought out NW's interest in the Graham Square LLCs. CP 1338. From then on, the Graham Square project was discussed only at meetings of the Graham Square LLCs, *id.*, and Coleman does not discuss those meetings at all.

The plaintiffs did know that the Prices were members of NW, LLC, and that NW was the manager of NW Commercial. It was reasonable for the plaintiffs to allege on information and belief that the Prices were involved. CP 7, 92-93. As discussed above, when the Prices finally filed a declaration about their knowledge, they still

did not deny knowledge of all of the loans to Graham Square. The claims against the Prices were not frivolous.

H. It is not frivolous to file a lawsuit later than the statute of limitations date incorrectly suggested by a lawyer who does not know the facts.

1. The Yanick memo did not change the statute of limitations.

The defendants concede that the Yanick memo did not change the statute of limitations. BRFFBR 14, PFFBR 18. Through this concession, the defendants also concede that CCL 6/5 is erroneous in stating that it was frivolous for the plaintiffs to file an action later than February of 2004.

The Mitchell plaintiffs have consistently argued that the Yanick memo is blatant hearsay that is internally inconsistent and explicitly unclear about the timing of events. SJBA 16-18, FFBA 20 n.4. The defendants have never responded to the hearsay objection. Byrne/Reid attempt to bootstrap the memo by falsely stating that the Mitchell plaintiffs had never contended that any of the facts in the memo are incorrect, or disputing that the information on which Yanick formed his opinions was "gained directly from Appellants." BRFFBR 15. To the contrary, the plaintiffs have consistently contradicted the memo. SJBA 17-18. Reliance on the unauthenticated and disputed Yanick memo was error.

The Mitchell plaintiffs pointed out that the Yanick memo was addressed only to Grendahl, Mitchell and Stevens, not to the remaining plaintiffs. FFBA 20, n. 3. Byrne/Reid respond falsely that the memo was sent “to Will Stevens and ‘Northwest Commercial Loan Fund’ with a copy to Rob Mitchell, Gary Grendahl and Keith Baldwin. CP 1231-1241.” BRFFBR 14. The face of the memo itself shows that this is false. The memo was written to Mitchell, Grendahl and Stevens, not to “Northwest Commercial Loan Fund.”

Unable to defend the trial court’s reliance on the Yanick memo, defendants fall back on the Woodell letter. BRFFBR 15. For all of the reasons previously discussed, the Woodell letter does not support the summary judgment, let alone a finding of frivolousness.

2. There is no factual or legal argument that the statute of limitations had run with respect to Oldfield.

This issue is moot in light of the settlement with Oldfield.

I. The action was not frivolous as a whole.

The Mitchell plaintiffs argued in their opening brief that this action is not frivolous as a whole because the trial court’s errors in granting summary judgment require reversal and remand for trial. FFBA 22-23. The defendants seem to concede that if any of the

summary judgment orders are reversed and proceed to trial, the action cannot be considered frivolous. BRFFBR 16-17, PFFBR 19.

Byrne/Reid apparently recognize that the claims of some of the plaintiffs may not be barred by the statute of limitations and attempt to piecemeal the action, arguing that if all of the claims of any plaintiff are dismissed, then that plaintiff is liable for attorney fees under the frivolous action statute. BRFFBR 16-17. The language of the statute is contrary to Byrne/Reid's argument. RCW 4.84.185 provides that a court may award attorney fees if "the action was frivolous and advanced without reasonable cause" The focus of the statute is the entire action, not whether one plaintiff was dismissed from the action. So long as the claims of some of the plaintiffs are non-frivolous, the defendants still must defend the action and the case must still proceed. Since the defendants must still pay attorney fees and costs to defend "the action," the legislative purpose of the statute is not served by imposing all of the costs of defense on the one plaintiff who is dismissed from the case.

Byrne/Reid attempt to support their argument by citing ***State ex rel. Evergreen Freedom Found. v. Wash. Educ. Ass'n***, 111 Wn. App. 586, 49 P.3d 894 (2002), *rev. denied*, 148 Wn.2d 1020

(2003). Byrne/Reid neglect to mention that the ***Evergreen Freedom Found.*** case was not brought under the frivolous claim statute, but as a citizen action under the Fair Campaign Practices Act. RCW 42.17.400(4). The attorney fee provision in RCW 42.17.400 is not for a frivolous action, but for an action “brought without reasonable cause.” *Id.* By contrast, the frivolous action statute requires that the action be “frivolous and advanced without reasonable cause” RCW 4.84.185. Moreover, a citizen action under the Fair Campaign Practices Act may only be brought if the attorney general or the prosecuting attorney declines to commence such an action after notice by the citizen. RCW 42.17.400(4). Clearly, the primary duty of enforcement is upon the attorney general and the prosecuting attorney, and once they have declined to bring an action, it only makes sense to award fees if a citizen proceeds with an action without reasonable cause. No such screening mechanism is available under the frivolous action statute, which accordingly imposes a higher standard for the award of fees.¹

¹ Byrne/Reid argue that the claims of appellants Jacobson and Grenville are asserted only with respect to contract claims, and that no challenge has been made to their dismissal on the action. BRFFBR 17, n. 3. The plaintiffs’ appeal applies to contract claims as well as other claims.

The Prices again argue that no facts support the claims against them. PFFBR 19-21. But as discussed above, the Prices failed to dispute any basis for liability against them. The Prices' judgment must also be reversed.

ATTORNEY FEES

The defendants request attorney fees for defending the attorney fees award. The defendants' requests should be denied because the summary judgments were erroneous and the action was not frivolous in any event. But even if this Court were to affirm, this Court should deny additional fees to the defendants because the issues raised on appeal are issues of first impression and sufficiently complex that it cannot be said that this is a frivolous appeal brought without reasonable cause.

CONCLUSION

The findings and fact and conclusions of law are factually erroneous and legally insufficient. The Court should reverse the frivolous judgments.

RESPECTFULLY SUBMITTED this 2 day of January
2008.

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CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed, or caused to be mailed, a copy of the foregoing REPLY BRIEF postage prepaid, via U.S. mail on the 2 day of January 2008, to the following counsel of record at the following addresses:

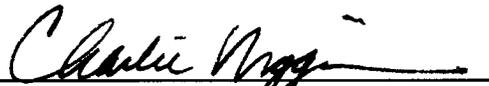
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