

COURT OF APPEALS
DIVISION II

07/07/19 11:19

No. 35291-5-II, consolidated with No. 36361-5-II

STATE OF WASHINGTON

BY *JW*

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

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 and 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.

BRIEF OF RESPONDENTS BYRNE AND REID
(FINDINGS APPEAL)

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MISCELLANEOUS

None

I. STATEMENT OF FACTS

Respondents incorporate by reference the Statement of Facts set forth in their brief on the appeal of the summary judgment dismissal.

On May 19, 2006, the trial court entered summary judgment in favor of Respondents, dismissing all causes of action against them. CP 1884-1887, CP 1888-1891. Thereafter, on June 14, 2006, Respondents Byrne and Reid, along with Respondents Price, brought motions before the trial court, in which Respondents Oldfield joined, seeking an award of attorney fees and costs pursuant to RCW 4.84.185 for a frivolous action. CP 1892-1896, CP 2015-2016, CP 2045-2050. On June 23, 2006, the trial court granted these motions. CP 2205-2206, CP 2207-2209, CP 2210-2214.

On May 18, 2007, the trial court entered Findings of Fact and Conclusions of Law in support of the award of attorney fees under RCW 4.84.185. CP 2561-2584, CP 2595-2601, CP 2607-2614, CP 2641-2647. Appellants' challenge to those findings is the subject of the present appeal.

II. ARGUMENT

A. Findings of Fact Should Not Be Disturbed If They Are Supported By Substantial Evidence.

Appellants have asked this Court to review the trial court's decision to award attorney fees and costs for having brought a frivolous action. Under RCW 4.84.185, an award of attorney fees and costs for a

frivolous action or defense is to be accompanied by written findings, without regard to whether the outcome stems from a summary judgment or trial before a trier of fact. RCW 4.84.185. The findings required under RCW 4.84.185 document the grounds for a determination that the claims were frivolous, but are not required to support a trial court's summary dismissal of the action. *See*, CR 52(a)(5)(B) ("findings of fact and conclusions of law are not necessary . . . on decisions of motions under rules 12 or 56 or any other motion. . . ."). And, contrary to Appellants' position, the standards to be used here in arriving at the findings required under RCW 4.84.185 are not the same as those used at summary judgment.

Findings of fact are reviewed for substantial evidence, or a quantum of evidence sufficient to persuade a rational fair-minded person that the premise is true. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). *See also*, *Estate of Shaughnessy*, 104 Wn.2d 89, 95, 702 P.2d 132 (1985) (findings of fact supported by substantial evidence must be upheld on review); *Discipline of Carpenter*, 160 Wn.2d 16, 23, 155 P.3d 937 (2007) (challenged findings in context of disciplinary proceedings). There is a presumption in favor of the trial court's findings, and the party claiming error has the burden of showing that a finding of fact is not supported by substantial evidence. *Fisher*

Props., Inc. v. Arden-Mayfair, Inc., 115 Wn.2d 364, 369, 798 P.2d 799 (1990). A trial court's findings will be sustained on appeal if supported by substantial evidence in the record, even in the presence of substantial evidence supporting a contrary view. *Hutchinson Cancer Research v. Holman*, 107 Wn.2d 693, 712-13, 732 P.2d 974 (1987). If the standard is satisfied, an appellate court should not substitute its judgment for that of the trial court even though it may have resolved a factual dispute differently. *Croton Chem. Corp. v. Birkenwald, Inc.*, 50 Wn.2d 684, 686, 314 P.2d 622 (1957).

This is not the same standard as that required for summary dismissal of an action; nothing in the law would suggest that the RCW 4.84.185 findings be construed in favor of a non-moving party. The findings at issue here do not bear on the summary dismissal of the claims, but rather upon whether the claims were themselves frivolous. Appellants' challenge to the findings required by RCW 4.84.185 appears simply to be a collateral attempt by Appellants to argue the summary dismissal of their action.

Adjudication of claims as being frivolous differs in another important respect from summary dismissal. A trial court's decision to award attorney fees for a frivolous action under RCW 4.84.185 is within the discretion of the court. *Jeckle v. Crotty*, 120 Wn.App. 374, 387, 85

P.3d 931 (2004). And whereas a summary dismissal is reviewed *de novo*, an award under RCW 4.84.185 is reviewed for an abuse of discretion, not *de novo*. *State v. Verharen*, 136 Wn.2d 888, 903, 969 P.2d 64 (1998). As such, the trial court is within its discretion to make such findings and to base upon them its subsequent award of attorney fees for a frivolous action. In making such findings, the trial court is not bound by the standards for summary judgment.

Contrary to Appellants' assertions, at no time did the trial court reject any of Appellants' evidence; the trial court indeed considered that evidence when entering findings under RCW 4.84.185. CP 2205-2206, CP 2595-2601. Only after having considered all of the evidence before it did the trial court then adjudicate the Defendants' motions for attorney fees and costs based on RCW 4.84.185. Appellants have not identified any evidence that the trial court declined or refused to consider on these motions.

In light of the Yanick Memo, CP 1231-1241, and the Woodell Letter of July 9, 2001, CP 1199-1201, and the sworn testimony of Appellant Robert Mitchell, CP 365, as well as the remainder of the evidence presented to the trial court, Respondents 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.

B. An Action May Be Found Frivolous Without a Finding That It Was Brought For Spite Nuisance or Harassment.

The clear language of the statute provides that an action may be found frivolous if it was “advanced without reasonable cause.” RCW 4.84.185. If a statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent. *Dept. of Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002), citing *State v. J.M.*, 144 Wn.2d 472, 480, 28 P.3d 720 (2001). Only if a statute can be said to be “ambiguous” is it appropriate to resort to aids to construction, including an examination of legislative history. *Dept. of Ecology v. Campbell & Gwinn*, 146 Wn.2d at 12.

Appellants fail to acknowledge the plain language of RCW 4.84.185, that an action is frivolous if it has been “advanced without reasonable cause.” Instead, Appellants rely on dictum in *Biggs v. Vail*, 119 Wn.2d 129, 830 P.2d 350 (1992) (*Biggs I*) to claim that, for an action to be frivolous, it must be proved to have been brought for harassment, delay, nuisance or spite, and that RCW 4.84.185 requires the court to make a specific finding of harassment, delay, nuisance or spite. Appellants are wrong.

The thrust of the holdings in *Biggs I* was to address the *scope* of the claims or defenses that must be found to have been advanced without reasonable cause. The Court evaluated not only the legislative history of RCW 4.84.185, but also the recommendations of a Washington State Bar Association task force, which included in its analysis lawsuits that “obviously have no chance of success or merit.” *Biggs*, 119 Wn.2d at 135.

The Court in *Biggs I* concluded its analysis as follows:

Thus, the intent of the Legislature is clear. The action or lawsuit is to be interpreted as a whole. If that action as a whole, or in its entirety, is determined to be *frivolous and advanced without reasonable cause*, then fees and costs may be awarded to the prevailing party.

* * *

The frivolous lawsuit statute has a very particular purpose: that purpose is to discourage frivolous lawsuits and to compensate the targets of such lawsuits for *fees and expenses incurred in fighting meritless cases*.

Biggs I, 119 Wn.2d at 136-37 (emphasis added).

Although the legislative history does describe “harassment, delay, nuisance or spite” as examples of actions that the statute might deter, there is no apparent intent that the statute be applied exclusively to actions so characterized. Neither is there any limiting language either in the legislative record or in the statute itself that would dictate the content of the findings required by RCW 4.84.185. Nowhere is it required that, for

an action to be found frivolous, a specific finding must be made that it was brought for harassment, delay, nuisance or spite.

Indeed, many cases in which such awards of attorney fees were made under RCW 4.84.185 never contained any of the words “harassment,” “delay,” “nuisance” or “spite.” *See, e.g., Zink v. City of Mesa*, 137 Wn. App. 271 (2007); *Reid v. Dalton*, 124 Wn. App. 113, 100 P.3d 349 (2005) (dismissed because plaintiff lacked standing); *Koch v. Mutual of Enumclaw Ins. Co.*, 108 Wn. App. 500, 31 P.3d 698 (2001) (insurance bad faith action dismissed on summary judgment).

The ruling of the trial court here should not be disturbed unless this Court finds that the trial court was *manifestly unreasonable* in its determination that the claims advanced by Appellants were not supported by rational argument. *See, Koch*, 108 Wn. App. at 510 (“Under the circumstances, a determination that Koch's claims were not supported by rational argument on the law or facts was not manifestly unreasonable.”). As was the case in *Koch*, the trial court’s decision here was not manifestly unreasonable.

C. Byrne/Reid’s Finding of Fact 2 Contains Only Findings of Fact and is Soundly Based on the Record Below.

A conclusion of law will be treated as such, even though it was labeled as a “finding” by the trial court. *Wygala v. Kilwein*, 41 Wn.2d 281,

248 P.2d 893 (1952). To the extent that any aspect of Combined Finding of Fact 3/2 should be rightly considered a conclusion of law, the court should treat it so. Appellants' argument here is surplusage.

Byrne/Reid's Finding of Fact 2 (as it relates to Combined Finding of Fact 3/2) states no conclusions of law. Each of the statements of fact contained in Byrne/Reid's Finding of Fact 2 is correct and supported by the record: At the time of filing the lawsuit, [Appellants] were investors in NW Commercial Loan Fund, LLC, which was in bankruptcy. CP 5; CP 368; CP 663; CP 683-718. Although one of the [Appellants] had purportedly assigned NW Commercial Loan Fund's claim to the [Appellants], the assignment of the claim was made after NW Commercial Loan Fund had filed bankruptcy. CP 656-658; CP 370. NW Commercial Loan Fund had not listed any claims against [Respondents] Byrne and Reid in its bankruptcy filings. CP 683-718. NW Commercial Loan Fund had not given notice nor received permission from the bankruptcy court to assign any NW Commercial Loan Fund claims against [Respondents] Byrne and Reid to outsiders. CP 683-718; [not contested]. The assignment was made to limited members at the time NW Commercial Loan Fund was insolvent. CP 656-658; 663; CP 369-370. The assignment to members constituted a distribution of some of the assets of the company. CP 369-370.

The trial court found that “NW Commercial Loan Fund had not listed any claims against Defendants Byrne and Reid in its bankruptcy filings.” Byrne/Reid’s Finding of Fact 2. Appellants do not dispute that this is indeed true.

“It is settled that the debtor has a duty to prepare these bankruptcy schedules and statements ‘carefully, completely, and accurately’ and bears the risk of non-disclosure.” *In re JZ, LLC*, 371 B.R. 412, __ (B.A.P. 9th Cir. 2007), citing *Cusano v. Klein*, 264 F.3d 936, 946-49 (9th Cir. 2001). Accordingly, Respondents do not bear any risk presented by NWCLF’s failure to accurately prepare its bankruptcy schedules.

With regard to the import of the bankruptcy proceedings, the case here is virtually identical to the case presented in *Hay v. First Interstate Bank of Kalispell, N.A.*, 978 F.2d 555 (9th Cir. 1992). In *Hay*, the debtor in Chapter 11 bankruptcy did not list as an asset any claim or counterclaim against three particular parties, even though by the time the reorganization plan was confirmed, the debtor had sufficient facts to identify the claims against these particular party defendants. The Court held that failure to give the required notice estopped the debtor to make the claim against

these particular party defendants and confirmed summary judgment of dismissal of these defendants.¹

And so it is here. On behalf of NWCLF, and without any apparent authority to do so, Appellants now wish to rewrite the NWCLF bankruptcy schedules to accommodate Appellants' superior court alleged claims against parties not identified in those schedules. At no time has NWCLF itself ever sought to amend its bankruptcy schedules to reflect the identity of those against whom it had potential claims. As such, the Bankruptcy Court did not have sufficient or accurate notice of these potential claims and Appellants (and NWCLF) are estopped from making those claims.

This result is not changed by the case of *In re JZ, LLC*, 371 B.R. 412, ___ (B.A.P. 9th Cir. 2007). This bankruptcy case under Chapter 11 dealt with the standing of debtor JZ to sue on causes of action that were property of the estate. *JZ, supra at* ___. But the Court in *JZ* went on to discuss the application of judicial estoppel to such claims in its discussion of *Hay supra*. The *JZ* court opined that judicial estoppel may arise in circumstances where a debtor has

¹ The Court in *Hay* also rejected the appellants' argument that "the equities favor its proceeding for the benefit of creditors whose shares of the estate may thereby be enhanced." *Hay*, 978 F.2d at 556. Similar to the debtor in *Hay*, Appellants here cannot now claim to be acting on behalf of NWCLF or its estate in bankruptcy. Appellants were required to have brought any such claims as a derivative action on behalf of NWCLF, which Appellants have not done.

gained some advantage through the court's acceptance of the initial position such as plan confirmation or grant of discharge. Since the existence of assets *and their value* is integral to plan confirmation, the *implied representation that an asset* does not exist (i.e., the omitted asset) or *is of low value* (i.e., the materially undervalued asset) may be sufficiently material that the court cannot in good conscience permit the debtor to take a contrary position in subsequent litigation.”

JZ, at 16 (emphasis added).²

Here, NWCLF gave no notice to the bankruptcy court as to any claims that may have been held by NWCLF against Respondents Reid or Byrne, and did not state in any terms the value of any such claims. With no value assigned to these claims, NWCLF cannot now say that those claims are of any substantial value to the estate and, in so doing, defraud the creditors of the estate. NWCLF and its members are estopped from bringing any claims against Respondents Byrne and Reid.

D. Combined Finding of Fact 4/3 is Indeed Supported by Undisputed Evidence.

1. Appellants and Their Representatives Met With Defendants Byrne and Oldfield in March 2001.

It is undisputed that Plaintiff Appellant Gary Grendahl and his attorney, Mike Woodell, met with Tom Oldfield and Kevin Byrne in March of 2001. The Yanick Memo confirms this meeting: “Gary [Grendahl] and his attorney, Mike Woodell, asked for a meeting to discuss

² The *JZ* Court noted that, in *Hay*, it was the *victim creditors* to which the omitted causes of action belonged, and not the debtor.

what was happening with the fund. Byrne showed up at the meeting with Oldfield. . . .” CP 1233. The Declaration of Respondent Byrne also confirms this meeting. CP 1143-1144.

The facts contradict Appellants’ position that, because this March 2001 meeting may not have directly involved Appellants other than Grendahl, any information discussed at this meeting may not be imputed to those other Appellants. But as previously briefed in these Respondents’ brief on the appeal of the summary judgment dismissal, the other Appellants similarly discovered or should have discovered the facts upon which they base their allegations of fraud. Brief of Respondents Byrne and Reid’s at 29. Such discovery or obligation to discover triggered the statute of limitations.

2. Grendahl Discussed the Same Issues That Were the Subject of this Litigation in his March 2001 Meeting with Byrne and Oldfield.

It is undisputed that “[i]n about March of 2001, some of the limited members of NWCLF attempted to make withdrawals from the fund and were met with delay and evasive responses from Byrne. . . .” CP 6. In response, at least one purpose of the March 2001 meeting was to discuss “what was happening with the fund,” referring to NWCLF. CP 1233. This entire litigation involves “what was happening with the fund” and Appellants’ growing concerns over its management. As such, those

attending the March 2001 meeting did discuss the same issues that are now the subject of the present litigation.

E. The Woodell Letter was Indeed Written on behalf of Plaintiff Appellants and Sets Forth Substantially All of Plaintiffs' Claims.

The July 9, 2001 letter from attorney Mike Woodell (the “Woodell Letter”), CP 1199-1201, identifies Mike Woodell as representing Gary and Joann Grendahl, each of them Plaintiffs (and Appellants) in this action. That the Woodell Letter does not indicate that it was written on behalf of all Appellants is not critical to the finding here. The trial court was indeed correct that the Woodell Letter sets forth substantially all of Appellants’ claims in this action.

The claims identified in the Woodell Letter mirror the claims identified in later letters from Will Stevens, CP 657-678, and Timothy Jacobson, CP 1705, CP 1502, as well as the claims set forth in Appellants’ Complaint, CP 1-86, and First Amended Complaint, CP 87-172.

F. Oldfield Finding of Fact 2 is not Erroneous.

These Respondents adopt the arguments of Oldfield in response to this claimed error of Oldfield Finding of Fact 2.

G. Price Finding of Fact 2 is not Erroneous.

These Respondents adopt the arguments of the Prices in response to this claimed error of Price Finding of Fact 2.

H. The Yanick Memo Clearly Identifies Who Knew What and When They Knew It.

1. The Yanick Memo Clarified the Start Date for the Statute of Limitations.

Taken alone, the Yanick Memo does not itself establish or change the statute of limitations. But in the context of this matter in its entirety, the Yanick Memo is instructive to the trier of fact as to the knowledge of the Appellants and their perceived basis for bringing this action.

Attorney Miles A. Yanick, at the request of NWCLF through its manager Will Stevens, drafted and sent a Memorandum dated December 22, 2003 (the “Yanick Memo”) to Will Stevens and “Northwest Commercial Loan Fund,” with a copy to Rob Mitchell, Gary Grendahl and Keith Baldwin. CP 1231-1241. In the “TO:” line, the Yanick Memo is directed to the attention of “Will Stevens, Gary Grendahl, and Rob Mitchell.” CP 1231.

The Yanick Memo is clear evidence that, as of March 2001, NWCLF, Gary Grendahl and Rob Mitchell were concerned about the management of NWCLF. Based on the facts and documents provided directly to Attorney Yanick by NWCLF, Will Stevens, Gary Grendahl and Rob Mitchell, the Yanick Memo recites those facts, refers to those documents, and presents a legal analysis of the issues with which the investors were faced. Based upon the information directly from these

parties, Attorney Yanick offered legal guidance regarding the timeliness of bringing claims based on their concerns. Appellants do not contend and there is no independent reason to believe that Attorney Yanick concocted any of the facts upon which he based the Yanick Memo regarding timing of the parties' discovery of bases for their causes of action. The only basis upon which Attorney Yanick could have formed his opinions was from information gained directly from Appellants.

Appellants' investigation into the factual bases for potential causes of action against Respondents culminated in the production of the Woodell Letter dated July 9, 2001. CP 1199-1201. The Woodall Letter itself establishes the latest "reasonable time" at which Appellants knew of their potential causes of action. As aptly noted by Appellants, the Woodell Letter states that, "[t]he Grendahls have reasonable grounds for believing the following improper acts and errors or omissions have occurred or are occurring. . . ." CP 2381. Because by July 9, 2001 the Grendahls believed that they had reasonable grounds for their allegations, then it is logical to conclude that the remaining Appellants, exercising due diligence similar to that of the Grendahls, should also have had "reasonable grounds" by that same time.

2. The Trial Court Did Not Error in Concluding that the Statute of Limitations Had Run With Respect to Oldfield.

These Respondents adopt the arguments of Oldfield in response to this claimed error.

I. The Action Was Indeed Frivolous as a Whole.

None of the causes of action advanced by Appellants were viable or advanced with reasonable cause and, as such, were dismissed by the trial court on summary judgment.

In *Biggs v. Vail*, 124 Wn.2d 193, 876 P.2d 448 (1994) (*Biggs II*), the Supreme Court upheld an award of attorney fees and costs where none of plaintiff's claims advanced to trial. In the suit leading to that decision, a single plaintiff brought suit against a single defendant regarding an employment relationship. In the earlier case of *Biggs I*, 119 Wn.2d 129, the Supreme Court had reversed the trial court's award of fees under RCW 4.84.185 because the trial court found only three of four claims asserted by its one plaintiff to be frivolous. *Biggs*, 119 Wn.2d at 132, 137. Because the fourth claim advanced to trial, the suit could not be considered frivolous in its entirety and award of fees under RCW 4.84.185 against this one plaintiff was not appropriate. *Id.* Such is not the case here.

The present appeal presents a new twist on the *Biggs* cases; this case involves not only multiple claims but also multiple plaintiffs and

defendants. Notwithstanding the holdings in the *Biggs* cases, Appellants' frivolous claims here should not be permitted to enjoy the safe haven of any ones found to be meritorious. *See e.g., State v. Washington Educ. Ass'n*, 111 Wn. App. 586, 49 P.3d 894 (2002) (attorney fees awarded on individual frivolous claims).³

In the circumstances present here, an award of attorney fees and costs may be made against individual Plaintiff Appellants so long as none of their individual claims advance to trial. For each Plaintiff-Defendant combination, there are several claims. So long as all claims between a particular Plaintiff and a particular Defendant are dismissed, the particular Defendant is not precluded by the *Biggs* decisions from obtaining an award of attorney fees and costs under RCW 4.84.185 for a frivolous action. These particular Plaintiff Appellants, who have nothing but frivolous causes of action, must not be entitled to ride on the coattails of any Appellants whose claims might not be found to be frivolous.

III. CONCLUSION AND REQUEST FOR FEES

The trial court appropriately used its discretion in reaching each of its findings of fact associated with Respondents' motion for attorney fees and based those findings upon substantial evidence. Appellants have

³ This is especially true with respect to the claims of Appellants Jacobson and Grenville, who only have contract claims. Appellants filed their Second Amended Complaint adding Jacobson and Grenville as to contract claims only. CP 1006-1091. No challenge has been made to their dismissal from the action.

presented no facts or argument that would require a different outcome. Coincident with and in addition to Respondents' request for fees on Appellants' initial appeal of this matter, Respondents Byrne and Reid request an award of fees in this appeal based upon RCW 4.84.185 and RAP 18.1.

RESPECTFULLY SUBMITTED this 3 day of October 2007.

SMITH ALLING LANE, P.S.

By 

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STATE OF WASHINGTON

BY _____
DEPUTY

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ROBERT R. MITCHELL, et al.,

Appellants,

v.

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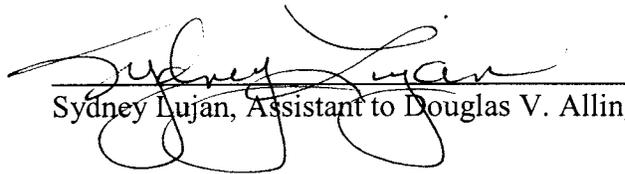
CERTIFICATE OF SERVICE

I certify that I mailed, or caused to be mailed, a copy of the foregoing BRIEF OF RESPONDENTS BYRNE AND REID (Findings Appeal) postage prepaid, via U.S. mail on 3rd day of October, 2007 to the following counsel of record at the following addresses:

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