

COURT OF APPEALS
OF THE STATE OF WASHINGTON

07/27/12 PM 2:17
STATE OF WASHINGTON
BY: 
CLERK

DIVISION II

NO. 36487-5-II

CRISTY A. GUNDERSON and JOHN DOE GUNDERSON,
MICHAEL J. ROGERS and NANNETTE B. ROGERS,
EAGLE HOME MORTGAGE, INC., HERITAGE SAVINGS
BANK, and JAMES E. BRAZIL and JANE DOE BRAZIL,

Respondents,

v.

AMEDEO NAPPI,

Appellant.

BRIEF OF RESPONDENT JAMES E. BRAZIL

Mary Ann Strickler
Taylor & Berg
6510 Capitol Blvd. SE
Tumwater, WA 98501
(360) 705-9000

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	ISSUE PRESENTED	1
III.	STATEMENT OF THE CASE	1
IV.	ARGUMENT	3
	A. APPELLANT NAPPI IS LIABLE TO BRAZIL FOR AN AWARD OF FEES OR SANCTIONS UNDER CR 11.	3
	1. The Court properly granted CR 11 sanctions in favor of Brazil as against Nappi.	3
	2. Nappi was liable to Brazil for fees under RCW 8.24.030.	4
	3. The Gundersons should have been found liable to Brazil for fees under CR 11.	5
	4. The Gundersons should have been found liable to Brazil for fees under RCW 8.24.030.	8
	B. RESPONDENT BRAZIL IS ENTITLED TO ATTORNEY'S FEES ON APPEAL.	9
V.	CONCLUSION	10

TABLE OF AUTHORITIES

Cases	Page(s)
<u>Beckman v. Wilcox</u> , 96 Wn. App. 355, 979 P.2d 890 (1999)	5
<u>Harrington v. Pailthorp</u> , 67 Wn. App. 901, 841 P.2d 1258 (1992)	9-10
<u>Kennedy v. Martin</u> , 115 Wn. App. 866, 63 P.3d 866 (2003)	5, 9
Statutes	Page(s)
RCW 8.24.030	1, 4, 8, 9
Other Authorities	Page(s)
CR 11	1, 3, 4, 5, 8

I. INTRODUCTION

Respondent James E. Brazil has requested that counsel respond only minimally to this appeal in the interest of finances.

II. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

The only assignment of error made by Appellant Nappi that affects Respondent Brazil is:

Whether the court erred in granting judgment for attorney's fees against Petitioner under CR 11.

III. STATEMENT OF THE CASE

This was an action under Chapter 8.24 RCW, Private Ways of Necessity, wherein Appellant Nappi sued adjoining property owners for ingress and egress for his land-locked five acre parcel.

Appellant Nappi did not name Respondent Brazil as a party, having previously litigated and lost the issue of an easement across Brazil's property under Thurston County cause number 00-2-01365-2.

Respondent James E. Brazil was joined as a defendant to this litigation a year into it, in January 2005, on the motion of Respondents Gunderson, who argued on the eve of trial that

Brazil was a necessary party to this action.¹ Brazil, not yet having been notified of his potential joinder to this action, was not present to represent to the court that this matter was res judicata as to his property by prior litigation. The motion was granted and Brazil was joined as a defendant then served with an amended petition.²

The case sat in limbo for a year and then in the fall of 2006, the Gundersons moved for summary judgment and Brazil moved to dismiss.

Both motions were granted. Both the Gundersons and Brazil were granted attorney's fees against Nappi. Brazil's judgment for fees was a modest \$1,285.00. He was also granted \$25.00 in costs.

¹ CP 71 - 76, Motion and Affidavit to Compel Amendment of Petition of Right of Way of Necessity, to Join Parties and for Continuance of Trial, filed December 30, 2004.

² CP 97 - 98, Order on Motion re: Amendment of Petition of Right of Way of Necessity to Join Parties and for Continuance of Trial, filed January 21, 2005.

IV. ARGUMENT

A. APPELLANT NAPPI IS LIABLE TO BRAZIL FOR AN AWARD OF FEES OR SANCTIONS UNDER CR 11.

At the time Brazil was joined in this action, all parties knew of the previous litigation in which Brazil prevailed. There was no factual or legal basis to join Brazil as a party, as the matter of an easement across his property was barred by the doctrine of res judicata.

After prevailing on his motion to dismiss, Brazil requested attorney's fees against both the Gundersons and Nappi under various theories.

1. The Court properly granted CR 11 sanctions in favor of Brazil as against Nappi.

The court granted attorney's fees to Brazil under CR 11, and only as against Nappi.³ Brazil had argued that the records of the Thurston County Auditor showed that Nappi was not the owner of the real property at issue at the time this law suit commenced, wasn't as of November 3, 2006, and despite Nappi's promises to the court to "prove" that he was the owner,

³

RP November 3, 2006, page 28, lines 20 - 24.

he never did.⁴

It was Brazil's argument that the property at issue was either being held fraudulently in the name of a 3rd person to avoid Nappi's creditors or Nappi was engaging in the unauthorized practice of law on behalf of Rhonda P. Jones, the owner of record.

The court properly explained the basis of its CR 11 sanctions:

"...Mr. Nappi was clearly barred from the relief he was requesting by previous Court rulings of which he was well aware, even though the Court was not."⁵

2. Nappi was liable to Brazil for fees under RCW 8.24.030.

Brazil further argued that Nappi could be found liable for an attorney fee award under RCW 8.24.030.

Under RCW 8.24.030, Nappi could be liable to Brazil for his

⁴ CP 184 - 196, Amended Motion re Attorney Fees or Sanctions on Motion to Dismiss and Memorandum, filed October 24, 2006; and RP November 3, 2006, page 26, line 26 - page 27, line 7.

⁵ RP November 3, 2006, page 28, lines 16 - 19.

attorneys' fees. "An entirety of judgment is not required before attorney fees can be awarded...In other words, there does not need to be a successful condemnation before the awarding of attorney fees, only an action." Kennedy v. Martin, 115 Wn. App, at 873, citing Beckman v. Wilcox, 96 Wn. App. 355, 363, 979 P.2d 890 (1999).

Brazil should never have been joined and Nappi, the Gundersons and their prior counsel were all aware of this.

3. The Gundersons should have been found liable to Brazil for fees under CR 11.

Brazil also moved for CR 11 sanctions against the Gundersons. The Gundersons had moved the court on December 30, 2004, to join Brazil as a defendant, arguing that all adjoining land owners must be joined as defendants.⁶

At the time the Gundersons moved the court for joinder of Brazil, Mrs. Gunderson was well aware that the issue of an

⁶ CP 71 - 76, Motion and Affidavit to Compel Amendment of Petition of Right of Way of Necessity to Join Parties and for Continuance of Trial, filed December 30, 2004.

easement across Brazil's property had already been litigated. Mrs. Gunderson's knowledge of the previous case is demonstrated in her Affidavit dated February 24, 2004.

Mrs. Gunderson states:

"Additionally, I am aware that the Petitioner (Nappi) and another neighboring landowner (Brazil) were engaged in litigation regarding the same issue of the Petitioner's need for some easement under Thurston County Cause Number 00-2-01365-2, and the Petitioner apparently settled the case to his satisfaction. My husband and I were not joined in that litigation, I have only learned of the outcome subsequent to the settlement of the matter."⁷

The Gundersons' motion compelling joinder of Brazil is dated December 30, 2004, nearly ten months after Mrs. Gunderson's Affidavit admitting knowledge of the case between Nappi and Brazil and of the outcome of that case. Yet the Gundersons proceeded with the motion to compel joinder of

⁷ CP 17, Affidavit of Cristy A. Gunderson-Meadows, filed February 25, 2004, lines 17 - 22.

Brazil, which was granted in January, 2005.⁸

The knowledge of the outcome of the Nappi v Brazil case was also known to the Gundersons' former counsel, as demonstrated by billing records attached to the Affidavit of Fees and Costs.⁹

The Affidavit of Fees and Costs prepared by Gundersons' attorney contains an entry at page 1 of the exhibit of detailed transactions/billings, which demonstrates that the Gundersons' prior counsel reviewed the court file and had knowledge of the outcome of the Nappi v Brazil matter.¹⁰

On January 30, 2004, counsel for the Gundersons billed two hours for: "Review file provided by client; Legal Research at Thurston County Superior Court to review Nappi v. Brazil, et al."¹¹

⁸ CP 97 - 98, Order on Motion re: Amendment of Petition of Right of Way of Necessity, to Join Parties and for Continuance of Trial, filed January 21, 2005.

⁹ CP 16 - 20, Affidavit of Cristy A. Gunderson -Meadows, filed February 25, 2004.

¹⁰ CP 226, Affidavit of Fees and Costs, filed November 3, 2006, Entry for January 30, 2004.

¹¹ Id.

The Gundersons' motion to compel joinder of Brazil was made in December 2004, eleven months after the date of the research. Having reviewed the file, the Gundersons' attorney knew or should have known that Nappi's claims as to an implied easement for ingress and egress were dismissed with prejudice as a matter of law by the Order Granting Partial Summary Judgment in the case of Nappi v Brazil, 00-2-01365-2, dated January 10, 2003.

The Gundersons' motion to join Brazil was also made with the knowledge that Nappi and his successors in interest had no right to easement on Brazil's property for any purpose, per the Order and Judgment Quieting Title and Granting Easement, Nappi v Brazil, 00-2-01365-2, September 9, 2003.

The Gundersons' motion to join Brazil warranted CR 11 sanctions. There were no facts or law that could support joining Brazil as a defendant in this action and the Gundersons knew it.

4. The Gundersons should have been found liable to Brazil for fees under RCW 8.24.030.

Brazil argued that the Gundersons were liable for an attorney fee award under RCW 8.24.030.

In the Kennedy v. Martin case cited above, Kennedy sued the Martins for an easement of necessity. The Martins joined the Cammacks who were also adjacent landowners. The court granted an easement across the Martins' property in favor of Kennedy but ordered the Martins, not petitioner Kennedy, to pay the Cammacks' attorney fees. Kennedy, 115 Wn. App. at 872 - 873. When the Martins joined the Cammacks, they made the Cammacks a potential condemnee and it became necessary for them to hire an attorney and defend against the action. "There is nothing in the language of RCW 8.24.030 or in the case law that prevents a court from requiring the party responsible for involving the party seeking reimbursement of his attorney fees to pay those fees." Kennedy, 115 Wn. App. at 873.

B. RESPONDENT BRAZIL IS ENTITLED TO ATTORNEY'S FEES ON APPEAL.

Respondent Brazil requests an award of attorney's fees on appeal. Nappi's appeal is frivolous as to the award of fees in the court below when "... no debatable issues are presented upon which reasonable minds might differ, and it is so devoid of merit that no reasonable possibility of reversal exists." Harrington v.

Pailthorp, 67 Wn. App. 901, 913, 841 P.2d 1258 (1992).

While Nappi may have presented some issues to the court on appeal that may have had merit, the only issue that related to Respondent Brazil, was the award of fees.

V. CONCLUSION

Brazil respectfully requests that the decision of the Superior Court granting his minimal attorney's fees be affirmed and that he be awarded his attorney's fees on appeal.

DATED this 2th day of December, 2007.



Mary Ann Strickler
Taylor & Berg
Attorney for Respondent James E. Brazil
WSBA No. 25294

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

07 DEC 12 10:17
STATE OF WASHINGTON
BY _____

AMEDEO NAPPI,)
)
Appellant,) (T. C. Superior Court
) No. 04-2-00305-6)
v.)
) AFFIDAVIT OF MAILING
)
CRISTY GUNDERSON, and)
JOHN DOE GUNDERSON, et)
al.,)
)
Respondents.)
)

STATE OF WASHINGTON)
) ss.
COUNTY OF THURSTON)

Mary Ann Strickler, being first duly sworn on oath, deposes and states:

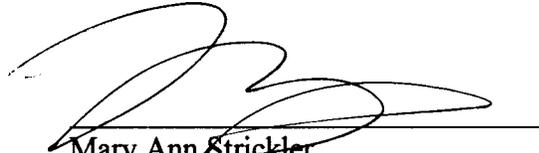
On the 7th day of December, 2007, I caused to be deposited in the United States mail at Tumwater, Thurston County, Washington, with first class postage prepaid, addressed to the parties as follows:

Amedeo Nappi
P.O. Box 11761
Olympia, WA 98508

Michael & Nannette Rogers
11700 Waddell Creek Road SW
Olympia, WA 98512

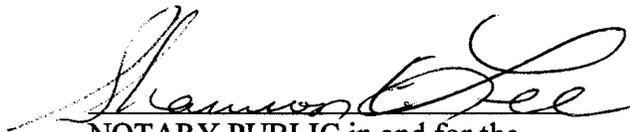
Daniel R. Tiffany
Ditlevson Rodgers Dixon PS
324 West Bay Drive NW, Suite 201
Olympia, WA 98502

a copy of the Brief of Respondent James E. Brazil.



Mary Ann Strickler
Attorney for Respondent Brazil
WSBA NO. 25294

SUBSCRIBED AND SWORN TO before me this 7th day of December,
2007.



NOTARY PUBLIC in and for the
State of Washington, residing at:

McDermott
My commission expires: 11/01/10