

No. 36583-9-II

IN THE COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

Jon M. and Lisa Riedel husband & wife d/b/a R&C Construction Inc. a foreign corporation,
Riedel and Company Construction Inc. and R&C Construction.

Appellants

vs.

Leanne L. McConnell

Respondent

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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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Jon M. and Lisa Riedel husband & wife d/b/a R&C Construction Inc. a foreign corporation,
Riedel and Company Construction Inc. and R&C Construction's opening brief

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I. ASSIGNMENTS OF ERROR; ISSUES PRESENTED

- A. The appellant assigns error to the trial courts order requiring the \$30,000 of the proceeds of a real property transaction with to be deposited in the Court Registry.
1. Did the trial court err by entering an order requiring the deposit of \$30,000 in the court registry as a pre judgment writ of attachment when none of the formalities of RCW 6.25.070 were met?
- B. The appellant assigns error to the trial courts finding of fact # 14 and conclusion of law #17 & 18.
1. Did the trial court have subject matter jurisdiction to enter a finding that Jon Riedel transferred a promissory note without consideration to enter a finding of fraudulent conveyance?

II. STATEMENT OF THE CASE

This matter started as a contract dispute between a builder/ developer R and C Building Construction Inc. (appellant) and a home buyer Leanne McConnell (respondent) over a custom home in Thurston County. On May 18, 2004 Jon Riedel executed and delivered a promissory note in the principle sum of \$10,000 to Leanne McConnell for the purpose of developing real property for residential lots. August 17, 2004, the due date of the promissory note was extended by Leanne McConnell. On or about April 4, 2005, R and C Building Construction Inc and Leanne Mc Connell entered into a construction contract to build a custom home on the land developed by Jon Riedel. (CP 73-83).

The land was developed and the home constructed for Leanne McConnell. During the course of development certain land issues arose that

created questions about legal access to the property, water well access and the cost of power installation. These claims were bought under a breach of contract claim as noted in the amended complaint filed February 28, 2006. (CP 4-23 Ex A). The amended complaint also raised issues of Consumer Protection Act claim for failure to maintain a contractor's license and other enumerated claims under the CPA. (CP 4-23).

On February 28, 2006 the same date of the amended complaint filing a Motion for Summary Judgment was brought and a proposed order on the motion. (CP 110-112). A hearing date was set for May 12, 2006. The motion was continued until June 9, 2006. On May 30th a response brief with declaration from Jon Riedel was filed by the appellants. On June 9, 2006 the motion was heard before Judge Paula Casey. During the argument Judge Casey determined that the declaration of Mr. Riedel raised the issue of a settlement. Counsel Mr. Hoss made the argument that Riedel would take certain monies and run. The court then at (RP 6/9/06 page 10) proclaims that she wants to accomplish some pre-judgment writ of attachment. At (RP 6/9/06 page 13) Judge Casey states "I'd like to issue a pre-judgment writ of attachment, which we don't have anything for, but I want to do something to protect this money, because this matter is a mess." Judge Casey then proceeded to issue the order which required proceeds from certain alleged transactions to be tendered into the court registry. (CP 133).

A bench trial was heard before Judge Pomeroy on 2007. Jon Riedel and appellants did not attend and rested on the claims as plead. After trial the

Findings of Fact and Conclusions of Law were sent to counsel for Appellants. Certain findings related to a Fraudulent Conveyance and Constructive Trust were included. The evidence at trial for a fraudulent conveyance consisted of the speculation testimony of Leanne McConnell. (RP 6/21/07 page 35-37). A motion for reconsideration was filed raising the issue that the order by Judge Casey was not properly before her and also objected to the claim for Fraudulent Conveyance and Constructive Trust as claims not before the court. (CP 151-155). The motion for reconsideration was denied and a revised findings of fact and conclusions of law were entered (CP 170-180).

III. ARGUMENT

A. The Applicable Review Is De Novo and Error of Law Standard

CR 12(b)(1) sets forth a defense for "lack of jurisdiction over the subject matter." "Without subject matter jurisdiction, a court or administrative tribunal may do nothing other than enter an order of dismissal." *Inland Foundry Co. v. Spokane County Air Pollution Control Auth.*, 98 Wn. App. 121, 123-24, 989 P.2d 102 (1999).

The construction of statutes is, of course, a question of law that we review de novo under the error of law standard. *Waste Mgmt. of*

Seattle, Inc. v. Utils. & Transp. Comm'n, 123 Wn.2d 621, 627, 869 P.2d 1034 (1994).

B. Pre-Trial Order is a Pre Judgment Writ of Attachment.

The order issued by Judge Casey on June 9, 2006 was in effect a “Pre judgment Writ of Attachment”. Even the transcript reveals her intent to establish a Prejudgment Writ of Attachment. (RP 6/09/06 page 10.)

When interpreting statutes, we first look to the plain meaning of words used in the statutes. *State v. Fjermestad*, 114 Wn.2d 828, 835, 791 P.2d 897 (1990). We may give a nontechnical statutory term its dictionary meaning. *Fjermestad*, 114 Wn.2d at 835.

If the statutory language is clear and unambiguous, we assume the legislature meant exactly what it said and determine the meaning of the statutes from their language alone. See *Duke v. Boyd*, 133 Wn.2d 80, 87, 942 P.2d 351 (1997); *C.J.C. v. Corp. of the Catholic Bishop of Yakima*, 138 Wn.2d 699, 708, 985 P.2d 262 (1999). On the other hand, if the statutory language is ambiguous, we resort to the tools of statutory construction to ascertain and give effect to the legislature's intent and purpose. *Harmon v. Dep't of Soc. & Health Servs.*, 134 Wn.2d 523, 530, 951 P.2d 770 (1998).

A statute is ambiguous when it is fairly susceptible to two or more reasonable interpretations. *Sacred Heart Med. Ctr. v. Dep't of Revenue*, 88 Wn. App. 632, 636, 946 P.2d 409

The attachment of funds prior to a judgment is a pre-judgment writ of attachment. This interim remedy is one that requires strict compliance with the statute. The statute reads as follows:

RCW 6.25.070

Issuance of writ -- Notice -- Hearing -- Issuance without notice -- Forms for notice.

(1) Except as provided in subsection (2) of this section, the court shall issue a writ of attachment only after prior notice to defendant, given in the manner prescribed in subsections (4) and (5) of this section, with an opportunity for a prior hearing at which the plaintiff shall establish the probable validity of the claim sued on and that there is probable cause to believe that the alleged ground for attachment exists.

(2) Subject to subsection (3) of this section, the court shall issue the writ without prior notice to defendant and an opportunity for a prior hearing only if:

(a)(i) The attachment is to be levied only on real property, or (ii) if it is to be levied on personal property, the ground alleged for issuance of attachment is one appearing in RCW 6.25.030 (5) through (7) or in RCW 6.25.040(1) or, if attachment is necessary for the court to obtain jurisdiction of the action, the ground alleged is one appearing in RCW 6.25.030 (1) through (4); and

(b) The court finds, on the basis of specific facts alleged in the affidavit, after an ex parte hearing, that there is probable cause to believe the allegations of plaintiff's affidavit.

(3) If a writ is issued under subsection (2) of this section without prior notice to defendant, after seizure of property under the writ the defendant shall be entitled to prompt notice of the seizure and of a right to an early hearing, if requested, at which the plaintiff shall establish the probable validity of the claim sued on and that there is probable cause to believe that the alleged ground for attachment exists. Such notice shall be given in the manner prescribed in subsections (4) and (5) of this section.

(4) When notice and a hearing are required under this section, notice may be given by a show cause order stating the date, time, and place of the hearing. Notice required under this section shall be jurisdictional and, except as provided for published notice in subsection (5) of this section, notice shall be served in the same manner as a summons in a civil action and shall be served together with: (a) A copy of the plaintiff's affidavit and a copy of the writ if already issued; (b) if the defendant is an individual, copies of homestead statutes, RCW

6.13.010, 6.13.030, and 6.13.040, if real property is to be attached, or copies of exemption statutes, RCW 6.15.010 and 6.15.060, if personal property is to be attached; and (c) if the plaintiff has proceeded under subsection (2) of this section, a copy of a "Notice of Right to Hearing" in substantially the following form:

The above statute requires written notice of a hearing for pre-judgment writ of attachment. RCW 6.25.070 (1). It also requires a hearing on the issues. None of these pre-requisites were provided to Riedel. Judge Casey at the urging of counsel created a writ in the form of an order requiring payment into the court registry \$30,000.00 for satisfaction of a possible judgment. None of the requirements of the statute were met. The order is in direct contradiction to the statute.

C. Fraudulent Conveyance Must be Plead

Finding of Fact #14 concludes that there was no evidence of payment for the assignment of the alleged assignment of the Promissory Note and Deed of Trust. While Jon Riedel did not participate at trial, he is entitled to rely on the complaint and amendments thereto that the trial would be limited to the issues or causes of action as plead. Neither the complaint nor an amendment raised the issue of the lack of consideration for a promissory note with Jon Riedel's father.

The finding of fact #14 set a record for the conclusion of a conveyance without consideration and thus a legal remedy of a constructive trust. A claim involving the contention for a fraudulent conveyance and the

remedy sought of a constructive trust must be plead.

Even our liberal rules of pleading require a complaint to contain direct allegations sufficient to give notice to the court and the opponent of the nature of the plaintiff's claim. There must be allegations worded in such a way as to permit the introduction of evidence concerning the propriety of the process by which it was determined not to sue, and which advise the defendant that it is this decision-making process which is to be the action under scrutiny. Absent such allegations, the complaint is properly dismissed. *Lightner v. Balow*, 59 Wn.2d 856, 370 P.2d 982 (1962). Equivalent federal rules are construed similarly by federal courts.

A reading of *Garcia, Conley*, and a host of other cases suggests that the complaint and other relief-claiming pleadings need not state with precision all elements that give rise to a legal basis for recovery as long as fair notice of the nature of the action is provided. However, the complaint must contain either direct allegations on every material point necessary to sustain a recovery on any legal theory, even though it may not be the theory suggested or intended by the pleader, or contain allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial. (emphasis added) *Berge V. Gorton* 88 Wn.2d 756, (1977)

The claim of fraudulent conveyance is a cause of action that must be specifically plead as common law fraud or as Fraudulent Conveyance

under the Uniform Fraudulent Transfer Act RCW 19.40 et seq. Under either theory the elements of fraud must be plead See *Freitag v. McGhie* 133 Wn.2d 816 (1997).

D. Evidence Not Sufficient for Constructive Trust

A constructive trust must be proved by clear, cogent and convincing evidence. *City of Lakewood v. Pierce County* 6 P.3d 1184, 102 Wash App 170, review granted, 21 P.3d 1149. 142 Wash 2d. 1024 affirmed 30 P.3d 446, 144 Wash 2d. 118 (2000). A “constructive trust” is an equitable remedy that compels where one through actual fraud, abuse of confidence repose and accepted, or through other questionable means, gains something for himself which, in equity and good conscience, he should no be permitted to hold. *Consulting Overseas Management, Ltd. v. Shtikel*, 18 P.3d 1144, 105 Wash App. 80 (2001) reconsideration denied, review denied.

Here the Finding of Fact #14 as entered by the trial court is the only evidence from which the remedy for the Constructive Trust has been created. Finding of Fact #14 says that there 1) was an alleged assignment of the Note and Deed of Trust by Jon Riedel on January 4, 2006, months

before Judge Casey issued the order requiring \$30,000 to be deposited into the court registry and 2) there was no evidence of payment for the assignment. First, neither Jon Riedel who made the alleged assignment nor the Jon Riedel's father and mother in law nor a representative of Puget Sound Construction LLC testified at trial. Any evidence relied upon is hearsay evidence and can not possibly meet the standard of clear, cogent and convincing evidence. The testimony of Leanne McConnell is nothing more than speculation and quite frankly supports the proposition that the assignment of the promissory note by Jon Riedel in question is supported by consideration. (RP 6/21/07 page 36 lines 17-24). Even Judge Pomeroy questioned whether there was evidence of valuable consideration for the promissory note. (RP 6/21/07 page 56 lines 17-24). There is no clear cogent and convincing evidence to support a finding that would allow the imposition of a constructive trust.

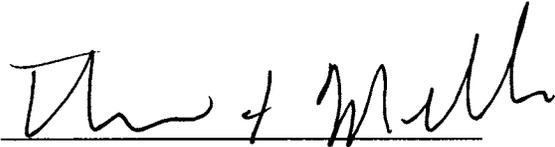
As a result of the Motion for Reconsideration the trial court revised the Findings of Fact and Conclusions of Law the strike the word fraudulent but still retained the Conclusion of Law that imposes a constructive trust over funds that are not part of the transaction involving

Leanne McConnell. The Conclusions of Law #17 & 18 create an equitable remedy of a Constructive Trust with no evidence other than speculation.

IV. CONCLUSION

Appellants ask that the findings and conclusion that the assignment of the promissory note was without consideration and therefore a remedy is imposed on the owner of those funds. The complaint makes no claim for a fraudulent conveyance and the order of Judge Casey is in direct contradiction to RCW 6.25 et. seq. seq. and RCW 6.26 et seq.

RESPECTFULLY Submitted this 6th day of March 2008

A handwritten signature in black ink, appearing to read "Thomas F. Miller", written in a cursive style.

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CERTIFICATE OF MAILING

I certify that on the 6TH day of March, 2008, I placed in the mails of the United States a duly addressed, stamped envelope containing a copy of the Jon Riedel's Opening Brief to the individuals and parties at the addresses listed below:

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DATED this 6th day of March 2008.

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