

COURT OF APPEALS
DIVISION II

No. 38394-2-II

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COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
BY
DEPUTY

BRADLEY C. HOGGATT and CONNIE HOGGATT, husband and wife,

Respondents,

v.

LUIS A. FLORES,

Appellant.

BRIEF OF RESPONDENTS

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601/215 (ud)

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I. Introduction

The Respondents, Bradley C. Hoggatt and Connie Hoggatt, respectfully submit the following brief of Respondent.

II. Statement of the Case

On June 8, 1993, the Hoggatts acquired fee simple title to Cowlitz County tax parcel number WC2001009, commonly known as 6933 Old Pacific Highway, Kalama, Cowlitz County, Washington. (CP 11) At the time, the property consisted of a single family residence and seven acres. (CP 11) The Hoggatts subsequently divided the property into four parcels, selling three of the parcels to their children and retaining ownership of the residence and four acres. (CP 11)

On April 27, 2004, the Hoggatts sold the residence and one acre to Mr. Flores, retaining ownership of the remaining three acres. (CP 11) It was the intent of parties that the properties be two separate, distinct parcels. (CP 11) The residence and property purchased by Mr. Flores was assigned Cowlitz County tax parcel number WC2001023 (hereinafter "Flores property"). (CP 12) The property retained by the Hoggatts was assigned Cowlitz County tax parcel number WC2001025 (hereinafter "Hoggatt property"). (CP 12)

On September 11, 2007, the Hoggatts made application to the Cowlitz County Department of Building and Planning for the short

subdivision of the Hoggatt property. (CP 12) By letter dated October 3, 2007, Nick Little, Assistant Planner with the Cowlitz County Department of Building and Planning, advised the Hoggatts that the Hoggatt property could not be divided until written approval from all property owners involved with the proposed plat was obtained. (CP 12) It was at this time that the Hoggatts learned that the Flores property and the Hoggatt property had never been properly divided pursuant to Cowlitz County Code (hereinafter "CCC") 18.34 et seq. and were considered one parcel for purposes of division. (CP 12) The Hoggatts thereafter began making contact with Mr. Flores in an attempt to procure his signature on the application for preliminary short subdivision approval in order to properly separate the Flores property from the Hoggatt property, creating two parcels as was originally contemplated in April, 2004. (CP 12)

In January, 2008, Mr. Flores signed the application for preliminary short subdivision approval; however, he would not authorize the Hoggatts to file the application without monetary compensation and the implication of several restrictions on the Hoggatts' use of the Hoggatt property. (CP 12) The Hoggatts refused to meet Mr. Flores' demands and initiated Cowlitz County Superior Court cause number 08 2 00917 4 seeking affirmative injunctive relief. (CP 12) Mr. Flores filed a counterclaim for the Hoggatts' violation of CCC 18.34 et seq. and sought redress under

RCW 58.17.210 and CCC 18.34.180, which hold that all purchasers of property divided in violation of the short subdivision rules may recover any amount reasonably spent because of the inability to obtain a development permit or to conform to the short subdivision requirements. (CP 8-9) RCW 58.17.210 and CCC 18.34.180 alternatively hold that the sale of the property may be rescinded.

On July 16, 2008, the Hoggatts filed a Motion for Summary Judgment asking that the Court enter an Order requiring Mr. Flores to sign the application for preliminary short subdivision approval. (CP 10) On September 29, 2008, the Honorable James Warne of the Cowlitz County Superior Court granted the Hoggatts' Motion for Summary Judgment and entered the Order on Plaintiffs' Motion for Summary Judgment at issue herein. (CP 53-55) Said order allowed the Hoggatts to proceed with the request for the division of the Flores property from the Hoggatt property absent Mr. Flores' signature on the application for preliminary short subdivision approval and the final plat. (CP 54) This order was entered after Mr. Flores refused to sign the application for preliminary short subdivision approval despite being directed to do so by the trial court. The trial court's reasoning was that the Hoggatts were doing nothing more than attempting to correct the subdivision error which would result in no harm to Mr. Flores.

III. Argument

A. The injunctive relief ordered by the trial court is appropriate because the Hoggatts have an equitable right to the relief sought.

One who seeks relief by temporary or permanent injunction must show (1) that he has a clear legal or equitable right, (2) that he has a well grounded fear of immediate invasion of that right, and (3) that the acts complained of are either resulting in or will result in actual and substantial injury to him. *Tyler Pipe Indus. V. Dep't of Revenue*, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982) (citing *Port of Seattle v. International Longshoremen's & Warehousemen's Union*, 52 Wn.2d 317, 319, 324 P.2d 1099 (1958)). Granting or withholding of an injunction is addressed to the sound discretion of the trial court, to be exercised according to the circumstances of the particular case upon examining the criteria "in light of equity including balancing the relative interests of the parties, and if appropriate, the interests of the public." *Id.*; *Blanchard v. Golden Age Brewing Co.*, 188 Wash. 396, 406, 63 P.2d 397 (1936). The trial court has all the powers of the English chancery court which was established to administer justice according to principles of fairness in cases where common law would give no or inadequate redress. *State ex rel. Burrows v. Superior Court*, 43 Wash. 225, 86 P. 632 (1906).

Mr. Flores contends that neither the trial court nor the Hoggatts have a legal or equitable right to require him to sign the application for preliminary short subdivision approval or in the alternative to proceed absent his signature. Mr. Flores does not contest that should this Court find such a right, the Hoggatts had a well grounded fear of immediate invasion of that right and that the acts complained of were resulting in or would result in actual and substantial injury to the Hoggatts.

RCW 58.17 et seq. and CCC 18.34 et seq. do not provide a remedy at law to the Hoggatts. Neither has a promulgated process wherein a seller who learns of his failure to properly subdivide his property can remedy the error. Accordingly, the Hoggatts had to rely upon the equitable powers of the trial court. This was necessitated by Mr. Flores' refusal to cooperate in the short subdivision process.

Here, the trial court's order simply allowed the Hoggatts to move forward with the process to correct the subdivision error. The order did not require the division of the properties, but instead simply allowed the filing of the application for preliminary short subdivision approval absent Mr. Flores' signature. In determining that such an order was necessary, the trial court considered and balanced the equities of the parties according to the principles of fairness.

If the trial court had not allowed the Hoggatts to proceed with the short subdivision process without Mr. Flores' signature, the Hoggatts would have been unable to utilize their property in any manner. Because their three acres was an illegal lot under the terms of the short subdivision rules, RCW 58.17.210 and CCC 18.34.180 prohibited the issuance of any building permits. The Hoggatts did not meet the building permit exception of being an innocent purchaser for value. As such, without the trial court's order, the Hoggatts property was useless and would remain bare until such time as the Hoggatts could meet the demands of Mr. Flores, no matter how unreasonable said demands may be.

Absent the trial court's order, Mr. Flores would have been in a position of absolute power. The Hoggatts would have had no bargaining position and no ability to do anything with their property without agreeing to Mr. Flores' mandates. Mr. Flores would have been in a position of being able to control the Hoggatts' use of their property at a monetary price, reasonable or otherwise. If the Hoggatts wanted to develop their property, Mr. Flores would have to agree to such under any terms unilaterally set by him. This certainly would not have fostered any principle of fairness.

The trial court's order was necessary to allow the parties to move forward and utilize their properties as they deemed appropriate. The order

took nothing away from Mr. Flores. To the contrary, it provided him a legal lot such that he too could obtain building permits and develop his property.

In April, 2004 it was the parties' intent that Mr. Flores hold fee simple title to one of four acres with the Hoggatts retaining fee simple title to the remaining three acres. Mr. Flores tendered monies in reliance thereon, and the Hoggatts issued a deed in conformity therewith. Each of the parties relied upon the promises and actions of the other in closing the transaction which resulted in Mr. Flores obtaining his interest in the one acre and residence.

Equitable principles now allow the Hoggatts to rely upon the actions of Mr. Flores and proceed with the division in order to consummate the agreement of the parties. Mr. Flores confuses this issue by continually stating that the trial court cannot make him subdivide his property. The trial court has not made Mr. Flores subdivide his property. In fact, its Order on Summary Judgment will have absolutely no affect on Mr. Flores's interest in his one acre. Instead, it does exactly what Mr. Flores argues should have occurred. It corrects the subdivision error. It allows people to manage their own property. It allows Mr. Flores to manage his one acre, and it allows the Hoggatts to manage their three acres as was the intent of the parties in April, 2004.

The principles of fairness required the trial court to allow the Hoggatts to move forward with the short subdivision process absent Mr. Flores' signature. To hold otherwise would have prevented the Hoggatts from utilizing their property and would have unfairly placed a ransom on the privilege of said use.

- B. The injunctive relief ordered by the trial court is appropriate because Mr. Flores has a legal obligation to take steps to comply with RCW 58.17 et seq. and CCC 18.34 et seq.

RCW 58.17.210 states in part that “[a]ll purchasers’ or transferees’ property shall comply with provisions of this chapter. . .” and upon achieving compliance may recover his or her damages related thereto.

CCC 18.34.180 states as follows:

“A. Except as provided in CCC 18.34.170, all purchasers or transferees of property divided in violation of this chapter shall comply with the provisions of this chapter. Each purchaser and transferee may recover his damages. . .

B. Such purchaser or transferee may, as an alternative to conforming to these requirements, rescind the sale or transfer. . .”

As is evident from this appeal, Mr. Flores, the purchaser as referenced in the above requirements, has taken no action to ensure that his property complies with RCW 58.17 et seq. or CCC 18.34 et seq. In fact, when ordered to take the affirmative act of signing a preliminary application for short subdivision approval, Mr. Flores refused, resulting in

the Order on Summary Judgment allowing the Hoggatts to go forward absent his signature. Mr. Flores' refusal to take affirmative action to comply with RCW 58.17 et seq. and CCC 18.34 et seq. is contrary to law.

Both the statute and the code hold that the purchaser's property "shall comply" with the short subdivision rules and provide for reimbursement of the cost of such from the seller. . This affirmative duty bestowed upon the purchaser is further evidenced by CCC 18.34.180(B) which allows for rescission "as an alternative to conforming to these requirements. . ." In short, the purchaser must make a choice between compliance and rescission. Failing and/or refusing to take any action is not an option.

Neither the statute nor the code is ambiguous, and as such, their plain meaning must be given effect. *Kilian v. Atkinson*, 147 Wn.2d 16, 20, 50 P.3d 638 (2002). Their use of the term "shall" creates a mandatory duty on the part of the purchaser. *Roberts v. King County*, 107 Wn. App. 806, 816, 27 P.3d 1267 (2001).

When Mr. Flores became aware that his lot was created in violation of the short subdivision rules, he was obligated to take affirmative action to bring it into compliance with RCW 58.17 et seq. and CCC 18.34 et seq. Instead, he refused to voluntarily take action or comply

with an oral order of the trial court. As such, the trial court was forced to enter an order allowing the correction of the violation absent his signature.

It is important to note that the order did nothing more than allow the Hoggatts to request that Cowlitz County allow the division of the property in order to comply with the short subdivision rules. The order did not divide the property nor did it require that Cowlitz County allow the division. At paragraph 3, it states:

“[t]his Order shall not be interpreted to require any entity, governmental or otherwise, to approve the short subdivision of Cowlitz County tax parcel numbers WC2001025 and WC2001023, Kalama, Cowlitz County, Washington. . . “

As is clear from the plain meaning of RCW 58.17.210 and CCC 18.34.180, the governing body intended for all subdivided properties to comply with the short subdivision rules. It was not the intent to allow property to be divided in violation of the rules and then to remain in violation. Initially, there is an affirmative duty on the original property owner to follow the short subdivision rules prior to the sale or transfer of any interest in the property. If he fails to do so, the duty to comply with the regulations shifts to the purchaser or transferee when actual notice of the violation is obtained. As an alternative to taking the necessary action to ensure compliance, the purchaser or transferee may rescind the transaction, thus shifting the burden to remedy the violation back to the

seller. Neither RCW 58.17 et seq. nor CCC 18.34 et seq. contemplate property being divided in violation of the short subdivision rules and then being allowed to remain in violation. “[A]ll purchasers’ or transferees’ property shall comply with provisions of this chapter. . . .” RCW 58.17.210. “[A]ll purchasers or transferees of property divided in violation of this chapter shall comply with the provisions of this chapter.” CCC 18.34.180. “Every short subdivision as defined in this chapter shall comply with the provisions of any local regulation adopted pursuant to RCW 58.17.060.” RCW 58.17.030.

Here, Mr. Flores took no action to correct the error or rescind the transaction until the Hoggatts filed for affirmative injunctive relief. It is clear that Mr. Flores intended to do nothing thus preventing the Hoggatts from developing their three acres.

The short subdivision regulations do not allow Mr. Flores to dig his heels in and refuse to cooperate with division of the property. RCW 58.17.210 and CCC 18.34.180 required that he take affirmative action to ensure compliance with the short subdivision rules or rescind his transaction with the Hoggatts thus allowing them to take the necessary action. Instead, Mr. Flores refused to do anything unless and until the Hoggatts agreed to monetarily compensate him and agreed to restrict the

use of their property. This inaction required the Hoggatts to seek and the trial court to enter the Order on Summary Judgment at issue.

- C. The trial court's Order on Summary Judgment is not contrary to the purpose and intent of RCW 58.17 et. seq. and CCC 18.34 et seq.

CCC 18.34.020 states:

“[t]he Board of County Commissioners deems it necessary to establish standards and procedures set forth in this chapter for the following purposes:

...

- E. To comply with the State Subdivision Law. . .”

RCW 58.17.010 holds that “[t]he purpose of this chapter is to . . . promote the effective use of land. . . ; to adequately provide for the housing and commercial needs of the citizens of the state. . .”

Mr. Flores' refusal to cooperate in correcting the short subdivision error and thus allow both he and the Hoggatts to use their land as they deem fit is in direct contradiction to the purpose of the short subdivision rules. As was previously stated, absent the trial court's order, the Hoggatts would have been prevented from doing anything with their property. They could not subdivide their three acres into smaller lots. They could not obtain a building permit. They were stuck with three useless acres.

It was never the purpose or intent of the short subdivision rules to handcuff an owner of an illegal lot, whether it was a result of his own

action or not, so as to make his land unusable. To the contrary, the purpose of the regulations is to “promote the effective use of land.” The trial court’s order fosters that goal.

D. The trial court’s Order on Summary Judgment is not contrary to the parties’ original intent or approval of the division of property.

Mr. Flores has asserted that CCC 18.34.060(B)(7) requires that all owners of property sign an application for short subdivision approval “to ensure that everyone with an interest in the property approves the application.” *Brief of Appellant*, p. 9. Here, Mr. Flores affirmatively expressed his approval of the division of property when he contracted for the purchase of one of four acres in 2004, when he accepted a deed for the one acre in April, 2004, allowing the Hoggatts to retain ownership of the remaining three acres, and when he conditionally signed the application for approval in January, 2008.

At no point in time has Mr. Flores asserted that he is opposed to the Hoggatts’ three acres being separated from his one acre. To the contrary, Mr. Flores stated on page 2 of his brief of Appellant that:

“Mr. Flores wanted to make sure that the process proceeded in a reasonable fashion. He wanted Mr. Hoggatt to adhere to the pledge he had previously given to Cowlitz County – that the subdivision would only create two lots.”

The trial court's Order on Summary Judgment is not in derogation of the parties' intentions nor their desires. Instead, it embraces their wishes. Paragraph 5 of said order states:

“[a]ny application for preliminary short subdivision approval and any final short plat shall create a lot meeting the legal description contained in that deed recorded under County Auditor's file number 3222383.”

Cowlitz County Auditor's file number 3222383 is the deed wherein the Hoggatts transferred the one acre to Mr. Flores.

E. The trial court's Order on Summary Judgment does not direct Cowlitz County to ignore its own ordinance.

The Hoggatts' Motion for Summary Judgment asked that the trial court order Mr. Flores to sign a preliminary application for short subdivision approval and authorize the filing of said application.

CCC 18.34.060(A) outlines what information must be included in a preliminary application for short subdivision approval. It provides in part:

“The preliminary application shall be in a form provided by the Administrator and shall contain the following information:

...
(7) The signature of owner(s) and developer(s).”

Nowhere within CCC 18.34.060(A) does it state that all owners and developers must sign the preliminary application. In fact, the term “all” has been specifically left out of the preliminary application requirement.

Had Cowlitz County wanted the signature of every owner, it would have included the appropriate adjective as was done in CCC 18.34.060(C)(10).

CCC 18.34.060(C)(10) states that “[s]ignatures, which are certified by a notary public, of all individuals having an interest in the property” shall be on the final plat. In comparing the two sections of CCC 18.34.060, it can be seen that had the governing body intended for all owners to sign the preliminary application, they would have included the term “all” as was done when discussing the final plat requirements.

F. Subdivision of the parties’ properties was inherent in the 2004 Purchase and Sale Agreement

Mr. Flores’s assertion that there is no contract between the parties that would require him to allow a short subdivision process to go forward is incorrect. Mr. Flores entered into a contract for the purchase of one acre from the Hoggatts with the understanding that the Hoggatts would retain title to the neighboring three acres. There were no covenants placed upon the Hoggatts’ use of their three acres at that time. Mr. Flores did not contract to hold a minority interest in four acres with the Hoggatts. In error, that has occurred. It is now necessary to divide the four acres into two lots, something the parties previously agreed to and contracted for. Accordingly, although Mr. Flores is correct that the parties’ contract for the purchase and sale of the one acre does not contain a specific provision

requiring a short subdivision, it is inherent within the terms of said agreement and it would be inequitable to now prevent such from occurring.

G. The trial court's Order on Summary Judgment did not violate the separation of powers.

Mr. Flores contends that the trial court's Order on Summary Judgment was in derogation of CCC 18.34 et seq., and as such, violated the separation of powers. Mr. Flores' contention is misplaced as the trial court's Order on Summary Judgment was within its power as a court of equity. The superior court has all the powers of the English chancery court. *State ex rel. Burrows v. Superior Court*, 43 Wash. 225, 86 P. 632 (1906).

"[B]y the Constitution, and independently of any legislative enactment, the judicial power over cases in equity has been vested in the courts, and, in the absence of any constitutional provisions to the contrary, such power may not be abrogated or restricted by the legislative department. Any legislation, therefore, the purpose or effect of which is to divest, in whole or in part, a constitutional court of its constitutional powers, is void as being an encroachment by the legislative department upon the judicial department." *Blanchard v. Golden Age Brewing Co.*, 188 Wash. 396, 405, 63 P.2d 397 (1936).

H. The trial court's Order on Summary Judgment does not authorize a short subdivision in contravention of regulatory requirements.

Prior to entering its Order on Summary Judgment, the trial court required counsel to contact the local governing agencies, the Cowlitz County civil deputy prosecutor, and the local title companies to determine if each would honor an order requiring initial acceptance of an application for short subdivision approval without the signature of all interest holders in the property. The response from each was yes. The trial court then entered its order directing any and all entities to require and accept signature of the Hoggatts only on the documents necessary for the short subdivision of the property. The trial court also specifically stated at paragraph 3 of its order that:

“[t]his Order shall not be interpreted to require any entity, governmental or otherwise, to approve the short subdivision of Cowlitz County tax parcel numbers WC2001025 and WC2001023, Kalama, Cowlitz County, Washington if such does not meet the remaining requirements of RCW 58.17 et seq. and/or Cowlitz County Code 18.34 et seq.”

The trial court's Order on Summary Judgment is not in contravention of regulatory requirements. It embraces the authority of the local government by only ordering that which has been pre-approved. The trial court went further to ensure such by entering paragraph 3 of its Order consistent with CCC 18.34.080 which states:

“The Director of the Building and Planning Department shall serve as the Administrator with the responsibility and duty of administering the provisions of this chapter and with authority to summarily approve or disapprove a proposed short plat under the guidelines set forth in this chapter. . . and to approve or disapprove final applications of short subdivisions.”

I. The doctrine of unclean hands is not applicable.

The doctrine of unclean hands is one of the maxims of equity embodying the principle that a party seeking redress in a court of equity must not have done any dishonest or unethical act in the transaction upon which he maintains the action in equity. Equity will not interfere on behalf of a party whose conduct in connection with the transaction has been unconscientious, unjust, or marked by the want of good faith. *Income Investors, Inc. v. Shelton*, 3 Wn.2d 599, 101 P.2d 973 (1940).

Unconscionable has been defined as “morally reprehensible as to known facts.” *J.L. Cooper & Co. v. Anchor Securities Co.*, 9 Wn.2d 45, 72, 113 P.2d 845 (1941). “Good faith” is a total absence of any intention to seek an unfair advantage or to defraud another party. *Barron’s Law Dictionary, Third Edition* (1991). In *Lavretta v. First National Bank of Mobile*, 235 Ala. 104, 178 So. 3, 6, it was held that the maxim that “[h]e who comes into equity must come with clean hands” is based on conscience and good faith, hence bad faith or unconscionable conduct which fall within maxim must rest upon positive or willful wrong and

must involve intention as opposed to a misapprehension of legal rights. In *Comstock v. Thompson*, 286 Pa. 457, 133 A. 638, the clean hands doctrine was held inapplicable as the wrongful act was committed under an honest belief as to its validity.

The Hoggatts have admitted that they failed to comply with RCW 58.17 et seq. and CCC 18.34 et seq. The underlying superior court matter was initiated to correct that error. No evidence exists demonstrating any intention on the part of the Hoggatts to seek an unfair advantage over Mr. Flores or to defraud him in their transaction by failing to comply with the short subdivision rules. Although there is evidence of a violation of the short subdivision rules, there is no evidence that this was a calculated act of the Hoggatts done by way of unclean hands.

J. An award of attorneys' fees to Mr. Flores is inappropriate.

An award of attorney's fees to a party who prevails in dissolving a wrongfully issued injunction is discretionary. *Cornell Pump Company v. City of Bellingham*, 123 Wn. App. 226, 231, 98 P.3d 84 (2004) (citing *Confederated Tribes of Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 758, 958 P.2d 260 (1998)). The purpose of this equitable rule is to discourage parties from seeking unnecessary injunctive relief prior to a trial on the merits. *Id.* at 233 (citing *White v. Wilhelm*, 34 Wn. App. 763, 774, 665 P.2d 407 (1983)). The purpose of the rule is not served where

injunctive relief prior to trial is necessary to preserve a party's rights pending resolution of the action or where it is the only relief available to the party. *Quinn Const. Co., L.L.C. v. King County Fire Protection District No. 26*, 111 Wn. App. 19, 35-36, 44 P.3d 865 (2002).

Here, like in *Quinn*, injunctive relief was the only available remedy to the Hoggatts. RCW 58.17 et seq. and CCC 18.34 et seq. do not provide a process wherein the seller of a parcel of property in violation of the short subdivision rules may correct his error. The seller must seek equitable relief from the trial court when the purchaser refuses to cooperate in correcting the error as has occurred here.

The Court in *Quinn* stated that "for all practical purposes, the hearing on the injunction was the trial on the merits. The purpose of the equitable rule allowing attorney fees for wrongful injunction is to encourage plaintiffs to prove the merits of their cases before seeking relief. That purpose would not be served by deterring plaintiffs from seeking the only relief available to them under law." *Id.*

An award of attorney fees in this case would be contrary to the purpose of the equitable rule because injunctive relief was the only remedy available to the Hoggatts and the summary judgment hearing was for all practical purposes the hearing on the merits. An award of attorney fees would not serve to discourage the Hoggatts or any other plaintiff in a

similar circumstance from seeking an order such as that at issue here prior to a trial on the merits. There was no need for a trial on the merits of the Hoggatts' claim. There was no issue of fact at the time and there continues to be no issue of fact.

Moreover, an award of attorney fees is not appropriate as this appeal is unnecessary and an abuse of the Court's time by Mr. Flores. Mr. Flores is seeking rescission of the April, 2004 transaction as was recently confirmed by his counsel. Previously, Mr. Flores refused to advise the trial court what remedy he was seeking, stating that he was under no obligation to elect his remedy. A closer look at RCW 58.17.210 and CCC 18.34.180 reveals that the only remedy available to Mr. Flores is rescission as he has not been denied any permits and he has not incurred any costs trying to correct the subdivision error. In fact, he has done everything he can to prevent the correction.

Accordingly, following the trial on Mr. Flores' rescission claim, the Hoggatts will regain complete ownership interest in the original four acres. Thereafter, they will divide the properties so that the residence and one acre can again be sold. Because Mr. Flores has made the decision to rescind the transaction and will no longer have any interest in the property, the Hoggatts can think of no logical reason why Mr. Flores has pursued this appeal to stop the correction of the short subdivision error. Why does

he care if the property is divided now versus at a later time if he is asking that his interest in the property be transferred back to the Hoggatts? Even if he were not seeking rescission, why would he want to prevent his lot from complying with the short subdivision regulations? What does he ultimately stand to gain by this appeal?

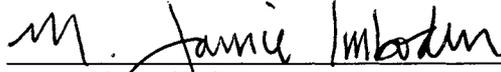
Liability in Mr. Flores' counterclaim is admitted. As such, it appears that this appeal is nothing more than an attempt to punish the Hoggatts. It is an attempt to monetarily punish them and an attempt to punish them by preventing or delaying the use and development of their property. Whether this Court finds that the trial court committed error or not, the Hoggatts will retake title to the one acre and residence by way of rescission and they will divide the properties. Mr. Flores gains nothing by this appeal and should not be awarded attorney fees as another way to punish the Hoggatts for their unintentional error.

IV. Conclusion

Based upon the foregoing, the Hoggatts respectfully request that the Court find that the trial court did not abuse its discretion in entering its Order on Summary Judgment and deny Mr. Flores' request for attorney's fees.

Dated this 21st day of May, 2009.

Respectfully Submitted,

A handwritten signature in black ink that reads "M. Jamie Imboden". The signature is written in a cursive style with a large, stylized "M" at the beginning.

M. Jamie Imboden

Attorney for Respondents

Washington State Bar Association No. 28416

COURT OF APPEALS
DIVISION II

No. 38394-2-II

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COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
BY *Ka*
DEPUTY

BRADLEY C. HOGGATT and CONNIE HOGGATT, husband and wife,
Respondents,

v.

LUIS A. FLORES,
Appellant.

AFFIDAVIT OF MAILING

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