

COURT OF APPEALS
DIVISION II

10 OCT 28 PM 1:30

STATE OF WASHINGTON
BY 
DEPUTY

No. 39975-0-II

COURT OF APPEALS - DIVISION II
OF THE STATE OF WASHINGTON

RICHARD W. WHIPPLE, Respondent

v.

FRANCES E. HALL, Appellant

Kitsap County Superior Court
Cause No. 06-2-02697-9

REPLY BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Appellant Response to Respondents Statement of the Case is found in
ISSUE THREE of ARGUMENT in conjunction with the CR 11 issue.

ARGUMENT

1. Judge Dalton's court erroneously based its rulings upon
misunderstanding of the legal theories involved in the case. (RP
4/10/09,4,11 5,14 5,22 6,2 7,1-25) The rulings CP 930-931-932
are based upon untenable reasons and are an abuse of discretion.
2. Judge Dalton's court erroneously based its rulings upon an apparent
misunderstanding of the facts of the case RP 4/10/09 9,1-14 8,13 10,10 ,
4/10/09 13,1-25) (5/8/09 p1-6)
The resultant rulings are based upon untenable grounds and are an abuse
of discretion.
3. Judge Dalton's court erroneously based its rulings of March 20, 2009
upon a deliberate misrepresentation of the law of the case perpetrated by
counsel for the plaintiff, William Broughton (RP CP927-928 -929 This
severely prejudiced defendant/counterclaimant Hall in the eyes of the
Dalton Court who then seemed to become determined that Hall would fail.
Broughton by his fraudulent assertions had accused Hall of bringing to
trial an issue which had already been decided over a year earlier.(CP 222,

400 CP728 CP 772) It was in fact Broughton who was bringing to trial an issue which had previously been decided. Broughton falsely offered that Judge Costello had denied Hall's request for recovery of Costs and Reasonable Attorney Fees and had thereby dismissed Her counterclaim under RCW 4.28.328 c (3) Hall provided Dalton with correct information but Dalton had already made the leap and apparently could/ or would not reverse the leap(RP 4/10/09). Hall moved for reconsideration. Dalton's response revealed considerable confusion about the statute (RCW 4.28.328), its definitions and its provisions .and improperly subjected the statute to unnecessary construction, using a different law with a different scheme as an interpretive measure(RP 8/10/09) Dalton. (RP3/20/09) was dismissive when Hall provided Costello's ruling of August 8, 2008 holding incorrectly that Costello's ruling was unclear . This is an error in the law of the case. (CP929) The Dalton courts rulings are based upon untenable reasons and constitute abuse of discretion. "Only if a statute can be said to be "ambiguous" is it appropriate to resort to aids in construction, including an examination of legislative history. *Dept. of Ecology v. Campbell & Gwinn*, 146 Wn.2d at 12

A trial courts uncontested findings of fact are verities on appeal. The Dalton Court's findings of fact are contested because they are contrary to

the record, based upon the unsupported opinions of the lawyer, based upon fraud on the court and ignore the overwhelming evidence brought by the defendant/counterclaimant . The findings of fact of the Dalton Court are **not** based upon substantial evidence:

"What constitutes substantial evidence is in sufficient quantum to persuade a fair minded person **of the truth of the declared premise**

One declared premise for the Dalton Court's conclusions of law and findings of fact is that Richard Whipple had a "colorable claim" because of the testimony of Hans Supit and so Whipple was determined to be not in bad faith when he filed his lis pendens against the Hall property. This conclusion involves error in fact and error in law. In order to conclude that Whipple had a colorable claim and was not in bad faith, the Dalton court made two inferential leaps from the testimony of Hans Supit. Supit testified that upon selling his property he told his realtor the Hall driveway was "shared" (RP3/2/09 58-68..)

The first inferential leap occurs at RP(May 8 p 5), If Supit told his realtor, Whipple might have heard from a realtor the driveway was shared when he considered the property.

The court leaps from a fact (the fact that Supit says he gave his realtor erroneous information) into a position based on **no evidence**. There was no evidence that Whipple heard any such thing from any Realtor. There

was no mention of a Realtors statement in any of the complaints or in Whipple's Declaration. There was no Realtor at trial to testify that such information had been given to Whipple, Whipple was not present at trial to testify about anything. There is no evidence that the misinformation actually went from Supit and the Realtor to Whipple. It is just as reasonable to infer that the Realtor behaved ethically and researched the matter and then **did not** pass on the misinformation.

From the position of **no evidence** the court makes another leap into a position of **ignoring all evidence to the contrary.**

the court had set herself to determine if Whipple was in bad faith at the time of he filed his lis pendens. The record shows that he purchased his property in April of 2004 and filed his lis pendens 2 years and nine months later on January 2007. Prior to filing his first Complaint for Quiet Title there had been informal investigation by Hall. Halls results were challenged by Whipple. By the time of filing all the parties involved knew:

1. Hall title searches and Whipple title searches found no easement of record.(CP 11/14/ 1-10)
2. Survey results and measurement results agreed that Whipple had no footage claim in the Hall driveway. This information negated any likelihood of a shared driveway easement based on footage.

3. The Whipple property had suffered fire damage and had for years been declared a dangerous, building, negating any claim based on ten years of usage of any kind by the Whipple property(CP145) The plaintiff offered no evidence for a different ten year period of Whipple property usage during any other time period. Since ten years of usage could not be established neither could 50 or 100 years be established. The plaintiff has continued to state these outrageous claims which all the parties knew were impossible. Claims for such have been simply advanced and argued without evidence.

4. Four months prior to filing his adverse possession and prescriptive easement claims, Whipple loudly and stridently proclaimed that he had permission to use Hall's property.(CP375-376) Plaintiff ceased to state this claim after retaining his attorney and commencing his suit.

The above **evidence to the contrary** renders Supits testimony about misinformation given to his realtor a moot point. It renders any speculation about what Whipple **might** have mistakenly believed when he first considered the property a moot point. By the time he filed his case and his lis pendens almost three years later, he had no good faith reason to believe that he had any valid interest in the Hall driveway. He filed anyway. He dropped his first failed claims and filed again, he abandoned the impossible Easement from prior use claim and brought a new claim

just 11 days prior to the summary judgment hearing in an obvious maneuver to prejudice the defendants preparation for the hearing. His fourth claim which he did argue at the summary judgment hearing was as inappropriate to the case as the other claims had been. It had no basis in fact.(Appendix A Appellants Brief) The legal theory appeared to be selected for its potential yield and then false allegations made to support it.

A fair minded person would conclude that Whipple was in bad faith when he filed his lis pendens against Hall's property---- especially since Whipple never released the lis pendens against the Hall property even though he was ordered to do so by Costello's summary judgment court.(CP232) (RP 8/1/08)It was left in place indefinitely Whipple behavior before, during, and after litigation demonstrated malicious intent, spite, and harassment towards Hall as well as a reckless disregard for truth or ethics. (CP 374-393)Whipple has engages in all three types of bad faith

A fair minded person would conclude that the court had no substantial evidence on which to base her finding of fact and conclusion of law that Richard Whipple had a "colorable claim" based on the testimony of Hans Supit. The Supit misinfomation had become rendered mute by the information gathered by both parties prior to litigation.

As a question of law, can such inferential leaping from a moot fact -- to a position with no evidentiary support be valid? As an additional question

of law: can a leap from a position with no evidentiary support to another position which ignores the overwhelming evidence to the contrary result in any reasonable judgment? The answer is no. It cannot because it ignores the landslide of evidence pressing against that judgment.

There is no evidence brought by the plaintiff to establish what Whipple saw, thought, believed or was told about his property at the time of purchase.

Exhibit 1 does not establish the existence of a common driveway.

Exhibit 1 shows the driveway which survey reports confirm (CP213-214) is situated entirely upon the Hall property and which in 1978 provided access to a garage which was also situated entirely on the Hall property.

The garage is no longer present (EX 3)but all four sides of its remaining foundation are located entirely on the Hall property. The 1978 aerial composite Ex 1 (photograph shows no evidence of ingress between the Hall driveway and the Whipple backyard. The Costello Court responded to the arguments of the plaintiff by saying "Where's the evidence?" (EX 15) The documents brought by the plaintiff CP 195-99 do not support his arguments. Judge Costello's Court dismissed every one of the plaintiff's claims on summary judgment. The Evidence brought before the court by the plaintiff was contradictory to his claims.The

previous owner of the Whipple property testified that his use of the Hall driveway had been permissive RP60-70, Hall testified that, out of neighborly accommodation, the Supits had been allowed to access their backyard through her driveway to allow off street parking.RP-----Hans Supit testified at trial that his use of the Hall driveway had not been exclusive.

Broughton misleads with his assertion that a common grantor had originally owned both the Whipple and the Hall properties. The U.S. Government originally owned all the properties in Washington and Oregon. There were many grantors after that who also owned both properties However The minimum requirement for bringing an implied easement claim is "Unity of Title in the Common Grantor with subsequent separation." The Common Grantor featured in the Whipple documents CP 85-88 is Edgar Gale, who owned a 28,400 square foot parcel on which the Whipple house was situated in 1908. Whipple Declaration admits "My house was here and there was a house on Halls properly." 3 days after purchasing the parcel from George Yarl, Edgar Gale sold 13.6 feet of property edge to William B Stoney who held a parcel to the north of his. Gale did not hold title to Stoney's parcel. The Whipple Declaration admits that Stoney derived his title from "Messensen" ("Messensen divides Hall 22 feet." CP195-198 .)

Whipple admits in his Declaration (CP193, 7-12) that Stoney had an already established parcel with a house on it when he purchased the 13.6 feet from Gale in 1908. He subsumed the 13.6 feet under the title of his 22 foot parcel, creating the 35.6 x 105 dimensions of the current Hall property. (CP179). Plaintiff Whipple could meet none of the elements required by his theory of Implied Easement by Implied Reservation: Gale did not have unity of title with the Hall estate. His divisions did not create any landlocked condition or even any blockage for vehicles. There was no evident need for or mention of any easement.

Mr. Broughton also asserts "this common grantor had divided by deed that portion of the property now known as the Whipple property without reserving an access easement to the rear of the house (CP 192-199) this statement by Broughton misleads. The division sold by Gale to Berg, was 60 x 105 feet in its dimensions and had no issue of landlock, having 60 feet of road front along Pleasant Avenue. There is nothing which suggests any need for or intention to reserve an easement. The conveyance which actually did create " that portion of the property now known as the Whipple property occurred sometime between 1909 and 1997 (CP and reduced its dimensions to the 30 x 105 feet of the present time. The 25 foot wide house situated on a 30 foot lot has no vehicular access to the rear of the house but has a 2.5 foot wide footpath running on each side of

the house leading to its backyard. It provides enough room to walk a horse. This unknown conveyance, the one that actually blocked vehicular access and would have prompted an easement if the owner had been so inclined, was not included in the Whipple documents. The common grantors identity is unknown --for some reason withheld from the court. The vagueness of Mr. Broughton's analysis could lead an unwary reader into mistaken conflation of these three transactions and cause the reader to seem like these events had all occurred at the same time and at the impetus of the same grantor ---unless the documents are examined closely See Appendix A Brief of Appellant for graphs of these conveyances. The last line of this paragraph at the bottom of page 4 touches on the Implied Easement from Necessity Claim. The space between the Whipple house at 929 Pleasant Avenue and 927 measures 6.5 feet at ground level. The utilities enter the Whipple property on its South side.(Ex hibit 1)The Hall driveway is on the North side. Hans Supit testified at trial that he renovated the Whipple house after its 5 years of derelict vacancy and that he had the lumber delivered to the front yard. He carried supplies to other places on the property as required. He testified also that he mixed the cement for his patio by hand in a bucket. It was observed at Costello's summary judgment (RP 4/4/08, Ex 15)that many other houses in that neighborhood and of that vintage have been maintained without

vehicular access to the backs of the houses(Trial Ex 1). Plaintiff's flimsy argument from necessity strains to conceal his hidden issue of BMC 20(Appendix B Appellant's Brief:) He needed to obtain the Hall driveway in order to convert his single family home into a duplex.(RP3/2/09)

ISSUE ONE: SUBSTANTIAL JUSTIFICATION

The trial court errantly misapplied her conclusion of law that Whipple was not in bad faith when he filed his lis pendens to her decision that the lis pendens was thus substantially justified. This misapplication of the equitable doctrine to the statute ignores the provisions under RCW 4.28.328 c(3) and improperly reverses the burden of proof specified in the statute. The statute provides that the "claimant" must establish substantial justification. It does not place the burden on the "aggrieved party" to prove "bad faith". This is an error of law. Hall's counterclaim under the provisions of RCW 4.28.328 was not ruled on due to misrepresentation and mistake. The courts stated reason for misapplying the bad faith doctrine to the statute is that "substantial justification is not defined by the statute" likewise the Dalton court also expressed lack of clarity about the term "Action" 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 1m 9-10, 43

P3.d 4 (2002), State v. J.M.1, 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.

Plaintiff relies inappropriately upon *Schwab v. Seattle*. This case is concerned with parcels which were truly landlocked. The Whipple property is not landlocked. If blockage of vehicular access for off street parking is an issue of landlock the plaintiff should have addressed his implied easement by implied reservation claim to the owner of 927 Pleasant Avenue and not to Hall since it was the partitioning off of that property which closed off the access. There is no "easement between the two properties" Broughton repeatedly uses this phrase apparently to imply that the Hall driveway spans the property line. The Hall driveway is entirely situated on Hall property.

ISSUE TWO: FRIVOLOUS ACTION

The Dalton Court erred in misapplying her conclusion of law that Whipple was not in bad faith when he filed his lis pendens to her ruling on RCW 4.84.185. This statute does not require that the counterclaimant prove "bad faith" The counter claimant has proven that the Whipple suit is frivolous in its entirety. Not one element for any of his legal theories was met. His theoretical arguments were advanced with invented fact lines

designed to satisfy his selected theories All of his allegations were proven false. None of the causes of action advanced by Plaintiff Whipple were viable or advanced with reasonable cause and , as such were dismissed by the trial court on summary judgment April 4, 2008.

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 the plaintiff's claims advanced to trial.

An Action May Be Found Frivolous Without a finding That it Was Brought for Spite, Nuisance or Harassment. Many cases in which awards of attorney fees were made under RCW 4.84.185 never contained any of the words "harassment, "delay" "nuisance" or "spite" *Zink v City of Mesa*, 137 Wn. App. 271 (2007); *Reid v. Dalton*, 124 Wn App. 113 100P.ed 349 (2005) *Kach v. Mutual of Enumclaw Ins.Co.*, 108 Wn. App. 500, 31 P.3d 698 (2001)

An Action is Frivolous if it has been advanced without reasonable cause: RCW 4.84.185.

Plaintiff did not produce evidence to support any "common driveway between the two properties" James David Einhaus denied that the properties had been purchased at foreclosure (RP 3/2/09 pag line) The Whipple claims for adverse possession and prescriptive easement were fatally flawed from their inception and could meet none of the required

elements. the Common grantor does not provide an appropriate claim but **what is minimally required is a unity of title in the common grantor with subsequent termination of two parcels.** *Landberg v. Carlson* 108 Wn.App, 749, 33 P.3d 406 Gale did not hold unity of title with the Hall/Stoney property. Had the Dalton court examined the evidence presented by the Whipple Declaration, and referred for examination (RP (Trial Ex 15 p line) (RP3/2/09)declaration she would have seen that it meets the test of risibility

ISSUE THREE CR 11

The Dalton court improperly denied a hearing for the CR 11 issue stating incorrectly that it had not been properly pled. It had been pled throughout the case : CP 35-42 CP74-81 CP112-119 and proved by the defendant's evidence. Additional evidence for the CR 11 claim has yet to be heard. At Exhibit 2 of Respondents Brief brings the section of the transcript in which the Dalton court incorrectly applied a subjective analysis to the CR 11 matter "she expresses her opinion that "Mr. Broughton honestly believed that he had a claim under prescriptive easement" the court then mixes this Prescriptive easement theory with the implied easement theory The court at page 18 determines that she would not "in any case" find bad faith. Bad Faith does exist in the Whipple case especially with Mr. Broughton's deliberate misrepresentation of the law of

the case(RP 3/2/09 p 108) (CP.770)

"Fraud on the court occurs when the judicial machinery itself has been tainted, such as when an attorney, who is an officer of the court, is involved in the perpetration of a fraud or makes material misrepresentations to the court. Fraud upon the court makes void the orders and judgments of that court." US Legal>>Legal Definitions Home>>

...It is where the court or a member is corrupted or influenced or influence is attempted or where the judge has not performed his judicial function---thus where the impartial functions of the court have been directly corrupted. *Bulloch v. United States*, 763 F.2d 1115, 1121 (10th Cir. 1985)

The other prongs of CR 11 analysis concerns the reasonability of the investigation conducted before filing (based upon an objective standard).

The circumstances and time involved (tolling of statute of limitations)

Whether or not there is a basis in fact or law. *Bryant v. Joseph Tree Inc.*

119 Wn.3d 220 89 2.Pd1099

An award of CR 11 sanctions was made and upheld in the case of *Escude v. King County Public Hospital District No. 2*, 117 Wn. App. 183, 69 P.3d 896 (2000). The plaintiffs improperly decided to press forward with their case even though their primary expert witness upon whom their case depended was lost to the case. In the case of Whipple, there never was any basis for the case and the plaintiff knew this before filing. There were no real facts to support his adverse claims yet he made false allegations and filed his complaints anyway. When the unity of title came

into the case discussion, Broughton named this as the only reason for the failure of the Whipple claims. Dalton erroneously accepted this (Appendix 2 Brief of Respondent) and even mistakenly echoes Broughton's false assertion (4/10/09 p 8 13-15) that the unity of title was the only basis for Halls summary judgment victory. This is contrary to the record was apparently accepted by Dalton because the unsupported opinions of the lawyer were incorrectly accepted as evidence (RP 3/2/09 P line Whipple case persisted for over a year and a half. More and more false allegations were invented to fit the inappropriately applied theories. the plaintiff counsels lack of candor with the court persists even into the currently submitted paper as arguments already established as false by evidence in the case are now submitted and argued to the Appellate court.

STATEMENT OF THE CASE:

There is a running flow of erroneous assertions made throughout this section. They are addressed here with corrective statements from the record. It is important to address them, however briefly:

page 1, It has never been established by evidence nor declaration what was "clear" at the time that Whipple purchased his property. This appears to be intended to support the Dalton Court in her first leap to the position of no evidence" What Whipple saw or thought 3 years before filing and before the preliminary informal investigations is rendered moot by this

increase in knowledge.

The plaintiff never established that there is a "common driveway" but continues to assert this. There is no evidence of established parking areas in the back of the Whipple property. Hans Supit testified he could not drive and had to bring 2 truckloads of rocks and gravel to create some traction. Under Bremerton Municipal 20: this does not make an established parking area. The grass quickly reclaimed this gravelled area. (CP301) The Hall driveway is not located "between the two properties, being entirely situated on Hall property CP261) **page 2** Halls car cage was placed for two reasons: to prevent further vandalism to her car and to prevent Whipple tenants from reinvading after Whipple yielded back the driveway on August 22 2008 in response to Halls letter (CP387) the "parking area" which Hall prevented Whipple tenants from using was the Hall driveway There was no evidence or determination brought by Whipple that the "parking area" (Hall driveway) had been used by Whipple house for a considerable time. James Einhouse denied at trial that he had purchased both properties at foreclosure(RP 3/2/09 p line) Hall title was not derived from Edgar Gale (CP195)This statement misleads. Plaintiff uses vagary to conflate the separate conveyances and obscure the facts (CP195-198).Judge Costello said What's the evidence?(Trial EX 15,15)

page3 Costello never found that the lis pendens was substantially(CP230-233) justified.

Many conclusions of law have been erroneously filed as findings of fact

CONCLUSION:

Because of the foregoing, appellant respectfully requests that the rulings of 3/20/09 , 4/10/09, 5/08/09 and 10/20/2009 from Kitsap County Superior Court be reversed or remanded with directives to enter judgment in favor of Respondent Hall.

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FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY

RICHARD W. WHIPPLE
Respondent

No. 39975-0-II
Kitsap No.
06-2-02697-9

v.

DECLARATION OF MAILING

FRANCES E. HALL,
Appellant

I, Frances E. Hall, declare that I am over the age of Eighteen (18) and am competent to make this statement: that on October 27, 2010, I deposited into the mails of the United States Postal System via first class mail, copies of the following documents

Appellants Reply Brief

Declaration of Mailing

to the following Addresses:

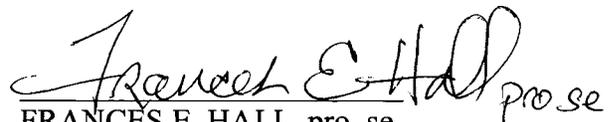
DECLARATION OF MAILING -1

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I declare under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct:

Dated this 27th Day of October, 2010


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DECLARATION OF MAILING -2