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COURT OF APPEALS

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STATE OF WASHINGTON

No. 40214-9-II

BY

APPEAL

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

LINCOLN F. LOCKHART,

Appellant.

and

HAROLD V. ROBINSON AND JUDY S. ROBINSON,

Respondents,

APPEALS FROM THE SUPERIOR COURT FOR KITSAP COUNTY
STATE OF WASHINGTON

BRIEF OF RESPONDENTS

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A. Summary of Argument of Respondent

The Respondents' bases for the dismissal of this appeal include:

There has been no hearing/trial on the issues Appellant wants to argue about on this appeal, no evidence has been taken in aid of determining if and what the parties may have agreed to, and the trial Court has made no judicial ruling, findings or legal conclusions for this Court to review on the matter of whether the parties entered into a settlement agreement after the entry of Judgment April 16, 2008, or if they did the terms of the settlement agreement. RAP 2.2 (a)

The order appealed from herein is not an appealable order as it added nothing to the Appellant's responsibilities beyond those set forth in the April 16, 2008 Judgment. CP 7-9 and 81-89. RAP 2.2 (a) (13)

Though negotiations ensued after entry of the April 16, 2008 Judgment, no meeting of the minds occurred, no agreement was reached; and Appellant's assertion that he acted detrimentally in reliance upon an agreement that was not formed by giving up an appeal he never made carries no weight here.

B. Counter Statement of the Case

Though there is no "record" for the Court to review re the events leading to this appeal, the Respondents' version of the "facts" is as follows.

In the summer of 2008, following post-judgment motions to reconsider, Mr. Lockhart, the Appellant herein, through his then attorney, Thomas O'Hare, sent the undersigned a "Notice of Appeal", leading the undersigned to believe that an appeal had been filed and was pending. In fact, the undersigned believed an appeal from the Judgment herein was validly filed until late 2009, or early 2010, when the then attorney for the Appellant, Clayton E. Longmire, revealed that the Notice of Appeal served on the undersigned **had never been filed** and an appeal from the Judgment of April 16, 2008 **had never been taken!!!**

After the Notice of Appeal was received by the undersigned, there was discussion between the parties' then attorneys of compromise as the Appellant was very unhappy with the ruling of the Trial Court. Those discussions **did not result in a meeting of the minds**, and the parties did not reach any agreement or compromise different than the Judgment. CP 7-9. Nevertheless, Appellant has tried to frustrate the enforcement of the existing Judgment settling the parties' mutual boundary by alleging *a subsequent contract pertaining to the amendment of the boundary*; i.e. an "agreement" amending the parties' boundary from what is described in the Judgment entered April 16, 2008.

The history of litigation between the parties includes the following events:

In September, 2003, Appellant sued Respondents to “quiet title” to Appellant’s version of their mutual boundary, which he claimed was based on the position of long standing corner monuments. He further alleged the long standing use and occupation of his property, consistent with his version of the boundary. The Respondents countered alleging that Appellant encroached on their property as defined by the platted description of their respective lots. The Respondents allege that Appellant (or somebody) had moved one of the corner monuments to disfavor the Respondents, and that the altered corner monument did not comport with the platted description of their respective lots.

In April of 2006, the Superior Court, following a trial and several post trial hearings, entered Findings of Fact and Conclusions of Law, and a “Judgment Quieting Title”. CP 1-9.

The Trial Court’s version of the parties’ mutual boundary specifically defines where it shall be, and provides a procedure for monumenting the boundary line on the ground. CP 7-9. Respondents have sought to enforce this judgment (CP 58-62), but have met resistance from Appellant, who *claims* the parties made a contract to do something else. CP 38-40. **Respondents deny they have made any such post-judgment agreement.**

This appeal was filed when Respondents took steps to enforce a Judgment against the Appellant regarding the parties' mutual boundary. The judgment (CP 7-9, entered April 16, 2008) defined the parties' boundary and provided for a survey and monumentation of that boundary, as set by the Trial Court. Specifically the Appellant is appealing an "Order to Enforce [the April 16, 2008] Judgment" and a subsequent Order denying the reconsideration of the order to enforce. CP 81-89 Appellant's basis of attack is that the parties made a deal after the April 16, 2008 judgment was entered and that agreement is inconsistent with the enforcement of the April 16, 2008 judgment. Respondents deny any deal was made, though they admit negotiations ensued. There has not been an action brought on the alleged agreement and its interpretation, so there is no order, final or otherwise, addressing the existence of an agreement as Appellant alleges. There has been no hearing, evidence or testimony considered by any court re the existence of the agreement Appellant alleges. Appellant's attack on the Respondents' effort to enforce a judgment quieting the parties' mutual boundary, entered on April 16, 2008, is based on the argument that the parties *agreed* to do something else and Mr. Lockhart relied on that something else to his detriment is not properly before this court for review, at best this appeal is premature, it must await some kind of decision re the nature and existence of the

agreement alleged by Appellant and denied by Respondent that amounts to a final order on the subject. Appellant's appeal of an order seeking enforcement of a judgment based on allegations never the subject of a court decision renders this appeal worthless. It should be dismissed forthwith.

C. Response to "Assignments of Error" and claim of Appellant re Issues Presented by Errors Assigned.

1. There is no judicial action or decision to review on appeal

It is Appellant's idea in this appeal to complain that *the Trial Court erred* by concluding the parties had not entered into a fair and knowing settlement that should be enforced. Appellant also urges that the failure of the Trial Court to "find" that Appellant detrimentally relied upon the settlement agreement when he chose to abandon his appeal was also error. Neither Assignment of Error is well taken, nor presents appealable issues for this Court's consideration.

The Orders appealed from do not mention the alleged settlement agreement, and they certainly do not hold that a settlement agreement was considered, let alone rejected, or the evidence upon which the Trial Court relied in not making a ruling on the matter. Nothing in the record supplied on appeal indicates that the issue of the alleged settlement agreement was considered by the Trial Court; at least the Trial Judge made no findings

one way or another re whether the parties accomplished or did not accomplish a settlement agreement. No testimony was taken on the subject. No settlement agreement can be identified from the materials/arguments considered by the Trial Court upon which the Appellant could have detrimentally relied. There was no appeal from the April 16, 2008 Judgment for Appellant to “abandon”. In any event, the Respondents deny that they entered into a post-Judgment “settlement agreement” that would preclude them from enforcing the Judgment entered herein April 16, 2008.

For the Appellant to present here the Assignments of Error that he asserts, there would have had to be a trial or other hearing wherein the proponent of the alleged agreement provided evidence of the existence and terms of such an agreement, resulting in a judicial determination that the alleged agreement should or should not be specifically enforced as its proponent asserts. No such hearing has been held, and no evidence of the an alleged agreement has been the subject of a finding of fact, a conclusion of law, or an order denying or enforcing such an alleged agreement. There is no judicial action or decision below relating to the nature or enforcement of the alleged settlement agreement for this court to weigh as to its appropriateness. Accordingly the appeal of the Plaintiff below should be dismissed. Whether a post Judgment contract arose from

the negotiations of the parties is a mixed question of fact and law that has never been considered by the Trial Court, and is not appropriate for consideration at this stage of this case in this Court.

2. There is no basis for appeal under RAP 2.2 (a) (13), the RAP that allows an appeal from any final order made after judgment that affects a substantial right. This appeal from an order after judgment does not bring up for review the judgment (CP 7-9) upon which it is based. *Griffin v. Draper*, 32 Wn.App. 611, 649 P.2d 123, (1982). Further, to be appealable at all, the post-judgment order appealed from must affect a substantial right other than rights adjudicated by the previously entered final judgment. *Seattle-First National Bank v. Marshall*, 16 Wn.App. 503, 557 P.2d 352 (1976). In this case, the Order on Motion to Enforce Judgment, entered November 6, 2009, the order appealed from, CP 81-89, does nothing more than direct the Appellant to do what the Judgment (CP 7-9) directed him to do. In *State v. Campbell*, 112 Wn.2d 186, 770 P.2d 620 (Wash. 1989), the Supreme Court again applied the rule and dismissed an appeal from an order that added nothing new to the burdens imposed by the final judgment, holding:

This court has previously reviewed and affirmed the judgment imposing the death sentence. *State v. Campbell*, 103 Wash.2d 1, 691 P.2d 929 (1984). A final order entered after judgment is appealable under RAP 2.2(a) (13) only if it affects a right other than those adjudicated by the earlier final judgment. *Seattle-First*

Nat'l Bank v. Marshall, 16 Wash.App. 503, 508, 557 P.2d 352 (1976). The trial court's order issuing the death warrant does not affect new substantial rights. *State v. Seaton*, 27 Wash. 120, 67 P. 572 (1902); *State v. Boyce*, *supra*; *State v. Nordstrom*, 21 Wash. 403, 58 P. 248 (1899) (interpreting Laws of 1893, ch. 61, § 1, subd. 7--the identically worded predecessor to RAP 2.2(a) (13)). Campbell's appeal is therefore dismissed.

Since the order appealed from, like the case above, only iterated the duties of the Appellant that is spelled out in the underlying Judgment, the order appealed from is not “appealable” under RAP 2.2 (a) (13), and should be dismissed without more.

3. Appellant’s argument that the Court should not enforce the April 2008 Judgment because of a *subsequent* contract between the parties is not well taken in the context of Respondents’ effort (and the Trial Court’s recent order in support thereof) to enforce the April 2008 Judgment, which is, of course, a final order of the Trial Court.

The terms of the agreement asserted by Appellant are not certain, and the very existence of an agreement is denied by the Respondents. To enforce a contract, along the lines Appellant is asserting now, requires the trier of fact to make determinations of fact and law based on evidence of what happened when the parties’ attorneys unsuccessfully sought to compromise after entry of the April 2008 Judgment. The Appellant has the burden of proving that the parties made a contract that the Respondents are not abiding by. His remedy is to bring an action to establish the

contract the Respondents deny and its provisions. Such an action would assumedly be based on the principles of contract law.

That is, the “contract” or settlement agreement alleged by Appellant is a whole different matter from the enforcement of the boundary line determination, contract claims are based on a different set of legal principals (contract law) and would necessarily be the subject of a separate action, to prove and enforce a contract that is inconsistent with Respondents enforcing the April 2008 Judgment Quieting Title.

The instant case ended when the Appellant here failed to appeal from the Judgment he now seeks to avoid or frustrate the enforcement of. The cases cited by Appellant, including *Gill v. Waggoner*, 65 Wn. App. 272, (1992), a contract case, reviewed trial court decisions pertaining to contract formation and interpretation, including oral contracts . The presentation and consideration of testimony and other evidence in the instant case ended with the entry of the Judgment (CP 7-9) in 2008. If the Appellant were to bring an action to enforce the agreement he alleges in this appeal, and an order or judgment in such an action resolved questions of fact and provided conclusions of law for an appellate court to review, after testimony and other evidence was presented and considered, then an appeal based on the alleged contract or settlement agreement might be appropriate, but that is not the case here. The issues that Appellant wants

resolved in the Court of Appeals are not ripe for determination; they have never been the subject of a trial court decision!

Even if the Court of Appeals were inclined to consider and resolve questions of fact in this case to determine whether the parties made an agreement and what that agreement provided, Appellant would not prevail. Appellant refers in his argument herein to communications between the parties' counsel in June through August of 2008, as the basis of their "settlement agreement". These negotiations occurred after the entry of the Trial Court's "Judgment Quieting Title" CP 7-9. Mr. O'Hare, on behalf of Appellant, and addressing the undersigned as counsel for the Respondents, said in a letter dated July 31, 2008: "I have been authorized to accept your offer. I will prepare a settlement document." Mr. O'Hare did not say that he or the Appellant *do* accept the offer, only that he has been *authorized* to do so. Mr. O'Hare, the then attorney for the Appellant, said he would prepare a writing that would be "a settlement document". Indeed, Mr. O'Hare did prepare a proposed "settlement document", (Exhibit D to Appellant's "Memorandum in Opposition to Enforcement of Judgment" CP 38-40) but it varies significantly from the terms of the offer Mr. O'Hare's then client, Appellant here, "authorized" him to accept. The so-called written "settlement document" that Appellant so stridently relies upon here **amounted to a counter-offer that the Respondents did not**

accept. No contract was formed, no agreement was accomplished, and none was signed affecting the parties' property rights. Eventually the Respondents took steps to enforce the Judgment actually entered leading to this appeal. CP 7-9 and 27-31.

Among the differences between the Respondents' offer of compromise and the so-called "written settlement document" eventually prepared by Appellant's attorney O'Hare, were the introduction of 90 day time periods for important aspects of the performance Appellant was to accomplish. It varied in material aspects from anything discussed by the parties' attorneys. It was not endorsed by the Respondents, they refused to sign it. Accordingly there was not and is not an agreement to do something other than what is provided for in the judgment of April 16, 2008 (CP 7-9).

Moreover, even if the attorneys involved had got on the same page, there is no indication that the parties agreed with what their counsel were talking about, certainly not because of anything they agreed to in writing. Agreements regarding the transfer of interests in real property, which was the subject matter of the negotiations, must meet the requirements of RCW 64.04.020. Such agreements must be in writing, they have to be signed by the parties to be bound, and those signatures must be acknowledged. The negotiations had not progressed so far as to include acknowledged

signatures on a written agreement that comported with RCW 64.04.020. Indeed, in the case of the Respondents, both of their signatures would be required, as neither of them alone was capable of conveying their community real property. See RCW 26.16.030(3).

Statements made in settlement negotiations are not admissible evidence. See ER 408. The purpose of this rule is to encourage parties to negotiate settlements, without worrying about having their negotiation thrown back in their face at some later point. A settlement different than the “Judgment Quieting Title” was not reached, the negotiations to amend it are not admissible evidence in this Court at this time.

In sum, following the entry of a final “Judgment Quieting Title” herein in April, 2008 CP 7-9, the parties attempted to negotiate a settlement of their relationship different than the judgment, involving the amendment of a boundary line, a real estate matter. They did not succeed. Their attempt to negotiate did not get them on the “same page”, written or oral. Their attempt to reach a settlement did not reach the level of legal enforceability that an agreement involving real property interests must have. The parties did not consummate a post judgment agreement in writing or at all. The Respondents refused to proceed further than the attempt by Mr. O’Hare to *restate* the parties’ negotiations to that point.

D. Conclusion

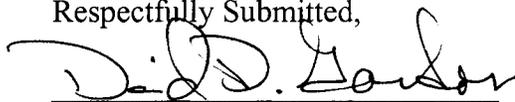
There has been no hearing/trial on the issues Appellant wants to argue about on this appeal, no evidence has been taken in aid of determining if and what the parties may have agreed to, and the trial Court has made no judicial ruling, findings or legal conclusions for this Court to review on the matter of whether the parties entered into a settlement agreement after the entry of Judgment April 16, 2008, or if they did, the terms of the settlement agreement. RAP 2.2 (a)

The order appealed from herein is not an appealable order as it added nothing to the Appellants responsibilities beyond those set forth in the April 16, 2008 Judgment. CP 7-9 and 81-89. RAP 2.2 (a) (13)

Though negotiations ensued after entry of the April 16, 2008 Judgment, no meeting of the minds occurred, no agreement was reached; and Appellant's assertion that he acted detrimentally in reliance upon an agreement that wasn't formed by giving up an appeal he never made carries no weight here.

This appeal and the errors assigned are not relevant to any issue appropriately before this Court. This appeal from the Trial Court's "Order on Motion to Enforce Judgment" entered herein November 6, 2009 and "Order Denying Motion for Reconsideration, entered December 18, 2009, should be dismissed.

Respectfully Submitted,



David D. Gordon, attorney for the
Respondents, WSBA # 5159

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STATE OF WASHINGTON

BY *KCB*
DEPUTY

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

LINCOLN F. LOCKHART,

Plaintiff/Appellant,

vs.

HAROLD V. ROBINSON and JUDY S.
ROBINSON,

Defendants/Respondents.

No. 40214-9-II

CERTIFICATE OF SERVICE
OF BRIEF OF RESPONDENTS

The undersigned hereby certifies under penalty of perjury of the laws of the State of Washington, that on the 25th day of June, 2010, I caused a true and correct copy of the Brief of Respondents to be delivered to:

Thomas E. Weaver
Attorney at Law
P.O. Box 1056
Bremerton, WA 98337

by depositing the same with postage prepaid in the United States Mail.

I hereby certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at *Gig Harbor* , Washington, this *25th* day of
 June , 2010.

 Sheila P. Harper
Sheila P. Harper

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