

No. 40667-5-II

COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON

DENNIS LANE AND ELIZABETH LANE,
Husband and Wife

Respondent

v.

SKAMANAIA COUNTY, a municipal
Corporation

Defendant,

LAWRENCE L'HOMMEDIEU and
SHELANE L'HOMMEDIEU,
Husband and Wife,

Appellant

COURT OF APPEALS
DIVISION II
JAN 17 2011 11:17
STATE OF WASHINGTON
BY [Signature]
CITY

OPENING BRIEF OF APPELLANT

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Table of Contents

| | |
|---|----|
| INTRODUCTION..... | 1 |
| I. ASSIGNMENT OF ERROR..... | 3 |
| II. STATEMENT OF THE CASE..... | 4 |
| A. The LUPA action..... | 4 |
| B. Lanes Benefitting from Their Own Delay..... | 7 |
| III. ARGUMENT..... | 10 |
| A. The Standard of Review..... | 11 |
| B. A Case of First Impression..... | 11 |
| C. The Timeliness of an After-Arising CR 13(e) Counterclaim..... | 14 |
| 1. The Timeliness of CR 13(e) in regard to RCW 4.28.328 cases..... | 14 |
| 2. The Lanes are Profiting From Their 3 Year Delay in Filing the Lis Pendens..... | 17 |
| D. The Lanes Continue to Change Legal Positions..... | 19 |
| E. The Lis Pendens was Defective as a Matter of Law..... | 21 |
| F. The Standard for Determining “An Action Affecting Title”..... | 23 |
| G. The Proper Venue for an Action Affecting Title is the County Where the Property is Located..... | 25 |
| H. The Progression of the Lawsuit and the Appeals..... | 27 |
| 1. Post Trial Actions of the Lanes..... | 28 |
| 2. A recount of the numerous delays during the appeal in Lane II..... | 33 |
| 3. Inaction to assert a known right can be seen as a conscious action..... | 38 |
| 4. Failure to post and maintain a bond..... | 39 |
| I. The Circumstantial Evidence only Leads to the Conclusion that the Lis Pendens was Wrongful..... | 43 |
| CONCLUSION..... | 47 |

Table of Authorities

Cases

| | |
|--|------------|
| <i>American Discount Corp. v. Saratoga West, Inc.</i> , 81 Wn.2d 34, 37 (1972)..... | 16 |
| <i>Burlington Northern R. Co. v. Strong</i> , 907 F.2d 707 (1991)..... | 16 |
| <i>California-Hawaii Development, Inc. v. The Superior Court</i> 102 Cal.App.3d 293 (1980)..... | 28, 30, 32 |
| <i>City of Kirkland v. Ellis</i> , 82 Wn.App.819, 826 (1996)..... | 13 |
| <i>Corey v. Carback</i> , 201 Md. 389, 403 (1953)..... | 36 |
| <i>Foster v. Nehls</i> , 15 Wn.App. 749, (1976)..... | 8, 9, 22 |
| <i>Golden Press v. Rylands</i> , 235 P.2d 592 (1951)..... | 43 |
| <i>Goldlawr, Incorporated v. Shubert</i> , 268 F. Supp. 965 (1967)..... | 16 |
| <i>Grand Investment Co. V. Sagage</i> , 49 Wn.App 364 (1987)..... | 23 |
| <i>Grandmaster Sheng-Yen Lu .v. King County</i> , 110 Wash.Ap. 92 (2002)..... | 20,44 |
| <i>Lane v. Skamania County, et al.</i> , | |

128 Wn.App. 1063 (2005).....1,19, 30-32, 44
Lane v. Skamania County, et al.

149 Wn.App 1017 (2009).....1, 18, 19, 28, 29, 34, 36, 44
Peery v. Superior Court,

29 Cal.3d 837 (1981).....32, 33, 45
Ronberg v. Smith,

132 Wash. 345 (1925)..... 18, 36
Schwab v. City of Seattle,

64 Wn. App. 742, (1992).....39
Snohomish Reg'l Drug Taks Force v. Real Prop. Known as 414,

Wn.App. 743, (2009).....7
Tallman v. Durussel,

44 Wn.App. 181 (1986).....14, 15
Universal Underwrit. Ins. Co. v. Security Indus.

291 F.Supp. 326 (1974).....17
Urez Corp. V. Superior Court,

190 Cal.App.3d 1141 (1987).....24
Wilson v. Horsley,

137 Wn.2d 500 (1999).....11

Statutes and Regulations

RCW 4.12.010.....25

RCW 4.28.320.....7, 8 12, 34-36, 45

RCW 4.28.328.....2, 12-16, 21, 47

RCW 7.40.080.....42

RCW 36.01.050.....25

• •

Other Authorities

John L. Bennett, *The Treatise on the Law of Lis Pendens*,
(1884).....34,38

INTRODUCTION

This case needs little introduction to this Court of Appeals. This is the third appeal to this Court of Appeals regarding a 60 year old deed restriction in which the Lanes unsuccessfully attempted to enforce against the L'Hommedieus.¹

Inasmuch as Dennis and Elizabeth Lane would like to convey to this Court of Appeals that they are just trying to enforce a restrictive covenant, this court needs to look no further than the original complaint filed by the Lanes in this matter. The Lanes filed this case in Clark County, Washington as a LUPA action, stating “The result of this decision is that instead of having one home located next to their property, they will instead have two houses, one located within 15 feet of the property line and the other within 50 feet.”²

At the time of filing the LUPA action (March 26, 2003), the Lanes did not ask any relief regarding the restrictive covenant. Their sole reason for filing the LUPA action was to prevent the construction of the L'Hommedieus home.

¹ *Lane v. Skamania County, et al.*, 128 Wn.App. 1063 (2005) will be referenced as (*Lane I*) while *Lane v. Skamania County, et al.*, 149 Wn.App 1017 (2009) will be referenced as (*Lane II*) throughout this brief.

² Lane's PETITION FOR REVIEW UNDER THE LAND USE PETITION ACT filed March 26, 2003 CP 1-57

And, as the Honorable Judge E. Thompson Reynolds stated after a 3 day bench trial:

I don't think it could be seriously be argued that the Lanes were objecting just to the septic systems...[T]heir theory was by preventing the septic systems you're preventing the house. But what they really wanted to do was prevent the house".³

The true crux of this litigation is the longstanding desire of the Lanes to acquire the L'Hommedieus' property. Unfortunately for the L'Hommedieus, the Lanes desire to acquire this property outweighed the L'Hommedieus interests in building a home on their property. The Lanes made numerous overt attempts to acquire the L'Hommedieus' property⁴, and when they were unable to acquire the property, the Lanes resorted to proselytizing the courts to assist them in their longstanding quest to acquire the property.

The L'Hommedieus filed a motion in Skamania County Superior Court requesting that they be allowed to file a CR 13(e) After-Arising Counterclaim for the wrongful filing of a lis pendens on the L'Hommedieus property in accordance with RCW 4.28.328. That motion was rejected by Judge Reynolds. The L'Hommedieus respectfully request

³ Trial VRP 735-736

⁴ Trial VRP 271

that this court find that the motion was wrongfully denied and allow the L'Hommedieus to file the After-Arising Counterclaim.

I. ASSIGNMENT OF ERROR

Appellants Lawrence and Shelane L'Hommedieu were sued by their neighbor Dennis and Elizabeth Lane in an attempt by the Lanes to enforce a 60 year old deed restriction that had become outmoded and lost its' usefulness as to modern septic systems.

The Lanes waited over 3 years after amending their complaint to file a lis pendens in this action and knowingly allowed the L'Hommedieus to encumber their property before filing the lis pendens.

The trial court agreed with the L'Hommedieus that this would be a case of first impression, yet it declined to accept the L'Hommedieus' CR 13(e) Motion to Amend the Complaint to assert an After-Arising Counterclaim in accordance with RCW 4.28.328 establishing lis pendens liability.

The trial court erred by holding that the CR 13(e) motion filed by the L'Hommedieus was untimely. The trial court erred by treating the CR 13(e) motion as a CR 13(f) motion. The trail court erred by failing to consider the actions of the Lanes during all stages of litigation, including the appeal.

II. STATEMENT OF THE CASE

A. The LUPA Action

The Lanes and, or their family members currently own over 1/3 of the of the lots in the Riverglen Subdivision.⁵

On March 26, 2003, Dennis and Elizabeth Lane filed a LUPA action against L'Hommedieu in Clark County Superior Court.

On June 10th, 2003, the Lanes amended their complaint adding a cause of action to enforce a restrictive covenant against the L'Hommedieus and requested the court to impose a permanent injunction against the L'Hommedieus.

It should not go unnoticed that the Lanes were fully aware of the restrictive covenant when they filed their LUPA action on March 26, 2003, yet they failed to request any relief regarding the restrictive covenant at the time they filed the original complaint. They waited almost 3 months to add their cause of action to wrongfully interject the restrictive covenant into the LUPA action. Their amended complaint states:

⁵ Trial VRP 92-93

Petitioners are prejudiced by the Final Order because the value and enjoyment of their property is adversely affected by the decision to grant a critical areas variance. The result of this decision is that instead of having one home located next to their property, they will instead have two houses, one within 15 feet of the property line and the other within 50 feet. In addition, grant of the variance and construction of the improvements contemplated will violate Codes, Covenants and Restrictions (“CC &Rs”) affecting both petitioners’ and respondents L’Hommedieu’s properties, along with all property in the subdivision. These injuries would be eliminated by a judgment in petitioners’ favor.⁶

Prior to amending their complaint, the Lanes filed an *ex parte* TRO without bond, in which they stopped all construction on the property, **including the construction of the home.**⁷

The L’Hommedieus filed their answer to the amended complaint on July 21, 2003.⁸

The L’Hommedieus were successful during a summary judgment hearing before the Honorable Judge E. Thompson Reynolds, which was overturned by this court and remanded to a trial for a factual determination, **as requested by the Lanes**, of whether the body of water that ran through the L’Hommedieus property was a tributary of the Washougal River, as described in the restrictive covenant **AND** if the covenant still served its’ intended purpose -- to prevent pollution to the

⁶ CP 88

⁷ CP 76-77

⁸ CP 99-102

Washougal River. “The fact finder should decide whether the septic systems’ sophistication renders the covenant unnecessary.” *Lane I*, 2005 WL 1847180, at *8.

During the first appeal of the interlocutory summary judgment decision of the Skamania County Superior Court, the Lanes knowingly allowed the L’Hommedieus to encumber their property on multiple occasions, first through a construction loan, then a primary mortgage, and additionally a second mortgage on the property.

Not only was the information disclosed to the Lanes in the form of interrogatories, it was also pointed out in the L’Hommedieus Motion to Establish liability for Damages and for Award of Attorney Fees that the L’Hommedieus were going to encumber the property. The order directly stated the L’Hommedieus intended course of action after the injunction had been lifted and stated:

“The injunction prevented L’Hommedieu from being able to close on a construction loan at very favorable rates. **Now that the preliminary injunction has been lifted, L’Hommedieu is nearing being able to close on a different loan**, however, interest rates and costs have climbed and therefore will cost him more money.”⁹

⁹ CP 183

The Lanes waited over 3 year to file a lis pendens on the L'Hommedieus property. The lis pendens was filed on June 14, 2006.

RCW 4.28.328 requires the successful outcome **to the end of litigation** in the underlying action before there is lis pendens liability – throughout the entire process.

The L'Hommedieus filed a CR 13(e) After-Arising Counterclaim motion for the wrongful filing of a lis pendens under RCW 4.28.328 in Skamania County Superior Court which was denied by the Honorable Judge E. Thompson Reynolds.

Judge Reynolds ruled that this was actually a CR 13(f) claim that was untimely filed. This is the crux of this appeal.

B. The Lanes Benefitting from Their Own Delay

RCW 4.28.320, the lis pendens statute is “one of our state’s oldest, and substantially unchanged since 1893”).¹⁰

From the time of the filing only shall the pendency of the action be constructive notice to a purchaser or **encumbrancer** of the property affected thereby, and every person whose **conveyance or encumbrance** is subsequently executed or subsequently recorded shall be deemed a subsequent purchaser or encubmrancer, and

¹⁰ *Snohomish Reg'l Drug Task Force v. Real Prop. Known as 414 Newberg Rd.* 151 Wn.App. 743, 751 (2009)

shall be bound by all proceedings taken after the filing of such notice.....

The operative portion of this statute lies in the fact that the Lanes knowingly let the L'Hommedieus move to their detriment by encumbering the property on numerous occasions by a construction loan, permanent financing, and then a second mortgage on the property before the Lanes filed a lis pendens on the property in 2006.¹¹

A similar situation is presented in *Foster v. Nehls*, 15 Wn.App.749, 753 (1976), where the court held:

The Nehlses next argue the court abused its discretion in ordering removal of the second story even though the neighbors had not filed a lis pendens in their action against the Nehlses. It is contended that failure by the neighbors to file a lis pendens denied notice of the action to the Nehlses' mortgagee; that the ordered removal decreased the value of the Nehls property, thereby reducing the value of the mortgagee's security without an opportunity in the mortgagee to defend; and that this harsh result makes the ordered removal inequitable and improper. We disagree.

A lis pendens is notice of the pendency of "an action affecting the title to real property". The present action is to enforce a restrictive covenant, which has no effect on title, thus a lis pendens is unnecessary.

The L'Hommedieus were essentially ambushed and prejudiced by the Lanes after their filing of the lis pendens, due to the fact that the lis

¹¹ CP 216-218

pendens was filed over 3 years after the Lanes filed their motion to amend their complain. The motion to amend the complaint was filed on June 10, 2003, while the lis pendens was not filed until June 14th, 2006.¹²

The L'Hommedieus had a reasonable reliance on *Foster v. Nehls*, *Id.*, that a restrictive covenant is not an action affecting the title to real property. Furthermore, the Lanes brought this LUPA action in Clark County, WA, attempting to interject the restrictive covenant issue to press their LUPA claim.

The L'Hommedieus relied on the actions of the Lanes. The Lanes filed a lis pendens that is not supported by case law in Washington State regarding a restrictive covenant. They filed the lawsuit in Clark County, Washington, and waiting over 3 years to file the lis pendens to specifically target the sale of the home in the middle of the litigation.

The L'Hommedieus should not be prejudiced from now amending their complaint (answer) to assert their counterclaim for the wrongful filing of the lis pendens.

Not only was it excusable for the L'Hommedieus not to file a response to the lis pendens, it would have been premature. There wasn't

¹² CP 58-72

any lis pendens liability against the Lanes at the time they filed the lis pendens. The claim against the Lanes would have been an inchoate claim rather than an existent claim.

III. ARGUMENT

The L'Hommedieus were the prevailing party in an attempt by the Lanes to enforce a restrictive covenant against the L'Hommedieus.¹³ After the successful outcome in their favor, the L'Hommedieus timely filed a CR 13(e) motion to amend their answer to file an After-Arising Counterclaim.

Superior Court Judge E. Thompson Reynolds erred by denying the L'Hommedieus motion to file and After Arising Counterclaim in accordance with Civil Rule 13(e) and held that it was a Civil Rule 13(f) motion that was untimely filed.

This case of first impression presents this court with two distinct issues:

Did the trial court abuse his discretion when he denied the L'Hommedieus CR 13(e) motion to file an After-Arising Counterclaim?

¹³ CP 375-383

Should the trial court have considered the actions of the Lanes throughout the litigation and on appeal when considering whether to accept or deny the motion?

A. Standard of Review

The standard of review in denial of a motion to amend a complaint is for an abuse of discretion. “We review the trial court's denial of a motion to amend for an abuse of discretion.” *Wilson v. Horsley*, 137 Wn.2d 500,505 (1999).

There is no case in Washington that addresses when to file a response to a lis pendens. In this particular case, the plaintiff waited over 3 years to file the lis pendens and knowingly allowed the defendant to encumber the property.

B. A Case of First Impression

The Honorable Judge Reynolds simply thought there needs to be an end to the litigation rather than allowing the L’Hommedieus to add the After-Arising Counterclaim by stating:

“The counterclaim should have been filed years ago. It should have been filed as soon as the lis pendens was filed and shortly thereafter, and that wasn’t done. And to protract this litigation, which has now gone on for seven years, certainly is – would not be, I think, to the benefit of this Court because there has to be some end to litigation.”

“This – for those reasons I can’t find that there was any excuse – that there was any excusable neglect, and I can’t find in this case that justice requires prolonging this case any further.”¹⁴

Judge Reynolds agreed with L’Hommedieu that this would be a case of first impression¹⁵ in Washington State, however, he still deemed the motion to add the counterclaim was untimely.

There is no case in Washington regarding the actions of a “claimant” (referring to the Lanes being the claimant filing the lis pendens), on appeal.

The intention of RCW 4.28.328 is to stop the inappropriate use of a lis pendens. It would defy common sense and logic that a claimant could use RCW 4.28.320 to cloud the title to property for an inordinate amount of time. During the appeal the lis pendens remained on file. The Lane’s “claimants” had numerous delays during the appeal in violation of the Rules of Appellate Procedure. They did not requesting leave of the court to untimely file their appropriate paperwork with this Court of Appeals.

Also, during the appeal the claimant brought juxtaposed positions during the two appeals.

¹⁴ VRP 15:15-25

¹⁵ VRP 14: 23-24

The L’Hommedieus should not be prejudiced by these actions of the Lanes. The L’Hommedieus reasonably relied on existing law and the civil rules regarding an After-Arising Counterclaim.

The Lanes filed this action and did not requested relief regarding the restrictive covenant... “in the first instance”. Had they filed the lis pendens when they filed the complaint, then Clark County Superior Court had no jurisdiction in the enforcement of the restrictive covenant since the Lanes legal position now is that this is “an action affecting title”.

This does not remove the fact that a restrictive covenant issue is (according to the Lanes own brief on the matter) **not** something that is adjudicated in a LUPA action.¹⁶

Judge Reynolds should have harmonized the intention of the statute RCW 4.28.328 with CR 13 and given effect to the intention of the statute, which is to determine if the claimant had a “substantial justification” for filing the lis pendens. “When a statute and a court rule are in apparent conflict, we must harmonize the provisions whenever possible and interpret them so as to give effect to both provisions.” *City of Kirkland v. Ellis*, 82 Wn.App.819, 826 (1996).

¹⁶ CP 112-113

This was not done and the Lanes are trying to profit from their 3 year delay in filing the lis pendens.

C. The Timeliness of an After-Arising CR 13(e) Counterclaim

Several distinct issues are presented on this appeal, namely, the integration of CR 13(e), or the After-Arising Counterclaim Rule in conjunction with RCW 4.28.328.

Additionally, can the actions of a litigant pre-trial, post-trial, and on appeal give rise to a lis pendens Counterclaim which is not substantiated in law or fact?

1. The Timeliness of CR 13(e) in regard to RCW 4.28.328 cases.

RCW 4.28.328 states:

(3) Unless a claimant establishes a substantial justification for filing the lis pendens, a claimant is liable to an aggrieved party who prevails in defense of the action in which the lis pendens was filed for actual damages caused by filing the lis pendens, and in the court's discretion, reasonable attorneys' fees and costs incurred in defending the action.¹⁷

There are very few, if any cases in Washington State that are directly on point in a CR 13(e), or the After-Arising Counterclaim. One case that touches on CR 13(e) is *Tallman v. Durussel*, 44 Wn.App. 181 (1986) and holds:

¹⁷ RCW 4.28.328

More simply, “a counterclaim otherwise compulsory would not have to be made by the defendant if the claim **had not matured at the time the defendant served his answer**”, *Tallman, Id.* at 184.

The L’Hommedieus filed their answer to the Lanes amended complaint on **July 21, 2003**. The Lanes filed the lis pendens on **June 14, 2006**.

Since there was no lis pendens when L’Hommedieu filed his answer, there could be no lis pendens liability against Lane at the time of filing the answer, stating all counterclaims against Lane. Not only had the claim not “**matured at the time the defendant served his answer**”, **there wasn’t a lis pendens filed when L’Hommedieus filed their answer**.

Furthermore, the L’Hommedieus did not have a viable claim for the wrongful filing of a lis pendens at trial, nor did they have a claim during the appeal, as RCW 4.28.328 only applies when there is an affirmative outcome in the aggrieved party’s favor.

In order to establish lis pendens liability, the courts need to determine if there is a substantial justification in law and fact to determine if the claimant is liable for damages and reasonable attorney’s fees. The Superior Court of Skamania County, Honorable Judge E. Thompson Reynolds made no such finding, he simply denied the motion to amend the answer to include the After-Arising Counterclaim.

Any claims by the L’Hommedieus requesting relief under RCW 4.28.328 would have been premature, as it requires the aggrieved party to prevail in the underlying action, which the L’Hommedieus prevailed.

In order to address the After-Arising Counterclaim rule, this court first must look at how the Washington Courts interpret civil rules. If there is no case in Washington State that addresses CR 13(e), the proper interpretation of a civil rule that is identical to Federal Rule is to look to how the Federal Courts interpret the Civil Rule. “Where a state and federal rule are identical, we may look to decisions and analysis of the federal rule for guidance”.¹⁸

The federal courts interpretation, holding: “Civil Rule 13 is explicit and requires the claim to exist ***at the time of serving the pleading”, *Goldlawr, Incorporated v. Shubert*, 268 F. Supp. 965 at 971 (1967).

In *Burlington Northern R. Co. v.. Strong*, 907 F.2d 707 (7th Cir. (1991), the court came to the same conclusion:

Even when a counterclaim meets the “same transaction” test, a party need not assert it as a compulsory counterclaim if it has not matured when the party serves his answer. This maturity exception “is derived from the language in the rule limiting its application to the claims the pleader has ‘at the time of serving the pleading.’” 6 C. Wright, A. Miller & M. Kane, *Federal Practice and procedure* § 1411, at 81 (2d ed. 1990).

¹⁸ *American Discount Corp. v. Saratoga West, Inc.*, 81 Wn.2d 34, 37 (1972)

In *Universal Underwrit. Ins. Co. v. Security Indus.* 291 F.Supp.

326, 329 (1974) the US District Court, W.D. Washington held:

Rule 13(a) requires a defendant to set up as a defense a compulsory counterclaim. To be deemed compulsory, **the counterclaim must be in actual existence, as distinguished from inchoate or potential existence, at the time the defendant answers the complaint.**

Judge Reynolds denied the L'Hommedieus request to add the

After-Arising Counterclaim, holding:

“The court rule that applies is CR 13, subparagraph (f), Omitted Counterclaim. When a pleader fails to set up a counterclaim through oversight, inadvertence or excusable neglect or when justice requires he may, by leave of the court, set up a counterclaim by amendment.”¹⁹

Additionally:

“The counterclaim should have been filed years ago. It should have been filed as soon as the lis pendens was filed and shortly thereafter, and that wasn't done. And to protract this litigation, which has now gone on for seven years, certainly is – would not be, I think, to the benefit of this Court because there has to be some end to litigation.

This – for those reasons I can't find that there was any excuse – that there was any excusable neglect, and I can't find in this case that justice requires prolonging this case any further.”²⁰

Did the trial err by placing an emphasis on ending the litigation rather than reaching the merits of the claim, or “when justice requires”.

2. The Lanes are Profiting From Their 3 Year Delay in Filing the Lis Pendens.

¹⁹ Verbatim Report of Proceedings 14-15

²⁰ Verbatim Report of Proceedings 15

The L'Hommedieus filed their answer to the Lanes amended complaint on July 21, 2003. Almost 3 years later (June 14, 2006), the Lanes filed the lis pendens on the L'Hommedieus property to prevent the sale of the properties.

In this court's previous ruling in *Lane II*, this court held that "The law requires that a plaintiff seeking enforcement of a covenant exercise the highest degree of diligence", citing, *Ronberg v. Smith*, 132 Wash. 345, 351 (1925).

Continuing on the same reasoning in *Ronberg, Id.* the court held:

"Very little in cases of this nature is sufficient to shew acquiescence; and courts of equity will not interfere unless the most active diligence has been exerted **throughout the whole proceeding**". *Ronberg v. Smith, Id at 351.*

The Ronberg case involved a two week delay in bringing the action while the plaintiff stood by and watched with the knowledge that he later tried to contradict. The court held:

He watched the construction go on, day by day, for nearly three weeks, garages built and one house roofed in, had the use of. (sic) Part of the earth removed to improve his own property, building contracts had been entered into by the defendants under which material was delivered on the ground, and an expensive foundation put in before any objection was attempted to be asserted, after which, while the work was still going on, **he delayed two weeks before commencing his action.** These differences are highly important in the application of equitable rules and principles. *Ronberg, Id., at 350.*

The Lanes waited 3 years to file the lis pendens. If the Lanes had an “action affecting title”, they needed to invoke that by filing the lis pendens before the L’Hommedieus moved to their detriment.

It does not appear to be diligent for a party to wait 3 years and knowingly let an adversary act to their detriment by financing a home and encumbering the title to the property on multiple occasions, and then filing a lis pendens to specifically halt any possible sale of the property,

D. The Lanes Continue to Change Legal Positions

The Lanes total change of positions should not be lost on this Court. This total change in positions is eerily similar to the Lanes complete change of positions from *Lane I* and *Lane II* regarding the Change in Neighborhood Circumstances Doctrine. In *Lane I*, the Lanes contended that the Change in Neighborhood Circumstances is a factual inquiry in, and totally reversed positions in *Lane II*, opining that the Change in Neighborhood Circumstances is now, somehow a legal inquiry subject to *de novo* review.

Not surprisingly, the Lanes have had other changes in legal positions. Prior to the L’Hommedieus motion to file an After-Arising

Counterclaim, the Lanes had the same ideology as the L'Hommedieus in this very same matter. Here is the Lanes changed positions:

Lane acknowledges that a declaratory judgment claim must be brought within a reasonable time. However, **it must also not be brought prematurely**. Before an action is timely, there must be a “justiciable controversy”, which has been held to mean:

(1)...an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.” citing *Grandmaster Sheng-Yen Lu .v. King County*, 110 Wash.Ap. 92, 98 (2002).”²¹

The Lanes now hold that the L'Hommedieus CR 13(e) claim for lis pendens liability is untimely. The L'Hommedieus claim for lis pendens liability was a potential claim predicated on the successful outcome of the litigation (all of the way through the entire appeal process) in the L'Hommedieu's favor in the underlying action which brought about the lis pendens.

The lis pendens liability statute, RCW 4.28.328 subsection (3) states:

Unless the claimant (in this case, the Lanes) establishes a substantial justification for filing the lis pendens, a claimant is liable to an aggrieved

²¹ CP 135

party who prevails in defense of the action in which the lis pendens was filed for actual damages caused by filing the lis pendens...

As the Lanes correctly point out in their Memorandum of Lanes in Response to L'Hommedieu Motion for Summary judgment, *Id.*, the L'Hommedieus only had a possible, **dormant**, hypothetical, and speculative theory to establish liability under RCW 4.28.328. Furthermore, any cause of action for lis pendens liability was **potential** (predicated on the outcome of the underlying action). Moreover, there is no justiciable controversy surrounding lis pendens liability under RCW 4.28.328 until there is a successful outcome in the defendants favor.

The Lanes were not bothered by the fact that they were aware the L'Hommedieus intended and did encumber their property, their sole reasoning in filing the lis pendens was to prevent the sale of the property.

This is the exact mischief that the lis pendens liability statute was intended to cure. The statute holds an affiant accountable for their actions if they use the lis pendens to keep an adversary on their heels. These are the types of cases that the lis pendens liability statute was aimed at curbing.

E. The Lis Pendens was Defective as a Matter of Law

Additionally, the Lanes lis pendens was defective on its' face. The Lanes will try and remove themselves as far as possible from *Foster v. Nehls, Id.*, however, this court must look at the actions of the Lanes (other than the 3 years delay in filing the lis pendens).

There is no doubt that any encumbrancer who acquired the interest to the L'Hommedieus property prior to June 14, 2006 (the date of filing the lis pendens) was a "purchaser" in good faith. The L'Hommedieus encumbered the property on multiple occasions without the Lanes interjecting the lis pendens, therefore, the lis pendens was defective as a matter of law.

In this case, any of the lien holders, or "purchasers" were bona fide purchasers of the L'Hommedieus property. Any lien executed prior to the filing of the lis pendens would have been deemed to have no actual or constructive notice that the Lanes had an "action affecting title".

Because there wasn't any notice given to the multiple bona fide purchasers, the lis pendens was defective:

Generally, a purchaser for value without notice from one with notice is held to be a bona fide purchaser and not affected by any notice to his vendor and takes title free from the equities of which his predecessor had notice.

Because Savage did not file a lis pendens or a supersedeas bond, Grand was free to dispose of the property with its title unencumbered by the possibility of future reversal. In this way, Granberg's claim is defeated.²²

F. The Standard for Determining “An Action Affecting Title”

This Court should not accept the argument as verities that this is” an action affecting title”. There is a clear standard to determine if the action, as it is pleaded, is an action affecting title to real property. The clear standard is to actually look at the complaint to determine what the overall goal of the litigation is. What is the plaintiff seeking?

Here, the Lanes were attempting to interject a restrictive covenant issue into a LUPA action due to the “value and enjoyment” of their property being adversely affected.²³ There isn't a case in Washington that holds that a lis pendens may be filed to preserve the “value and enjoyment” of a neighboring property.

After the court looks at the complaint, as it is pled, this court will come to the same conclusion that the trial court came to; this action was to prevent the construction of the L'Hommedieus home.

²² *Grand Investment Co. V. Sagage*, 49 Wn.App 364, 368 (1987)

²³ CP at 88

In *Urez Corp. V. Superior Court*, 190 Cal.App.3d 1141 (1987) the court identified the standard of interpreting the validity of a lis pendens:

In order to determine the validity of a lis pendens, the court must first look to the complaint to determine the validity of the lis pendens. “In determining the validity of a lis pendens, courts have generally restricted their view to the face of the complaint.” *S. Utsunomiya Enters. Inc. V. Moomuku Country Club*, Haw. 75 Haw. 480, 505, 866 P.2d 951, 964 (1944), citing *Urez Corp. v. Superior Court*, 190 Cal.App.3d 1141 (1987), “The issue is simply whether the action as pleaded is one that affects title or possession of the subject property”. *Id at 1149*.

The Lanes were attempting to keep the L’Hommedieus from building a home on their own property by interjecting the restrictive covenant issue into a LUPA action. The Lanes even concede that the enforcement of a restrictive covenant is not the role of the County.

“Petitioners concede that enforcement of the Covenant is not the role of the County....”

Furthermore:

However, the Covenant is a limitation upon the other property in the vicinity. Simply ignoring it in the decision to grant a variance is grant of a special privilege to L’Hommedieu alone.²⁴

Here, the Lanes were attempting to prevent the construction of the home and attempting to superimpose a restrictive covenant into a LUPA

²⁴CP 112-113

action, which has no affect on the title to the property. The restrictive covenant issue was merely their “legal hook” to prevent what they had always sought in the case...to prevent the construction and occupation of the L’Hommedieus home.

Again, if this court looks to the actions of the Lanes, it can clearly identify not only the purpose of the entire lawsuit, it can clearly identify how totally devoid of merit their lis pendens is, and that Judge Reynolds should have accepted the L’Hommedieus After-Arising Counterclaim.

G. The Proper Venue for an Action Affecting Title is the County Where the Property is Located.

The L’Hommedieus property is located in Skamania County, therefore, if this was “an action affecting title”, it should have been filed in Skamania County and it was not.

The Lanes reside in Clark County, WA, and therefore, brought this action in accordance with RCW 36.01.050 stating:

Petitioners, subject to RCW 36.70C.005 et. Seq. bring this action for judicial review of a land use decision made by Skamania County, Washington. Jurisdiction is proper in **Clark County Superior Court** pursuant to RCW 36.01.050.”²⁵

²⁵ CP at 87

RCW 4.12.010 Actions to be commenced where subject is situated.

RCW 4.12.010 points out the proper venue for any action affecting the title to real property. The statute states:

Actions for the following causes shall be commenced in the county in which the subject of the action, or some part thereof, is situated:

- (1) For the recovery of, for the possession of, for the partition of, for the foreclosure of a mortgage on, or **for the determination of all questions affecting the title**, or for any injuries to real property.

Even after amending their complaint, the Lanes still contended that this action was till appropriate in Clark County, Wa.²⁶

The Lanes also filed an opposition to the Change of Venue to Skamania County. After amending their complaint, as late as June 17, 2003, the Lanes still contended that the appropriate jurisdiction for this “action affecting title” was proper in Clark County, Wa (the Lanes MEMORANDUM OPPOSING SKAMANIA COUNTY’S MOTION FOR CHANGE OF VENUE AND TO DISMISS).²⁷

If this were an action affecting the title to property, as the Lanes have claimed, this case was filed in the wrong venue. Clark County, Washington is not the proper venue for this claim. Their position that this

²⁶ CP at 87

²⁷ CP at 81

is now (3 years post hoc) somehow an action affecting title, is inapposite to current law regarding the proper venue for an action affecting the title to real property.

The Lanes must now attempt to make up their gaff of recording this action in Clark County, WA. The L'Hommedieus had no indication that this was an action affecting title to real property, as it is not supported by Washington law. Moreover, the Lanes action (inaction) of filing the lis pendens “**in the first instance**”, and waiting over 3 years to file the lis pendens diminishes the meritoriousness of the claim that they had an action affecting title.

H. The Progression of the Lawsuit and the Appeals.

The progression of the Lanes lawsuit is telling. This Court has seen both appeals by the Lanes. The first appeal of Summary Judgment in favor of the L'Hommedieus was appealed by the Lanes due to the Change of Neighborhood Circumstances doctrine. This court agreed with the Lanes that the Change in Neighborhood Circumstances was a factual inquiry.

The second appeal by the Lanes did not challenge any of the findings of fact,²⁸ and the appeal in *Lane II* requested a *de novo* review of the trial courts conclusion that the overwhelming evidence in this case is that there is very little, if any, possibility that the L'Hommedieus septic system would pollute the Washougal River, Finding 19. While the Lanes agreed with the facts in the case, the fact that there will be no pollution to the Washougal River, they still appealed. Their appeal had nothing to do with keeping the Washougal River clean. The appeal was nothing more than a delay tactic used by the Lanes.

1. Post Trial Actions of the Lanes

The Washington Courts have not ruled on any cases involving the post-trial actions of a “claimant” in lis pendens cases, however, the California Courts have squarely addressed this issue. In *California-Hawaii Development, Inc. v. The Superior Court of Santa Clara County*, 102 Cal.App.3d 293 (1980), the court held:

“In accordance with the foregoing discussion, it would appear that the statute should be read as requiring the person having recorded the notice of lis pendens and having lost at the trial court level to show by a preponderance of the evidence that any further review he seeks is “prosecuted...for a proper purpose and in good faith.”

Furthermore;

²⁸ Appellant's Opening Brief in *Lane II* at 25

“...but would focus more upon the party’s intent than upon the strength of the case on appeal. **However, certainly one element of determining the party’s reason for filing an appeal is examination of the question raised on appeal.**”

The appeal by the Lanes in *Lane II* did not challenge any of the findings of fact. In particular, “the overwhelming evidence in this case is that there is very little, if any, possibility that L’Hommedieu’s septic system would pollute the [ditch].” Finding 19. “L’Hommedieu’s septic system, although located within 50 feet of the stream, is actually less likely to pollute the stream than a conventional gravity system 50 feet from the stream. Finding 16; “There would be no substantial benefit to the public, to the plaintiffs, or to the environment by enforcing the 50-foot setback as it applies to L’Hommedieu. The deed restriction has been outmoded and lost its usefulness as to modern septic systems. Finding 17.²⁹

The appeal challenged the application of the Change in Neighborhood Circumstances Doctrine in the case and the Balancing of the Equities. The original appeal filed by the Lanes (*Lane I*) determined that the Change in Neighborhood Circumstances doctrine is a factually based inquiry and could not be determined on summary judgment. Their

²⁹ CP at 368-369

second appeal can be looked at as res judicata of the first appeal; first requiring it be remanded to a trial on the facts of the case, then, the second appeal claiming that the doctrine is not applicable in the case and it is subject to a *de novo* review.

The court in *California-Hawaii Development, Inc. v. The Superior Court of Santa Clara County*, 102 Cal.App.3d 293, 298 (1980), also held:

(after determining that the action affects title or right of possession of real property) is into the recording party's motives for commencing the action. If his motives are proper, the validity of his lawsuit is of little present concern. *Id.* at 298

The motive of the Lanes are very clear in this case and it is very well articulated in their original complaint and their amended complaint:

Petitioners are prejudiced by the Final Order because the value and enjoyment of their property is adversely affected by the decision to grant a critical areas variance. The result of this decision is that instead of having one home located next to their property, they will instead have two house, one within 15 feet of the property line and the other within 50 feet.³⁰

In fact, Mr. L'HOMMEDIEU already has one house on his property. He is now asking for a variance in order to build a second house. This density of development is not consistent with the neighborhood.³¹

³⁰ CP at 88

³¹ CP at 91

...Further, since the lots are quite small, using multiple lots for a single residence preserves the rural character of the area...³²

...Appellants argue that the grant of the variance will be materially detrimental to their property. They will then have two houses next door to them, one within 15 feet of the property line and the other within 50 feet and the CC & Rs will be compromised.³³

Not surprisingly, Judge Reynolds held:

I don't think it could be seriously be argued that the Lanes were objecting just to the septic systems...[T]heir theory was by preventing the septic systems you're preventing the house. But what they really wanted to do was prevent the house.³⁴

The Lanes latest appeal is more about form than substance. Both parties agree that the purpose of the restrictive covenant is to protect the Washougal River from pollution. The latest appeal by the Lanes does nothing to prevent pollution to the Washougal River.

This court held that the defenses of the L'Hommedieu's were factual inquiries and reversed summary judgment in favor of L'Hommedieu. In *Lane I*, 2005 WL 1847180 at *7. "the availability {the defense of changed circumstances} is generally a question of fact." This court stated:

The fact finder should decide whether the septic systems' technological sophistication renders the covenant unnecessary.

Lane I, 2005 WL 1847180, at *8.

³² CP at 91

³³ CP at 93

³⁴ Trial VRP 735-736

After requesting the remand in *Lane I*, the Lanes made every attempt to ignore the trial courts findings that, “**The deed restriction has been outmoded and lost its usefulness as to modern septic systems**” Finding 17.

The questions raised by the Lanes on appeal had nothing to do with keeping the Washougal River clean. They appealed was based on the application doctrinal purity of Changed Neighborhood Circumstances and the Balancing of the Equities.

The reasoning in *California-Hawaii, Id.* is expounded upon by the California Supreme Court in *Peery v. Superior Court*, 29 Cal.3d 837 (1981). The Supreme Court also discussed that post trial actions of the claimant are germane in establishing the validity of the lis pendens:

“Next we reach the issues on which the courts have not agreed. *United Professional* focused only on the plaintiff’s motives in commencing the action (*United Professional Planning, Inc. v. Superior Court*, 9 Cal.App 3d at pp. 388 (1970)) thereby implying that his intent at subsequent stages of the litigation was irrelevant. *California-Hawaii*, on the other hand, concluded that the plaintiff’s **motives throughout the course of the litigation and on appeal** are to be considered. (*California-Hawaii* 102 Cal.App.3d at 299 (1980)). We agree with *California-Hawaii*.” *Peery, Id.* at 842

The Supreme Court of California also held:

“We hold that (1) to avoid expungement of the lis pendens, the appellant must demonstrate beyond a preponderance of the evidence that he has litigated in good faith both **at trial and on appeal**; (2) as a necessary but not sufficient condition of providing his good faith, **he must show that his appeal constitutes a substantial challenge to the judgment**; and (3) **relevant findings made at trial are normally conclusive in resolving factual disputes** for purposes of the expungement motion.” *Peery, Id.* at 840.

This sound reasoning was presented to Judge Reynolds and should have been applied in Judge Reynolds decision to grant or deny the acceptance of the After-Arising Counterclaim and it was not. Particularly in light of Finding 16, 17, and 19.

The L’Hommedieus should be allowed to present the questions the Lanes raised on appeal, especially since they are essentially the exact opposite argument from the Lanes first appeal. Here, there was not a “substantial challenge to the judgment”, *Peery, Id.*. The Lanes did not challenge a single finding of fact, particularly, that the “**overwhelming evidence**” in this case supports the conclusion that there will be no pollution entering the Washougal River.

2. A recount of the numerous delays during the appeal in Lane II

The Lanes had numerous delays during the appeal process. In total, the Lanes amassed over 100 days in delay during the appeal process

in *Lane II* and were eventually sanctioned by this Court for delaying these proceedings. The Lanes only requested an extension of time in one instance (for 2 weeks out of over 100 days of delay) while the second appeal lingered in the court system.

The Treatise on the Law of Lis Pendens, John L. Bennett, (1884)

addresses the dilatory tactics used by the Lanes in this case;

“The suit must be kept upon the docket, and there should be no such delays in taking the ordinary **steps in bringing it to a final hearing as to lead the opposite party or the community at large to suppose the suit had been abandoned.** More especially one will not be heard to invoke this doctrine who has deliberately made false representations to his adversary, for the express purpose of throwing him off his guard, and surreptitiously obtaining a decree against him, as was done in this case...

The matter of leaving a cause off the docket, when in the regular course of the business of the court it would be expected to be there, is a circumstance which may be regarded as tending very strongly to mislead the other side into the belief that the case is abandoned. When to this is added the fact that statements were made to induce a false belief and corresponding action, in neglect of the case, and advantages are taken of those circumstances, it is a clear case of estoppel by conduct, *Bennett, Id* at 183-184.

RCW 4.28.320 states in part:

For the purpose of this section an action shall be deemed to be pending from the time of filing such notice: PROVIDED, HOWEVER, That such notice shall be of no avail unless it shall be followed by the first publication of the summons, or by the person service thereof on defendant **within sixty days** after such filing.

The clear intent of this portion of this statute is to protect the defendant from having a lis pendens filed on his property with no action taken in the underlying dispute. The legislators that wrote this statute, and it has retained the same 60 day language since 1893, recognized the havoc an adversary could wreak on a defendant by filing a lis pendens and allowing it to linger for an indefinite period of time.

If the legislature recognized the importance of timeliness in 1893, then the intention of the statute should be recognized during all phases of litigation, not just the original action. Clearly, the intent of the legislature was to impress upon claimants that a lis pendens is a right that requires diligent prosecution of the claim. This was not done here. The Lanes delay of over 100 days in filing; appropriate statement of arrangements, verbatim report of proceedings, and the opening brief and closing briefs. This delay subverts the intent of the statute, which is the timely adjudication of the claim.³⁵

Subsequent to the adoption of RCW 4.28.320 in 1893, the court system in Washington State has adopted numerous rules to aid the progression of cases in the form of Rules of Appellate Procedure and the Civil Rules. While the main reasoning behind the rules is to conserve

³⁵ The Lanes were eventually sanctioned by this Court for the disregard for the Rules of Appellate Procedure after filing their closing brief in an untimely manner.

judicial resources, it cannot be lost on this court that the timeliness of a claim is also to be considered, given the time-frames allotted in the Rules of Appellate Procedure and the Civil Rules (not to mention the 60 day timeframe in RCW 4.28.320).

Other courts have weighed in on the timeliness of adjudication of lis pendens claims. In Maryland, the courts addressed the progression of a suit involving a lis pendens. The court in *Corey v. Carback*, 201 Md. 389, 403 (1953) held:

“There can be no long and unexplained delay in the prosecution of a suit”, citing *Taylor v. Carroll*, 89 Md. 32 at 42, which adopts the language of Pomeroy, in his work on Equity Jurisprudence, as follows:

“in order, however, that a purchaser pendent lite may be thus affected, the suit must be prosecuted in good faith with **all reasonable diligence and without unnecessary delay**. A neglect to comply with this requisite would relieve a purchaser from the effect of the lis pendens, as notice.”

This is not unlike the same language this Court used in its’ ruling in *Lane II*, that “The law requires that a plaintiff seeking enforcement of a covenant **exercise the highest degree of diligence**”, citing, *Ronberg v. Smith*, 132 Wash. 345, 351 (1925).

The Lanes exercised no degree of diligence during the prosecution of this litigation. There were numerous “long and unexplained delay(s) in the prosecution of a (the) suit”.

This is evidenced from the record that the Lanes violated numerous Rules of Appellate procedure during the appeal causing numerous delays, namely:

RAP 9.2 requires a Statement of Arrangements “within 30 days of the Notice of Appeal”,

- Statement of arrangements was not filed until August 2, 2007: **6 day delay**.

RAP 9.5 requires a Verbatim Report of Proceedings “with the clerk of the trial court within 60 days after the statement of arrangements.”

- This was filed on October 2, 2007: **2 day delay**.

RAP 10.2 (a) ...[T]he brief of an appellant or petitioner should be filed with the appellate court within 45 days after the report of proceedings is filed in the trial court.

- This opening brief was due on November 15, 2007. This was not filed until January 4, 2008: **49 day delay**.

RAP 10.2 (d) ...”A reply brief of an appellant or petitioner should be filed with the appellate court within 30 days after service of the brief of respondent unless the court orders otherwise”:

- A Reply brief was due on March 16, 2007: **54 day delay**.

The Lanes only requested an extension of time in once instance, two weeks to file an opening brief. They amassed over 100 days of delays in violation of the Rules of Appellate Procedure. Along with the 3 year delay in filing the lis pendens, this does not show that the Lanes exercised any degree of diligence.

3. Inaction to assert a known right can be seen as a conscious action

In this case, the Lanes did not assert any right incident to title to the property and allowed the L'Hommedieus to encumber their property on numerous occasions. The Lanes were put on notice that the L'Hommedieus intended to obtain a mortgage on property.³⁶ If the Lanes thought they had an incident that rose to the dignity of title, then they needed to exercise it---in the first instance.

The Treatise on the Law of Lis Pendens, P. 182-183. (1884):

“The plaintiff was present at the sale, made no objection thereto...”,
Similar to the Lanes inaction of filing the lis pendens and allowing the property to be encumbered multiple times. The Lanes did not intervene.
Additionally;

“A party who negligently or culpably stands by and allows another to contract, on the faith and understanding of a fact which he can

³⁶ CP 183

contradict, can not afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving.” (from *Gregg v. Wells*, 10 Ad. & E. 90). *Id. at 182*.

The Lanes were fully aware that the L’Hommedieus intended to encumber their property. They did nothing to prevent the L’Hommedieus from expending funds in order to finance and construct the home.

The Lanes did not remove the lis pendens on the property and it had remained in place during the entire appeal, or almost 3.5 years. In a dissenting opinion, *Schwab v. City of Seattle*, 64 Wn. App. 742, (1992), before RCW 4.28.328 was passed the Honorable Judge C.J. Petrich made an ominous prediction. He held:

Some easements are minor in nature and do not involve the only means of access to the dominant estate. Does it seem fair that someone objecting to a minor easement should be able to cloud title to the dominant estate merely by interjecting a lis pendens? I think not. **Such a result would be intolerable and has the potential as a means of legal blackmail.**

This is precisely what has transpired in the instant case. The Lanes attempted to use the lis pendens statute as a weapon of oppression rather than adjudication of a just cause.

4. Failure to post and maintain a bond.

The Lanes failed to file a supersedeas bond during this appeal to preserve their right to the appeal. The Lanes needed to file a bond in accordance with RAP 8.1. The Lanes never filed a bond in accordance with RAP 8.1 in either appeal. The Lanes neither maintained the bond during the first appeal, nor did they file and maintain a bond during the second appeal. The Lanes position is that they were not required to maintain a bond because:

“Within a couple of months of that preliminary injunction there was an order quashing that order that had said the order should be quashed”.³⁷

This is what they represented to the court for their failure to maintain the injunction bond.

The Lanes were referencing the Order Granting L’Hommedieu partial summary judgment. The order states:

Defendant’s Motion for Partial Summary Judgment is granted in that the covenant alleged to restrict L’Hommedieu’s location of a septic system on his property is not ~~enforceable or binding~~ (applicable) ETR against L’Hommedieu as a matter of law or equity.

The order dated July 17, 2003, granting the preliminary injunction against L’Hommedieu is hereby quashed.

³⁷ VRP 22:19-22

The July, 17, 2003, Order granted the Lanes the preliminary injunction that the Lanes requested, predicated on the posting of a \$150,000 bond:

3. Along with the executed order, Lane shall file a bond, in the sum of \$150,000, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.
4. This order shall go into effect on June 26, 2003 and shall remain in effect until further order of this court.

After losing the summary judgment proceeding, the Lanes position is that the injunction bond was no longer necessary. The order that they referenced was “The order dated July 17, 2003, granting the preliminary injunction against L’Hommedieu is hereby quashed”,³⁸ allowed them to remove the bond that was required in case the L’Hommedieus suffered any damages from the wrongfully preliminary injunction.

The Lanes confusing position on the matter is summarized below::

“The important fact here – I – our position is – my position is that at that time there was no longer – if the Lanes had decided that they wanted to remove the bond, they could have removed the bond at that point...”³⁹

This is precisely what the Lanes did. The L’Hommedieus obtained a successful judgment against the Lanes on July 17, 2003 and the Lanes

³⁸ CP 147

³⁹ VRP 22, 23

never maintained the bond throughout the course of the litigation. Nor did they file a supersedeas bond with the Court in accordance with the Rules of Appellate Procedure 8.1 in either appeal when there had been a judgment against them for the \$12,513.

This court should keep in mind that Dennis Lane is an attorney in the State of Washington. The Lanes interpretation of the law is that they no longer needed to maintain a valid and existing bond after losing summary judgment and an award of damages to the L'Hommedieus for the wrongful filing of the injunction.

The purpose of RCW 7.40.080 is to clarify that the injunction is predicated on posting a bond and is “ **conditioned to pay all damages and costs which may accrue by reason of the injunction or restraining order**”).

Furthermore, CR 65 (c) “no restraining order or preliminary injunction shall issue except upon the giving of security...for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained”).

The Lanes legal theory now is that they no longer needed a bond. The Lanes felt no need to maintain the bond, nor did they feel the need to place a supersedeas bond.

All of the time, the Lanes maintained the lis pendens on the L'Hommedeus property and never paid the judgment by Judge Reynolds that awarded the L'Hommedeus \$12,513 in damages.

This case has never been about pollution, or about a septic system. This case has been about an attorney using his skills in the court system as an equitable club as a weapon of oppression rather than adjudication of a just claim. *Golden Press v. Rylands*, 124 Colo. 122, 235 P.2d 592 (1951). This case has been about preventing the construction and occupation of the L'Hommedeus residences.

J. The Circumstantial Evidence only Leads to the Conclusion that the Lis Pendens was Wrongful

Once this court unpeels all of the layers of this 7+ year litigation, it can come to only one conclusion; the Lanes have been using the lis pendens for an improper purpose and the Honorable Judge E. Thompson Reynolds abused his discretion by disallowing the L'Hommedeus to file their After-Arising Counterclaim in accordance with CR 13(e).

The Honorable Judge Reynolds should have taken into account all of the actions of the Lanes throughout the course of the litigation when determining whether the lis pendens was proper. These include:

His holding that the Lanes brought this cause of action to specifically prevent the construction of the home.

The Lanes filing an ex parte TRO without bond and without notice when the L'Hommedieus were represented by counsel.

The Lanes failure to maintain an injunction bond.

The Lanes delay of 3 years in filing the lis pendens.

The lis pendens was devoid of merit as a matter of law.

The Lanes knowingly allowing the L'Hommedieus to encumber their property on numerous occasions before filing the lis pendens..

The Lanes juxtapose position from their appeal in *Lane I* and the appeal in *Lane II* regarding the Change in neighborhood circumstances.

The Lanes 100 plus day delay in filing documents with this Court of Appeals during the second appeal.

The Lanes motive for filing the lis pendens: to put future purchasers on notice (not encumbrancers).

The Lanes failure to post a supersedeas bond during the appeal.

The complete change in the Lanes position regarding filing of unripe claims, citing *Grandmaster Sheng-Yen Lu. V. King County*, 110 Wash.Ap. 92, 98. The Lanes contended that the L'Hommedieus claim needed to be ripe for adjudication. (See MEMORANDUM OF LANES IN RESPONSE TO L'HOMMEDIEU MOTION FOR SUMMARY JUDGMENT)

Dennis Lane contacting Samuel A. Rodabough and presenting a job offer during the course of the litigation.

Furthermore, Judge Reynolds held:

I don't think it could be seriously argued that the Lanes were objecting just to the septic systems...[T]heir theory was that by preventing the septic systems you're preventing the house. But what they really wanted to do was prevent the house.⁴⁰

The Lanes original complaint and amended complaint both repeatedly state that they do not want a second home next to their vacation home.

Furthermore, the Lanes, over the years have made numerous attempts to purchase the property from the L'Hommedieus.

This court should again, look at the trial courts judgment in this matter, or the reason the Lanes filed this lawsuit:

The judgment is an important tool for determining the motives of the party bringing the appeal. Because the trial court's decision is entitled to considerable deference on review.

Furthermore:

Because the question of a person's motive in filing a lawsuit relates primarily to his subjective state of mind, the issues of proper purpose and good faith **must often be determined by inference from a variety of circumstantial evidence** and we recognize that in some instances the patent lack of merit of a lawsuit may strongly suggest that the plaintiff has not filed the action for a proper purpose or in good faith. *Peery v. Superior Court*, 29 Cal.3d 837, 845 (1981).

⁴⁰ Trial VRP 735-736

The holding of Judge Reynolds identifies the clear intent of the reason the Lanes brought this suit; “but what they really wanted to do was prevent the house”.

Not only the judges reasoning, but the Lanes pleading itself states the clear purpose of the reason for filing the suit, “that instead of having one home located next to their property, they will instead have two houses”.

If this court looks at all the aforementioned actions (**circumstantial evidence**) of the Lanes, it can come to only one conclusion; the Lanes brought this suit to prevent the construction of the home and wrongfully filed a lis pendens on the L’Hommedieus property.

The Lanes wrongfully used RCW 4.28.320 against the L’Hommedieus to specifically target the sale of the home. The Lanes should not be allowed to profit from their 3+ year delay in filing the lis pendens when they were fully aware that L’Hommedieus intended to encumber the property.

CONCLUSION

The L'Hommedieus respectfully request that this action be remanded to the Skamania County Superior Court allowing the L'Hommedieus to amend their complaint (answer) to file a CR 13(e) After-Arising Counterclaim for the Lanes wrongfully filing a lis pendens in accordance with RCW 4.28.328.

BY: 

Lawrence Matthew L'Hommedieu

(pro se)

DECLARATION OF SERVICE

I, Lawrence M. L'Hommedieu declare:

I reside in the State of Washington and am over 18 years of age;

On November 21, 2010 a true and correct copies of the OPENING BRIEF OF APPELLANTS in a sealed, first-class postage-prepaid envelopes, addressed to the attorneys shown, the last-known office addresses of the attorneys and deposited with the united States Postal Service in

Portland, Oregon.

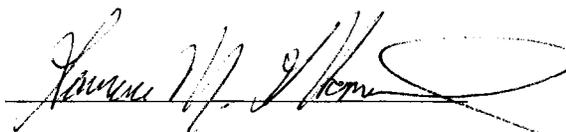
Were served upon :

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COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON
BY _____
DEPUTY



Lawrence M. L'Hommedieu