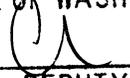


FILED
COURT OF APPEALS
DIVISION II

2015 MAR 25 AM 9:56

Case No. 46898-1-II

STATE OF WASHINGTON

BY  _____
DEPUTY

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

CHAMBERS CREEK, LLC, a limited liability company registered to do

business in Washington,

Appellant,

v.

CHARLES SCHMIDT and ANTHONY SCHMIDT,

Respondents.

RESPONDENTS' ANSWERING BRIEF

Steven C. Burke, WSBA 30431
James D. Case WSBA 14009
Case & Dusterhoff, LLP
9800 SW Beaverton-Hillsdale Hwy.
Suite 200
Beaverton, Oregon 97005
Tel: 503-641-7222
Fax: 503-641-6522
Email: Steve@case-dusterhoff.com
Of Counsel for Respondents

Table of Contents

I. Introduction	1
II. Assignments of Error	3
III. Issues Presented	3
a. Did the Trial Court Err in Granting Summary Judgment?	3
b. Did the Trial Court Err in Relying on the Prior Settlement Between the Parties?	3
IV. Statement of the Case	3
V. Argument	5
a. First Assignment of Error - Plaintiff Failed To Create Any Disputed Issue of Material Fact	5
1. Plaintiff Failed To Establish a Prima Facie Case for Civil Conspiracy	6
2. Plaintiff Failed to Establish a Prima Facie Case for Conversion	8
b. Second Assignment of Error – Plaintiff Settled The Claims Brought In The 2013 Case As Part Of The 2011 Case.	12
VI. Conclusion	24

TABLE OF AUTHORITIES

Arkison v. Ethan Allen, Inc., 160 Wash. 2d 535, 160 P.3d 13 (2007) 13, 14

Biggs v. Vail, 124 Wash. 2d 201 (1994) 23

Chee Chew v. Lord, 143 Wash. App. 807, 181 P.3d 25 (2008) 15

Chee Chew v. Lord, 143 Wash. App. 813 (2008) 15

Exec. Mgmt., Ltd. v. Ticor Title Ins. Co., 114 Nev. 823, 963 P.2d 465
(1998) 15, 17

Foote v. Grant, 55 Wash. 2d 797, 350 P.2d 870 (1960) 22

Gingrich v. Unigard Sec. Ins. Co., 57 Wash. App. 424, 57 Wash. App.
424 (1990) 12

Grimwood v. Univ. of Puget Sound, 110 Wash. 2d 359 (1988) 11

Hudesman v. Foley, 73 Wash. 2d 880, 441 P.2d 532 (1968) 11

Kantor v. Kessler, 132 N.J.L. 336, 40 A.2d 607 (1945) 19

Krikava v. Webber, 43 Wash. App. 217, 716 P.2d 916 (1986) 17

MacDonald v. Korum Ford, 80 Wash. App. 877, 912 P.2d 1052 (1996) 23

MacDonald v. Krause, 77 Nev. 312, 362 P.2d 724 (1961) 16

Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574, 89 L. Ed.
2d 538, 106 S. Ct. 1348 (1986) 12

Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 10 L. Ed. 1060 (1842) 16, 17

Ruff v. Cnty. of King, 125 Wash. 2d 697, 887 P.2d 886 (1995) 18

Schoeman v. N.Y. Life Ins. Co., 106 Wash. 2d 855, 726 P.2d 1 (1986) 15, 16, 17

W.G. Platts v. Platts, 73 Wash. 2d 434, 438 P.2d 867 (1968) 19

70 C.J.S. *Perjury* § 92 (1951) 18

Nev. R. Civ. P. 13(a) 15

I. Introduction

On June 30, 2011, Plaintiff filed a lawsuit against Coyote Excavation, Pierce County Superior Court Case No. 11-2-10852-5, alleging claims for breach of contract, indemnification, and negligence. Defendant Anthony Schmidt is the owner of Coyote Excavation, and counterclaimed for conversion, negligence, and attorney fees. The other defendant is Anthony Schmidt's father, who has no ownership interest in Coyote and was not involved in the prior litigation. The 2011 case was settled shortly after Chambers Creek, LLC was held in contempt of court for intentionally violating the Court's court order commanding Chambers Creek to release construction equipment owned by Coyote Excavating back to Coyote Excavation. Chambers Creek had illegally converted Coyote's construction equipment, and was using it for a demolition project for months while refusing to reimburse Coyote. The same project led to the 2011 lawsuit.

In settling the prior claims in the 2011 lawsuit, the parties filed a Notice of Settlement of All Claims Between All Parties with the Court, which is contained in the Court's file. The document gave notice of the settlement as follows:

“The parties have reached an agreement at mediation to a dismissal of the captioned action including all claims by plaintiff against defendant and all claims by defendant against plaintiff. The equipment currently in the possession of each party shall remain in the possession of each party. The parties through their respective attorneys shall cause a Stipulated Dismissal with Prejudice, and without costs or attorney fees to be entered of record forthwith.”

As part of the 2011 lawsuit, Chambers Creek claimed for an offset against Coyote Excavation’s counterclaims based upon the alleged conversion of metal on the project. That claim for offset is the whole premise of the 2013 lawsuit (the case at bar), despite having been an active claim in the 2011 lawsuit and fully released by the prior settlement agreement. As demonstrated below, Plaintiff’s complaint states claims not recognized under Washington law, were already settled and released, and which Plaintiff has no evidence to support.

In responding to Defendants’ Motion for Summary Judgment, Plaintiff and its attorney also offered perjured testimony wholly inconsistent with the trial court record and prior testimony made under penalty of perjury. No reasonable juror would conclude either counsel or

client were credible, would not find any reasonable inference of disputed material facts, and summary judgment was appropriate.

II. Assignments of Error

- a. The Trial Court Erred By Granting Summary Judgment In The Face Of Numerous Material Disputes Of Fact.
- b. To The Extent That The Trial Court Relied On The Settlement In *Chambers v. Coyote* As A Basis For Dismissal Of The Claims In This Separate Action, The Trial Court Committed Error.

III. Issues Presented

- a. Did the Trial Court Err in Granting Summary Judgment?
- b. Did the Trial Court Err in Relying on the Prior Settlement Between the Parties?

IV. Statement of the Case

Respondents object to Plaintiff's Statement of the Case because it contains allegations unsupported by any evidence, and includes mostly irrelevant issues from the first lawsuit, which were settled between the parties. The omissions of evidence are discussed in detail in the assignments of error.

What is most ironic in Plaintiff's statement of the case is that Plaintiff asserts the claims at issue in the 2013 case were not settled, yet at

the trial court level, and now appeal, continues to relitigate all of the 2011 case issues, despite that settlement. Plaintiff's reliance on the 2011 case arguments and facts plainly demonstrates how its claims in the 2013 were settled in the 2011 case. Plaintiff's argument also relies heavily on inadmissible evidence, which was objected to at the trial level. Those objections are raised entirely on appeal as well.

The following facts should be undisputed:

1. On June 30, 2011, Plaintiff filed a lawsuit against Coyote Excavation, Pierce County Superior Court Case No. 11-2-10852-5, alleging claims for breach of contract, indemnification, and negligence. CP-7-15.

2. Defendant Anthony Schmidt is the owner of Coyote Excavation, which counterclaimed for conversion, negligence, and for attorney fees. CP 16-20, CP21-24 (Def. Motion SJ, p.3-4)

3. The other defendant is Anthony Schmidt's father, who has no ownership interest in Coyote and was not involved in the prior litigation. CP 16-20, CP21-24 (Def. Motion SJ, p.3-4)

4. The 2011 case was settled shortly after Chambers Creek, LLC was held in contempt of court for intentionally violating this Court's court order commanding Chambers Creek to release equipment owned by Coyote Excavating, which it converted illegally, and had been using

without payment to Coyote for months on the project that led to this lawsuit as well. CP 16-20, CP21-24 (Def. Motion SJ, p.3-4)

5. In settling the prior claims in the 2011 lawsuit, the parties filed a Notice of Settlement of All Claim Between All Parties with the Court, which is contained in the Court's file. CP 16-20, CP21-24 (Def. Motion SJ, p.3-4)

6. In the 2011 lawsuit, Plaintiff claimed Coyote Excavation converted the same scrap metal Plaintiff now claims the individual defendants in the case at bar are accused of converting. CP 16-20, CP21-24 (Def. Motion SJ, p.3-4)

7. Plaintiff dismissed the claim for conversion of the metal, and released that claim in its entirety. CP 16-20, CP21-24 (Def. Motion SJ, p.3-4)

V. Argument

a. First Assignment of Error - Plaintiff Failed To Create Any Disputed Issue of Material Fact

Instead of creating disputed issues of material fact, Plaintiff offered a significant amount of inadmissible evidence, most of which came from the 2011 lawsuit, and is fatal to the factual issues presented in the case-at-

bar¹. Plaintiff also failed to explain how nearly all of the evidence offered actually could create a disputed issue of material fact. It jumps to a conclusion without providing any reasoning. Given there is no explanation, one conclusion is possible: Plaintiff cannot offer an explanation because none exists.

**1. Plaintiff Failed To Establish a Prima Facie Case
for Civil Conspiracy**

Plaintiff failed to offer any evidence showing Defendants “combined to accomplish a lawful purpose by unlawful means, and failed to offer any evidence showing Defendants entered into an agreement to accomplish the conspiracy. Taking all evidence in a light most favorable to the non-moving party, Plaintiff only demonstrated that Anthony Schmidt asked his father, Charles Schmidt to drive some scrap metal to a company that purchased scrap metal. In fact, Mr. Ralston’s declaration merely states “The elder Defendant Schmidt...was observed operating a “side dump” truck...” The statement is hearsay, and not a statement of anything Mr. Ralston actually observed with personal knowledge given the grammar. Mr. Ralston did not observe nearly all of the factual events

¹ Plaintiff never addressed how the “metal theft” issue was repeatedly brought up in the 2011 lawsuit in pleadings and argument, yet was not a claim at issue in the 2011 lawsuit. This glaring omission speaks volumes to Plaintiff’s entire appeal in terms of the lack of substance on the material issues.

he testified to in his declaration. Instead, he claims he reviewed other declarations and other documents, and recites hearsay statements allegedly made by others. Defendant moved to strike the statement as inadmissible hearsay. CP 141-144 (Def. Motion to Strike).

Finally, there is the perjury by Mr. Ralston. He testified: “We did not have actual evidence of the metal theft until my attorney subpoenaed records from Seattle Iron & Metal and R.S. Davis, a Portland based metal recycler.” CP 136-140 (Decl. Ralston, ¶6); *see also* CP 21-40; 141-175. As demonstrated above, Mr. Ralston’s statement is demonstrably false by virtue of his prior testimony and the statements and briefing of his attorney. His attorney made the allegations two years prior to May 2013.

The mere allegation of theft of the metal is not evidence, and Plaintiff has failed to offer proper, admissible evidence in support of its claim to create a disputed issue of material fact.

Plaintiff did not dispute Defendants’ legal argument that any prospective defendants to the conversation claim were necessary parties to the prior lawsuit, and by failing to add them in the prior lawsuit, Plaintiff waived any right to pursue putative joint tortfeasors. Accordingly, given the totality of the evidence, the Court can only conclude the claim for metal theft, or conversion, was settled in the prior lawsuit, regardless of whether it was the intent of the parties to include the second lawsuit in the

mediation or not. By operation of law, all of the conversion claims had to be brought in the prior lawsuit, and ignorance of the law is not a defense to Plaintiff's failure to properly include all necessary parties in the prior case.

**2. Plaintiff Failed to Establish a Prima Facie Case
for Conversion**

Plaintiff's response to the Motion for Summary Judgment attempted to confuse the issues, largely by offering subtle but misleading declarations, which at first blush appear to declare certain facts, but is instead are well-written but vague allegations lacking personal knowledge. No reasonable inference can be taken from the declarations that can actually create a disputed issue of material fact to avoid summary judgment.

The first example is the declaration of Mr. Zyph, which assuming *in arguendo* it is admissible (it is not), never actually states the specific nature of the alleged "side job" and fails to actually state any of the defendants actually engaged in any suggested conduct against Chambers Creek. It only claims a conversation (which is false) occurred between Tony Schmidt and Mr. Zyph, but lacks any specificity that actually ties it to a specific conspiracy or plan of action. It is noteworthy Mr. Zyph has not provided a declaration for the case-at-bar, and affirmatively states he actually observed metal theft by defendants, particularly since he testified

he actually supervised the project. His prior declaration states if he saw it, he would have reported it. There is no evidence he reported any metal theft, so the only reasonable inference is that no metal theft occurred. Taken in a light most favorable to the non-moving party, a juror could only conclude there were vague discussions about a “side job” but nothing ever came of it.

The declaration of Tim Ralston is considerably more misleading. While Mr. Ralston claims he did not authorize the sale of metal, he fails to offer any evidence that the real party of interest, *Chambers Creek*, did not authorize the sale of the metal. He never testifies Chambers Creek did not authorize the sale of the metal. He never testifies no one else gave instructions on behalf of Chambers Creek. He never testifies that someone actually saw specific actions of metal theft. He never testifies Chamber Creek did not benefit from the sale of metal from the project.

Ralston also tried to testify on behalf of Dennis Zyph as to knowledge and authorization, which is inadmissible.

Mr. Ralston’s declaration also states that “Neither I, nor Mr. Zyph [sic] to my knowledge received any portion of the proceeds.” CP 136-140 (Decl Ralston, ¶3); *see also* CP 21-40, 141-175). The testimony fails to state that Chambers Creek, the Plaintiff and only party of interest regarding the claims, did not receive any of the proceeds. It is irrelevant

that Mr. Ralston didn't receive any funds since it was not his to receive in the first place. In fact, it should be expected that Mr. Ralston did not receive the funds, he is not Chambers Creek. He also qualifies the statement with the "to my knowledge" clause, and fails to give a statement actually proving the deposit receipt to Mica Creek's (Zyph) bank account is not what Anthony Schmidt testified it was. Ralston only denies having knowledge of the fact, which is not a denial of the fact itself.

Ralston failed to create a disputed issue of material fact concerning whether there was authorization to sell the metal, and whether Chambers Creek and/or its agent received the funds. The declaration is crafted in a very clever way to give a false impression of material testimony intended to create a disputed issue of material fact, but is actually devoid of admissible, substantive, and resolute testimony. Instead, he testifies to the credibility of the defendants, which is inadmissible. ER 608 , E.g. "...and deny that any of the testimony about the involvement of Dennis Zyph or myself...is true." The rest is basically just smoke and mirrors.

Finally there is the problem with the star material witness of Plaintiff's case being its own attorney. Mr. Brain offers a considerable amount of testimony that includes hearsay, hearsay within hearsay, and conjecture, on issues he cannot possibly have any personal knowledge. Much of his material statements are not based on his own personal

knowledge being he was not present for the events he testifies to. CP 141-144 (Def. Motion to Strike).

Taking all evidence in a light most favorable to a non-moving party, and giving that evidence the proper inferences, Defendants are entitled to judgment as a matter of law. While issues of credibility are not normally the basis for summary judgment, there are exceptions. *See Hudesman v. Foley*, 73 Wash. 2d 880, 441 P.2d 532 (1968). One exception is where the facts are conceded or uncontroverted, where there is no evidence on which to base a verdict, or where the evidence is such that only one conclusion may reasonably be drawn therefrom. In those instances, the question is for the court, and in such a case it is error for the court to submit the question to the jury. *Id.* at 889-890, 441 P.2d 532 (citing 92 C.J.S. *Vendor and Purchaser* § 374 (1955)). Plaintiff offered materially conflicting statements of fact, which is directly impeached by Plaintiff and Plaintiff's counsel's own prior statements. A reasonable juror can only conclude their statements are false in part, and would disregard those statements to reach a defense verdict. To survive a motion for summary judgment, Plaintiff must do more than express an opinion or make conclusory statements, *Grimwood v. Univ. of Puget Sound*, 110 Wash. 2d 359, 359-60 (1988). Mr. Ralston states his beliefs, which are merely opinion (e.g. I believe, I think, Supposedly...), but fails to offer

admissible facts with any conviction of knowing something specific, or actually stating something actually occurred and he saw it happen.

Even on the claim of civil conspiracy, Plaintiff offered no evidence of an actual agreement to conspire to engage in unlawful acts that cause harm to Plaintiff. There is no testimony of damage. No testimony of an agreement, direct, or indirect. A summary judgment opponent "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 89 L. Ed. 2d 538, 106 S. Ct. 1348, 1356 (1986) *cited with approval* *Gingrich v. Unigard Sec. Ins. Co.*, 57 Wash. App. 424, 430, 57 Wash. App. 424 (1990). Plaintiff did not establish a prima facie case to any of its claims, assuming they were not already settled in the prior lawsuit.

b. Second Assignment of Error – Plaintiff Settled The Claims Brought In The 2013 Case As Part Of The 2011 Case.

The Notice of Settlement of all Claims Between the Parties filed in the 2011 litigation read:

“The parties have reached an agreement at mediation to a dismissal of the captioned action including all claims by plaintiff against defendant and all claims by defendant against plaintiff. The equipment currently in the possession of each party shall remain in the possession of each party.

The parties through their respective attorneys shall cause a Stipulated Dismissal with Prejudice, and without costs or attorney fees to be entered of record forthwith.” CP 21-23..

Plaintiff alleged in the 2011 litigation that Coyote Excavation converted the metal from the mill project, and settled that claim. Despite the settlement, it brings the identical claim already settled, but now alleges the claim against the owner of Coyote Excavation and the owner’s father converted the metal. Plaintiff is judicially estopped from doing this.

The doctrine of “[j]udicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position.” *Arkison v. Ethan Allen, Inc.*, 160 Wash. 2d 535, 538, 160 P.3d 13 (2007) (quoting *Bartley-Williams v. Kendall*, 134 Wash. App. 98, 98 (2006)). The determination of whether to apply judicial estoppel focuses on three core factors:

(1) whether “a party's later position” is “‘clearly inconsistent’ with its earlier position”;

(2) whether “judicial acceptance of an inconsistent position in a later proceeding would create ‘the perception that either the first or the second court was misled’”; and

(3) “whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.”
Id. at 538-39, 160 P.3d 13 (quoting *New Hampshire v. Maine*, 532 U.S. 742, 750-51, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001) (quoting *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 599 (6th Cir. 1982))). The purpose of the doctrine is “to preserve respect for judicial proceedings” and “to avoid inconsistency, duplicity, and ... waste of time.” *Id.* at 538, 160 P.3d 13 (alteration in original) (internal quotation marks omitted).

Plaintiff is estopped from alleging in the 2011 case that Coyote Excavation converted the metal, and then claiming different parties, but most notably the owner of Coyote Excavating and the owner’s father, were the culprits in a subsequent case. Plaintiff’s claim is a ruse to get around its prior settlement and engage in bad faith litigation against the principal of Coyote Excavation and his family member. Assuming Plaintiff’s historical revision of its conversion claim is based on actual facts, it is barred from relitigating that claim because the conversation claim against the individuals was a compulsory counterclaim.

Alternatively, Plaintiff already settled the conversion claim and is barred from attempting to relitigate the same claim in a subsequent

lawsuit. *See Chee Chew v. Lord*, 143 Wash. App. 807, 181 P.3d 25 (2008).

Washington, Nevada, and the federal courts share an identical compulsory counterclaim rule: A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the same transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. *Id.* at 813, 181 P.3d 25. CR 13(a); FRCP 13(a); Nev. R. Civ. P. 13(a).

The purpose of the rule “is to make an “actor” of the defendant so that circuity of action is discouraged and the speedy settlement of all controversies between the parties can be accomplished in one action.” *Exec. Mgmt., Ltd. v. Ticor Title Ins. Co.*, 114 Nev. 823, 842-43, 963 P.2d 465 (1998) (quoting *Great W. Land & Cattle Corp. v. Sixth Judicial Dist. Court*, 86 Nev. 282, 285, 467 P.2d 1019 (1970)). “The considerations behind compulsory counterclaims include judicial economy, fairness and convenience.” *Schoeman v. N.Y. Life Ins. Co.*, 106 Wash. 2d 855, 866, 726 P.2d 1 (1986). *Chee Chew v. Lord*, 143 Wash. App. 813, 813-14 (2008).

In determining what constitutes a “transaction or occurrence,” Washington courts, Nevada courts, and federal courts consider whether

the claim and counterclaim are logically related. *Id.*, citing *Schoeman*, 106 Wash. 2d at 865-66, 726 P.2d 1 (quoting *Rosenthal v. Fowler*, 12 F.R.D. 388, 391 (S.D.N.Y. 1952)); *MacDonald v. Krause*, 77 Nev. 312, 320, 362 P.2d 724 (1961). Plaintiff cannot reasonably deny the theft claim made in the 2011 case is not exactly the same claims as in the 2013 litigation. CP 4-6 (Ex. 4-6) (Emails from Brain describing the claim in the prior case). Plaintiff alleged the metal theft claim as an affirmative defense (offset) in the 2011 litigation, but the affirmative defense it is properly categorized as a claim, not an affirmative defense. The allegation of metal theft became the crux of Plaintiff's case in the 2011 litigation.

A "claim" is a demand of some matter as of right made by one person upon another, to do or to forbear to do some act or thing as a matter of duty. A more limited, but at the same time an equally expressive, definition was given by Lord Dyer, that "a claim is a challenge by a man of the propriety or ownership of a thing, which he has not in possession, but which is wrongfully detained from him." *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 10 L. Ed. 1060 (1842). "Claim" has generally been defined as a demand for a thing, the ownership of which, or an interest in which, is in the claimant, but the possession of which is wrongfully withheld by another. But a broader meaning must be accorded to it. When a party has mistakenly designated a defense as a counterclaim or a

counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

Black's Law Dictionary defines a "claim" as "the aggregate of operative facts giving rise to a right enforceable by a court." Black's Law Dictionary, 9th Ed. (1999). This definition, and all the definitions, proves the affirmative defense is really a claim. For that matter, the term "offset" is defined as "something (such as an amount or claim) that balances or compensates for something else." *Id.* "Offset" is a claim, not an affirmative defense, assuming Plaintiff used the term correctly.

Generally, a party's failure to plead a compulsory counterclaim will prevent that party from subsequently bringing a separate action on that claim. *Schoeman*, 106 Wash. 2d at 867, 726 P.2d 1; *Krikava v. Webber*, 43 Wash. App. 217, 219-20, 716 P.2d 916 (1986); *Exec. Mgmt.*, 114 Nev. at 842-43, 963 P.2d 465 (citing *MacDonald v. Krause*, 77 Nev. 312, 362 P.2d 724 (1961)). Plaintiff made the claim of conversion in the prior lawsuit, and settled that claim. It was required by law to bring the claim against all defendants in the prior action, assuming any of its facts are valid. Plaintiff failed to name the two individual defendants in the 2011 case, but settled the claim anyway. It is barred from bringing the claim now, under the doctrine of compulsory claims and judicial estoppel.

Of course, Plaintiff and its counsel denied the metal theft claims were *ever* at issue in the prior lawsuit. Plaintiff's response to the Defendants' Motion for Summary Judgment states, "The metal theft was not discovered until about a year after the filing of Chambers' Reply on the counterclaim of Coyote." CP 186-188 (Pltf. Br. at 4, *citing* Decl. Brain, ¶7). The Court's records show the reply is dated April 4, 2012. This is much more than a year before the date claimed in the new declarations of Mr. Brain and Mr. Ralston filed in opposition to Defendant's Motion for Summary Judgment, and a year after Mr. Ralston's attorney made threats of criminal action against Coyote, its owner, and the owner's father in the prior lawsuit. As demonstrated below, Plaintiff's representations are materially false, were intended to mislead the trial court, and are grounds for the Court to issue sanctions. Furthermore, no reasonable juror would see such false statements and then consider a verdict in favor of the party that offers such specious evidence. The falsity of the statements are proven by the objective evidence below. Questions of fact may be determined on summary judgment as a matter of law where reasonable minds could reach but one conclusion. *Ruff v. Cnty. of King*, 125 Wash. 2d 697, 703-04, 887 P.2d 886 (1995).

In 70 C.J.S. *Perjury* § 92 (1951), the rule is stated:

“The general rule, in the absence of statute, is that no action lies to recover damages caused by perjury, false swearing, subornation of perjury, or an attempt to suborn perjury, whether committed in the course of, or in connection with, a civil action or suit, a criminal prosecution or other proceeding, and whether the perjurer was a party to, or a witness in, the action or proceeding.” *citing Kantor v. Kessler*, 132 N.J.L. 336, 40 A.2d 607 (1945), and cited with approval by *W.G. Platts v. Platts*, 73 Wash. 2d 434, 440, 438 P.2d 867 (1968). The trial court denied the motion in part due to the obviousness of Plaintiff’s perjury, and the perjury of its attorney.

On September 13, 2011, Plaintiff’s attorney sent an email to James Case asserting a claim against the owner of Coyote Excavation and his father for theft of metal from the mill project. At this time, Plaintiff’s counsel was using the threat of criminal prosecution in an attempt to gain leverage in the prior lawsuit. CP 157, 160 (Decl. Case, ¶2; Ex. 4).

On September 21, 2011, Plaintiff’s attorney sent another email to Mr. Case, again raising the allegation of metal theft. CP 157, 161 (Decl. Case, ¶3; Ex. 5). The email speaks to a separate lawsuit being filed, but later communications demonstrate how Chambers included the claim in its Reply to the Counterclaim in the prior lawsuit.

On October 14, 2011 Plaintiff's counsel sent yet another email accusing the owner of Coyote Excavation of metal theft. CP 158, 162 (Decl. Case, ¶4; Ex. 6). The email plainly demonstrates how Chambers, acting through its attorney, was using threats of criminal sanctions as a means to dissuade Coyote from attempting to regain possession of its equipment from the mill project. E.g. extortion. Chambers Creek would not honor the timeline promised in the October 14, 2011 email, which led to Coyote filing pleadings to obtain its equipment from Chambers. Coyote's motion for replevin was successful, and Chambers would later be held in contempt of court for intentionally refusing to return all of the property to Coyote. The case settled shortly after the order of contempt being issued.

Part of the pleadings filed to regain Coyote's possession of its equipment included summary judgment on the remainder of the case. In its response to that motion, Chambers Creek specifically raised the claim of metal theft as a defense to the motion. CP 154-170 (Ex. 8). Chambers argued it had a right to recover damages from Coyote Excavation, including a setoff defense to Coyote's counterclaim. CP 168 (Ex. 8, p. 4). The setoff included "three classes of damages to Chambers." The third class was "the issue of conversion of salvaged metal." This is the words of Plaintiff's attorney, subject to CR 11, and filed with the Court in 2013.

Plaintiff's denial that it did not assert the metal conversion claim in the prior lawsuit is specious.

Furthermore, in his declaration dated May 6, 2013 in the case of *Chambers Creek v. Coyote Excavation*, Tim Ralston declared:

“Finally, Chambers has evidence that Coyote was removing metal from the Mill Site and selling it for its own account. To date, Chambers has been able to document \$145,000 in sales of steel in the Seattle area in the name of Charles Schmidt, the father of Coyote Coyote's principle Tony Schmidt and the founder of the business. It is my belief Chambers will discovery larger sales of non-ferrous metal, principally copper, made in Oregon, the Schmidt's state of residence.”

This declaration was filed in response to Coyote's Motion for Summary Judgment in the 2011 case. As already demonstrated in the brief filed by Chambers Creek in the 2011 case, the testimony was offered in a futile attempt to avoid summary judgment and replevin by arguing it was entitled to an offset related to the allegation of metal theft. Plaintiff's attorney, Paul Brain, argued this very issue during oral argument before the Court on May 17, 2013. Mr. Brain has not refuted that he made this

argument to the Court. Mr. Brain first shared the subpoenas to Seattle Iron with defense counsel on April 24, 2013. CP 163 (Ex. 7).

Mr. Brain also filed a declaration in the prior lawsuit raising the allegations of metal theft. CP 157 & 172 (Decl. Case, ¶7; Ex. 9). Again, this declaration was offered as part of the evidence to oppose Coyote Excavation's Motion for Summary Judgment in the 2011 lawsuit. Given the overwhelming and undisputable evidence, the allegation of metal theft was brought as a material issue in the prior lawsuit, and Plaintiff's denial of this is impossible to sustain.

Given the extraordinary conflict between the declarations (all subject to penalty of perjury) between the 2011 lawsuit and the 2013 lawsuit, coupled with the representations made in the briefing by Chambers, granting Defendants' Motion for Summary Judgment was appropriate. The evidence demonstrates bad faith on the part of Chambers Creek and its attorney, by offering perjured testimony in order to defeat the pending Motion for Summary Judgment. No reasonable juror would conclude Plaintiff was credible, or honest. In other words, it is not an issue upon which reasonable minds could differ. Summary judgment is appropriate when reasonable minds would find the evidence "too incredible to be believed." *Balise v. Underwood*, at 200. *Accord, Foote v. Grant*, 55 Wash. 2d 797, 799, 350 P.2d 870 (1960).

Generally, a trial court may not impose Rule 11² sanctions for a baseless filing unless it also finds that the attorney who signed and filed the pleading, motion or legal memorandum failed to conduct a reasonable inquiry into the factual and legal basis of the claims; in conducting such inquiry, the court must use an objective standard, asking whether a reasonable attorney in like circumstances could believe his or her actions to be factually and legally justified. *MacDonald v. Korum Ford*, 80 Wash. App. 877, 912 P.2d 1052 (1996). Furthermore, an attorney's blind reliance on a client will seldom constitute a reasonable inquiry. *Id.* An appropriate sanction for the intentional the use of false statements by a party or attorney includes the granting of summary judgment, and certainly includes the award of reasonable attorney fees and costs. *Id.*, at 891, *citing Biggs v. Vail*, 124 Wash. 2d 201, 201 (1994).

The evidence demonstrates Plaintiff and its attorney were closely involved in the issues and investigation of the alleged claims of

² CR 11 provides in part that every pleading, motion, and legal memorandum of a party represented by an attorney shall be dated and signed by at least one attorney of record in the attorney's individual name, whose address and Washington State Bar Association membership number shall be stated. The signature of an attorney constitutes a certificate by the attorney that the attorney has read the pleading, motion, or legal memorandum; that to the best of the attorney's knowledge, information, and belief, formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law and that it is not interposed for any purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

conversion, and despite the lack of merit to the claim itself, filed declarations and briefing with the Court that contain fatally conflicting statements, and that cannot be reconciled as typographic error or excusable neglect. Quite the opposite. At oral argument, Mr. Brain summarily dismissed the allegations of perjury, despite clear and convincing evidence proving the falsity of the statements. Taking the statements into proper context, they cannot be reconciled as anything from perjury, and intentionally false representations to the Court. The false statements demonstrate a consistent pattern of misrepresentation by Plaintiff and its counsel. Defense counsel conferred with Plaintiff's counsel by email, requesting he withdraw the offending pleadings. Plaintiff's counsel adamantly refused.

Plaintiff settled "all claims," including the claims for metal theft, in the prior lawsuit. Despite its willful misrepresentations regarding the prior case history, the indisputable evidence demonstrates Plaintiff did allege metal theft against Coyote Excavation in the prior lawsuit, and settled that claim. Plaintiff waived any right to reallege that claim against the 21013 case defendants.

VI. Conclusion

The trial court record overwhelmingly demonstrates it was appropriate to grant defendants summary judgment, because of the lack of

proof by Plaintiff, and as a sanction for intentionally false statements to the trial court by Plaintiff and its counsel.

DATED this 24th day of March, 2015.

CASE & DUSTERHOFF, LLP

A handwritten signature in black ink, appearing to be "S. C. Burke", written over a horizontal line.

Steven C. Burke, WSBA 30431
Of Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify I have this 23rd day of March, 2015, served a true and correct copy of the foregoing document upon counsel of record, via the methods noted below, properly addressed as follows:

Mr. Paul E. Brain
Brain Law Firm PLLC
1119 Pacific Ave., Suite 1200
Tacoma, Washington 98402

Via email to pbrain@paulbrainlaw.com

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

Dated this 24th day of March, 2015, at ~~Beaverton~~, Oregon.



Steven C. Burke, WSBA 30431
Of Attorneys for Respondents

FILED
COURT OF APPEALS
DIVISION II
2015 MAR 25 AM 9:56
STATE OF WASHINGTON
BY _____
DEPUTY