

Court of Appeals No. 49007-2-II
Superior Court No. 15-2-02049-0

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

VINCENT L. BADKIN,
a divorced man,
Appellant/Plaintiff

v.

SAMANTHA J. BADKIN,
a divorced woman,
and
HOWARD M. ALLEN and
NANCY B. ALLEN

Respondents/Cross-Appellants.

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RESPONDENT'S BRIEF

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I. INTRODUCTION

Appellant Vincent Badkin (herein referred to as "Vincent") and Respondent Samantha Badkin (herein referred to as "Samantha") were once married; while they were married they resided in a house purchased with the money of and in the name of Samantha's parents, Howard M. Allen and Nancy B. Allen (herein referred to as "the Allens").

According to Vincent, while they were living as a married couple and residing in the house, Vincent and Samantha paid the mortgage and attendant costs. Vincent separated from his wife and moved out of the house in 2008; in 2012 the *final dissolution decree dividing the property* was issued. The house was never listed as a community asset in any court order.

More than three years after entry of the final decree settling the property, Vincent brought this action, seeking to assert an interest in the house still held solely in the name of the Allens and in which he had had no participation, either benefit or burden, for seven years. Although he asserted many possible causes of action, the only one that he continues to argue on appeal is that the initial transaction created a resulting trust in his favor, which, according to him, was never repudiated.

II. ASSIGNMENTS OF ERROR

The trial court erred in failing to impose attorneys' fees on Plaintiffs for bringing a groundless action.

III. STATEMENT OF THE CASE:

Vincent filed his original complaint on October 6, 2015. (CP 1) Samantha and the Allens filed a motion to dismiss under CR 12(b)(6) on December 1, 2015, arguing that the statute of limitations had run as to all actions alleged in the original complaint, based on the dates listed in the original complaint. They also requested attorneys' fees under CR 11 because of the groundless nature of the complaint. (CP 8) Vincent responded, focusing on his argument that a resulting trust had been created and not repudiated, so that the statute of limitations had not begun to run. (CP 13) The reply countered that the facts pled did not support a resulting trust and even if they had, the facts alleged in the Vincent's complaint showed he had notice of repudiation more than three years before filing suit. (CP 17)

The trial court found in favor of Samantha and the Allens on January 13, 2016. (CP 25) The same day Vincent filed an amended complaint, without leave of the court, with more focus on his case for a resulting trust. (CP 27) Vincent then filed a Motion for Reconsideration on January 22, 2016, asking the court to again consider his arguments for the

finding of an unrepudiated resulting trust, or in the alternative to acknowledge treating the motion as a summary judgment motion and designating other matters considered. (CP 33)

Samantha and the Allens, in addition to their response to Appellants' Motion for Reconsideration, filed a specific request for attorneys' fees and costs on February 26, 2016, based on CR 11 for bringing claims not well-grounded in fact or law. (CP 79)

The court again denied Vincent's motion and confirmed dismissal of Vincent's complaint in a ruling dated March 28, 2016, but designated that it had considered, as a matter of public record, the pleadings in the prior dissolution action which had, as stated in both versions of the complaint, not listed the subject property as a marital asset. The court's ruling denied attorneys' fees to Samantha and the Allens. (CP 66)

IV. ISSUES:

Did Vincent's complaint plead any conceivable scenario under which a resulting trust could be found?

Did Vincent's complaint plead any conceivable scenario under which a resulting trust was not repudiated more than three years before the filing of his complaint?

Where an attorney makes a stale claim and persists in seeking review of his claim in the face of the law and fact, causing unnecessary

effort and costs to the defendant, should he pay the resulting fees and costs?

V. ARGUMENT

Whether this case is considered as the original CR 12(b)(6) motion or as having been converted to a CR 56 summary judgment motion under CR 12(b)(7), the standard of review is de novo. *Hoffer v. State*, 110 Wn.2d 415, 420, 755 P.2d 781 (1988). *Hisle v. Todd Pacific Shipyards Corp.*, 151 Wash.2d 853, 860, 93 P.3d 108 (2004).

Because review is de novo, rather than focusing on Vincent's voluminous citations to specific errors in the record, this response will consolidate those errors into the two fundamental issues in the case: (1) whether a resulting trust could have been found under any interpretation of the facts alleged in the complaint, and (2) whether such a resulting trust could have been found to be unrepudiated under any interpretation of the facts alleged in the complaint.

For the sake of simplicity, this argument will focus solely on the language in Vincent's amended complaint even though the original 12(b)(6) motion was based on the original complaint. Even after being given opportunity to reconsider and refile the complaint, Vincent still failed to state a claim upon which relief could be granted.

The facts alleged by Vincent's amended complaint are as follows, quoted directly:

- On or about August 25, 2004, Vincent and Samantha purchased the subject real property family home located at 9295 Dishman Road Northwest, Bremerton, WA 98312.
- The family home was purchased in the names of Howard and Nancy Allen, Samantha's parents, for ease of financing, with Nancy Allen making the down-payment as a gift to Vincent and Samantha. However, it was intended by all parties that Vincent and Samantha would make and did make the mortgage payments and all equity in the property belonged only to the marital community of Vincent and Samantha.
- Vincent and Samantha resided at the family home, made the mortgage payments, insurance payments, property taxes, utility payments, and Vincent made all repairs and upkeep of the house with the belief that the house was their own community property.
- On May 23, 2008, Vincent and Samantha were permanently separated and Vincent moved out of the family home on Dishman Rd while Samantha continued and continues to reside there.
- On May 7, 2012, Vincent and Samantha were divorced in Kitsap County Superior Court after a "default trial" during which

Samantha testified but concealed from the court that the family home was their community property. The court divided Vincent's and Samantha's community assets but did not address and did not divide the family home, on Dishman Road, in Bremerton.

(CP 28-29)

A. Creation of a resulting trust

The question, then, is whether under any conceivable interpretation of these pled facts, an action for a resulting trust can be shown. The necessary conditions of a resulting trust in real estate are described in *Carkonen v. Alberts* 196 Wash. 575, 578-579, 83 P.2d 899 (1938), as follows:

The authorities are uniform, however, that it is necessary in the creation of a resulting trust that the principal must have paid over his money at or [b]efore the execution of the conveyance from the vendor to the agent, or that the principal incur, at that time, an absolute obligation to pay as part of the original consideration of the purchase. The trust can not be created by an advance of the purchase money after the purchase has been made by the other with his own funds or on his own credit. A resulting trust must grow out of the facts existing at the time of the conveyance and

can not arise from a mere parol agreement that the purchase should be for the benefit of another.

Id., at 579.

Here, the complaint plainly alleges that the initial funds for purchase were given by the Allens, not by Vincent or Samantha. Title and financing were also taken in the name of the Allens. (CP 28) The complaint alleges that the funds were intended to be a gift to Vincent and Samantha, but the intent to make a gift does not create a resulting trust. The funds of the initial purchase must be provided by the alleged “principal” of the trust, at the time of purchase, or no resulting trust is created.

Alternatively, it is possible to show a resulting trust if the principal incurred, at the time of purchase, an “absolute obligation to pay as part of the original consideration of the purchase.” *Id.* In other words, if Vincent alleged that he had co-signed on the mortgage at the time of purchase, he would have incurred such an absolute obligation to pay as part of the original consideration. However, Vincent does not allege such facts and instead alleges that it was taken in the Allens’ names specifically for “ease of financing.” (CP 28) His subsequent supplying of funds to make payments on the mortgage cannot change the nature of the initial transaction.

Resulting trust is a doctrine that exists to characterize a transaction that might, on the face of it, be interpreted as a gift: where one party provides the funding, but the title is taken in the name of another party. It is never used to enforce a gift where one party provides the funding and takes it in their own name, and a third party claims that it really was meant to be a gift to them. Yet this precisely the situation Vincent has alleged in his complaint and continues to allege on appeal.

Despite Vincent's repeated argument that he never alleged any "parol agreement," it is plain from his complaint that his alleged interest does not arise from the land transaction instruments in the case, the deed and mortgage, which he acknowledges in his complaint are in the name of the Allens. Any intention or document or agreement other than these is parol—that is what parol evidence is, evidence (whether written or oral) outside a written, complete instrument such as a deed or a mortgage.

Buyken v. Ertmer, 33 Wn.2d 334, 341-342, 205 P.2d 628 (1949). Failure to use the word does not change the nature of the allegation made.

This is not a case where the complaint is missing some facts which could later be added on discovery; this is a case where the facts actually pled in the case (most of which are matters of public record) directly contradict all theories of law advanced.

Under the greatest possible stretch, the facts alleged by the complaint are precisely that situation which *Carikonen* says is not a resulting trust: a parol agreement that the purchase should be for the benefit of another.

B. Repudiation of a resulting trust

Even if a resulting trust could be found to exist, Vincent's complaint fails on its face because the facts he alleges show that he had full notice that no trust was being maintained for his benefit more than three years before he filed his action.

First, the three-year statute of limitations was properly used by the court below for the resulting trust as well as all other claims. *Arneman v. Arneman*, 43 Wn.2d 787, 797, 264 P.2d 256 (1953). Vincent is correct in asserting that if there were a resulting trust, the statute of limitations would not begin to run until it was repudiated.

The facts alleged in the complaint, however, demonstrate unequivocal actions repudiating any possible trust more than three years before the action was filed. "A repudiation occurs when the trustee by words or other conduct denies there is a trust and claims the trust property as his or her own." *Goodman v. Goodman*, 128 Wn.2d 366, 373 (Wash. 1995). For repudiation of a resulting trust to occur there must be repudiation by trustee, and notice to the beneficiary. Restatement 2d of

Trusts, Sec. 409. As the comment on the Restatement says, “Such repudiation need not be in specific words; it may consist of conduct on the part of the trustee inconsistent with the existence of the trust.”

The treatment of property in a legal proceeding may serve as repudiation of the trust. For example, in the case of *Skok v. Snyder*, 46 Wn.App. 836, 841, 733 P.2d 547, (Wash.App. Div. 3 1987), the conduct that was found to repudiate the trust was requesting in a probate that the trust property be used to provide a homestead interest. *Id.*, at 841. (Although *Skok* deals with an express trust, the nature of repudiation remains the same.)

As stated in the Amended Complaint, Samantha did not list any marital interest in the property during the dissolution proceeding nor acknowledge the home to be a family asset. (CP 29) Although this was not an action by the Allens, it was certainly notice to Vincent that no interest in the property was being held for him. The action by the Allens which repudiated the trust was simply treating the property as their own—holding it in their own names as their own asset.

The case law does not appear to require, nor does it seem a necessary limitation, that the notice be communicated directly by the trustee. Notice supplied by a third party of the trustee’s actions is still notice that provides the beneficiary a basis for action.

Vincent already knew the property and the associated mortgage were held in the Allens' name. He had ceased to live on the property for many years. He knew there was no formal agreement nor segregation of the asset nor any other indicia of trust. All of these facts he states within his own complaint. Under such circumstances, notice of formal court proceedings which should list the alleged "trust" interest, but do not, should be ample notice of repudiation of trust.

Naturally the point Vincent tries to argue is that some additional action by the Allens was necessary for repudiation, besides owning the property in their own name and without any outward indication of trust, and his knowledge of that action—which only highlights how problematic his allegation of "resulting trust" is. It is too much to ask of the property owners of Washington that they constantly be disclaiming possible "resulting trust" interests on property they own and sign the mortgage on for every person who has temporarily resided there.

C. Peripheral procedural matters

1. Filing of an answer

Vincent complains that Samantha and the Allens have not filed an answer or other evidence. (Appellants' Brief, p. 2, p. 9) A motion under CR 12(b)(6) should be brought before making further pleading: "A motion making any of these defenses shall be made before pleading if a further

pleading is permitted.” CR 12(b). Even a summary judgment motion does not require an answer before being raised: “A party against whom a claim, counterclaim, or cross claim is asserted or a declaratory judgment is sought may move with or without supporting affidavits for a summary judgment in such party's favor as to all or any part thereof.” CR 56(b). Therefore, this claim of error is without merit.

2. Record on Appeal

Vincent also complains that the pleadings in the former divorce proceeding were not made part of the record. (Appellant’s Brief, p. 2) The superior court did take judicial notice of its own former proceedings without formally including copies in the record in the current case, but in doing so its findings that only confirmed the facts alleged in the complaint: A decree distributing the property was entered on May 7, 2012, and the house was not listed as one of the marital assets. Vincent alleges no prejudice resulting to him from the review of these public domain documents leading to the same conclusion he alleges in his complaint.

In the interest of simplifying the appeal, Samantha and the Allens have not sought to include these additional records but are willing to rest on the complaint itself. They are, however, willing to supplement that record if the appeals court finds it beneficial.

3. Responses not “in strict reply.”

Vincent also complains several times that reply or response motions were not “in strict reply” in violation of KCLCR 7(b)(1)(A). (Appellant’s Brief, p. 3, 4, 5, 6, 7, 10, 11, 12, 13, 14, 18, 23, 24, 38, 39, 40, 41, 42). However, he alleges no prejudice that resulted from this alleged lack of strict reply. Further, all pleadings below were and remained focused on the original question of whether any claim of the complaint was within the statute of limitations; clarification of legal issues as the pleadings proceed is a natural and proper result of the motions process. Finally, as review on these issues is de novo, the claimed lack of strict reply has no bearing on this court’s review of whether Vincent has in fact failed to state a claim upon which relief can be granted.

D. Attorney’s Fees

Decisions either denying or granting sanctions are generally reviewed for abuse of discretion. *Washington State Physicians Ins. Exchange & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 858 P.2d 1054 (1993). The purpose of CR 11 sanctions is “to deter baseless filings and to curb abuses of the judicial system.” *Biggs v. Vail*, 124 Wn.2d 193, 876 P.2d 448 (1994), citing *Bryant v. Joseph Tree, Inc.*, 119 Wash.2d 210, 218-19, 829 P.2d 1099 (1992).

CR 11 provides for the permissibility of attorneys' fees for pleadings or motions filed in violation of the following standard:

The signature of a party or of an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading, motion, or legal memorandum, and that to the best of the party's or attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is well grounded in fact;

(2) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation . . .

The imposition of CR 11 sanctions for a baseless filing must be based on the failure of the attorney to conduct a reasonable inquiry into the factual and legal basis for the claim. The standard of reasonableness is an objective standard. *Stiles v. Kearney*, 168 Wn.App. 250, 277 P.3d 9 (Div. 2 2012). It is sufficient to either show the lack of a reasonable basis or to show improper purpose; it is not necessary to show both. *Eller v. East Sprague Motors & R.V.'s, Inc.*, 159 Wn.App. 180, 191; 244 P.3d 447

(Div. 3 2010) When the documents in the case provide the totality of the available evidence, it is not improper for the appellate court to review them directly to determine whether the complaint has an adequate factual and legal basis. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 222, 829 P.2d 1099 (1992).

In the instant case, Samantha and the Allens requested attorneys' fees based on Vincent's bringing of the action more than three years after all possible causes of action had accrued, and Appellant (and his attorney) being fully aware of them for that entire time period. Appellant did not raise at the trial level nor has yet raised any reason why he could not have brought this alleged action in the past three years, nor any argument why he should be exempt from the statutes of limitations.

It may also be noted that Vincent (and his attorney) had every opportunity to raise these issues in the earlier dissolution proceeding, which they had proper legal notice of and participated in, and which they attempted to appeal all the way to the Supreme Court. *In re Marriage of Badkin*, 43900-0-11 (Div. II, 2015); *In re Marriage of Badkin*, 352 P.3d 187, 183 Wn.2d 1010 (2015).

Essentially, this action is a groundless attempt to rewrite a dissolution decree more than three years after it was entered, brought by the attorney who was responsible for the former action. Not content with

the dismissal of his complaint, Vincent moved for reconsideration.

Unwilling to accept that loss, Vincent has appealed. There appears to be no lengths to which Vincent and his attorney will not go to continue legal action against Samantha and now her parents.

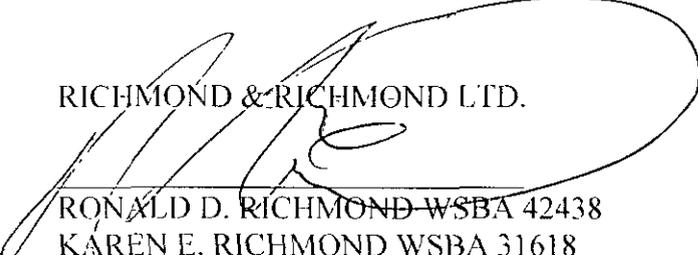
The pleadings and motions signed were not well grounded in fact, were not well grounded in law, and under the circumstances appear strongly indicative of an attitude that simply cannot take no for an answer, and therefore must be deterred. These are not the actions of a zealous attorney attempting to find help for his client after arriving late on the case, but of an attorney who has been fully involved, aware of all issues, and representing his client since 2011, but who will not give up regardless of the law or the facts.

Such endless pursuit of Samantha and her parents is exactly the sort of abuse of the legal system that CR 11 exists to censure. Vincent's attorney, as long as they face no consequences for this conduct, can continue indefinitely to come up with extravagant legal theories and avenues for action which will force Samantha and the Allens to incur defense costs. It was an abuse of discretion for the trial court not to impose CR 11 sanctions of fees and costs on Appellant for bringing this groundless action.

VI. CONCLUSION

Samantha and the Allens request that this court confirm the trial court's dismissal of Vincent's case for failure to state a claim upon which relief can be granted, overrule the trial court's denial of CR 11 sanctions, and remand for determination of fees and costs. Regardless of the ruling on the CR 11 sanctions, they request costs on appeal pursuant to RAP 14.2.

RESPECTFULLY SUBMITTED this 18th day of August, 2016.



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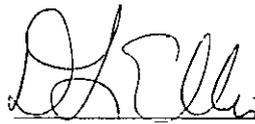
CERTIFICATE OF SERVICE

The undersigned certifies that she is an employee of Richmond & Richmond, Ltd., and is a person of such age and discretion as to be competent to serve papers:

I certify that on the date below, I served the foregoing on the person(s) herein after named via U.S. first class mail, postage prepaid, addressed as follows:

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DATED this 22nd day of August, 2016.



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