

No. 49815-4-II

COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

2nd HALF LLC,

Appellant,

vs.

HEATHER RANKOS and GEORGE RANKOS, and their marital
community and BARBARA WEBSTER, and JAMES and JUDITH
BETOURNAY and their marital community,

Respondents.

RESPONDENTS RANKOS' AND WEBSTER'S RESPONSE

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1. Overview

This Court strives to decide cases on their merit and at times will overlook minor flaws of procedure and form to do so. However, some flaws are so fundamental no liberal reading of the rules will forgive them. Appellants' brief founders on a myriad fundamental failings

Ostensibly appellant appeals from summary judgment orders yet does not assign error to either those orders or the judgment. Further, despite in one breath acknowledging this Court will affirm summary judgment on any issue, in the next breath appellant provides argument on only one issue ignoring the others the motions were based on. Worse, appellant's entire brief is merely rebuttal of an oral comment by the Trial Court. Oral comments are of no weight other than to provide context to assist review. A Trial Court order cannot be impeached by an oral remark. Even if appellant persuades this Court a stray oral comment was incorrect, that cannot lead to reversal of summary judgment orders. Finally, appellant mischaracterizes what the Trial Court said.

2. Argument

**A. APPELLANT'S BRIEF CONSTITUTES A
FUNDAMENTAL FAILURE OF APPELLATE
PROCEDURE**

It is a bedrock of appellate procedure that a party must assign error to be reviewed. RAP 10.3(a)(4). The "failure to assign error to and

argue against the Court’s decision... waives any argument...” Jackson v. Quality Loan Service Corp., 186 Wn.App. 838, 846 (2015).

Although imprecise assignment of error will at times be forgiven if clarified in the brief, no authority could be found allowing an appellate court to overlook the total failure to assign as error any order or decision which, if wrong, could justify reversal.

Error is not assigned by flyspecking a supposedly incorrect statement by the Trial Court. Arguments a Trial Court made “statements” in its “oral decision” that were error “do not constitute proper assignments of error.” Rutter v. Estate of Rutter, 59 Wn.2d 781, 784 (1966).

Further, even if an appellant can identify a stray comment that was erroneous, such cannot be used to “impeach the findings or the judgment.” Id. Once an order is reduced to writing, oral comments may only be used, if at all, to provide context to assist review. Id.

As a review of summary judgment, it is well settled this Court

review[s] de novo a trial court's grant of summary judgment. [The court] may affirm on any basis supported by the record whether or not the argument was made below.

Bavand v. Onewest Bank, 196 Wn.App. 813, 827 (2016).

Appellant assigned no error as required by RAP 10.3(a)(4) to any appealable decision of the Trial Court. On an appeal of summary judgment, the appellant must assign as error the order on summary

judgment and/or the judgment itself. It is error in entry of one of those orders that might justify reversal.

Without assigning error to any actual order or decision, appellant has accepted those orders are without error. Jackson.

The entirety of appellant's brief is an argument that an oral comment by the Trial Court was incorrect. Even if true, that allegedly incorrect oral statement may not be used "to impeach... the judgment" dismissing appellant's claims. Rutter, 59 Wn.2d at 784. Yet, that is all appellant has done.

Appellant has lost sight of the forest for the trees by forgetting it is appealing, ostensibly, the orders on summary judgment because only error of those orders may lead to reversal. Stray remarks from the bench are not what dismissed appellant's case.

Even if this Court is willing to overlook appellant's failures and consider on the merits its argument the Trial Court made two incorrect statements, appellant acknowledges but then ignores respondents moved for summary judgment on a myriad of issues that also justified dismissal that appellant provides neither argument or authority on. Not having briefed those issues demonstrating they did not support summary judgment, appellant accepts their correctness and may not be heard to raise them for the first time in reply. See Collins v. Clark County Fire Dist.

No. 5, 155 Wn.App. 48, 96 (2010) ([A]n appellant's brief must include arguments supporting the issues presented for review and citations to legal authority. Without supporting argument or authority, an appellant waives an assignment of error.”)

Thus, this Court could agree with appellant that the Trial Court’s oral comments were incorrect. Appellant’s failure to provide briefing on the other grounds for summary judgment concedes their correctness and waives any error dismissing the case for them. Bavand, *supra*.

Finally, but by no means not least, appellant’s notice of appeal identified only the Trial Court’s November 23, 2016 order of summary judgment dismissing respondent Rankos as the order it is appealing. Appellant has not appealed at all, much less timely appealed, any other order including but not limited to (1) the order of summary judgment on March 25, 2016 granting respondent Webster’s motion for summary judgment dismissal (CP 519) or (2) the order denying reconsideration dated April 29, 2016 of the March 25, 2016 Webster motion for summary judgment dismissal. (CP 533) Nor did appellant appeal any of the orders granting respondents their attorney’s fees for prevailing under the Condominium Act and/or condominium by-laws. RAP 5.3(a)(3) requires the notice of appeal to “designate the decision or part of decision which the party wants reviewed.” Appellant has not appealed the dismissal of its

claims against respondent Webster. It only provided notice of appeal of the order dismissing the Rankos (and did not assign specific error to the dismissal of Webster.) Not only does that preclude review of the order as to Webster, as a matter of estoppel it bars seeking review of the dismissal of respondents Rankos as the claims are identical, arising out of the same facts.

Frankly, respondents need say nothing else in response. These failures by appellant are dispositive. However, without waiver and for the sake of completeness, respondents will continue.

B. THE ORAL COMMENT APPELLANT ASSERTS WAS SAID IN ERROR WAS BOTH UNSAID AND NOT ERROR IF SAID

Appellant asserts the Trial Court said on reconsideration of respondent Webster's order of summary judgment, and on the subsequent summary judgment motion of Rankos, that appellant could not make a claim directly against respondents but instead had to sue the HOA and could reach the board members only derivatively. Appellant contends such comments are contrary to Alexander v. Sanford, 181 Wn.App. 135 (2014). Appellant reasons that if those oral statements were incorrect, the entirety of both orders on summary judgment are error.

Even if appellant persuades this Court those statements were made and were incorrect, that would not support reversal. Rutter. However, the Trial Court did not say what appellant contends.

On respondents Rankos' motion for summary judgment, and as even the portion of the transcript cited by appellant makes clear, the original Judge explicitly said on reconsideration that appellant had "standing, for lack of a better term" to assert its claims. (Appellant brief, p. 5, and RP 4). Right there, the entire thesis of appellant's appeal is revealed to be without a good faith basis in law or fact: the Trial Court did not say what appellant certified was said.

The Trial Court did not find appellant had no standing to bring its claims directly against respondents. The Court simply found appellant failed to create a question of fact on respondent Webster's summary judgment motion: "I don't think there are any facts or more reasonable inference that shows she (Ms. Webster) breached any duty individually owed to 2nd half, LLC, an individual member of the condominium Association." RP 4. The Court did not say no duty was owed nor that there were no circumstances where appellant could ever sue respondents. The Court only said that here, it found no evidence of a breach of a duty.

Appellant also fundamentally mischaracterizes the record on respondents Rankos' summary judgment motion.

First, nowhere in the transcript cited by appellant does the second Trial Judge indicate it was granting respondent Rankos' motion over a lack of standing as appellant certified to this Court. Indeed, the entire portion of the transcript cited by appellant is its attorney (1) trying to put words in the Trial Court's mouth regarding what the first judge supposedly based his decision on and (2) appellant's attorney's statement he believes the first trial judge read Alexander incorrectly.

It is true the second Trial Judge said he disagreed with how appellant was reading Alexander. However, what the Trial Judge did not say was that he was granting the Rankos' motion for summary judgment over a lack of standing by appellant based on Alexander as appellant prefaces its entire appeal on. Further, the second Trial Judge did not even say, as appellant assumes/requires, that plaintiff may not sue board members individually. The only thing the Trial Court said was it "disagreed" with appellant's counsel's statement that the order on Webster's motion "is directly in conflict with the Andrews (sic, it is assumed he meant to say Alexander) case which says there is a direct cause of action." The Trial Court said it disagreed with counsel; not that appellant could not bring a direct action.

Finally, and while not necessary for this court to reach but to take head-on the gist of appellant's argument, it is incorrect as appellant

suggests that Alexander holds an individual HOA member may sue HOA board members on the claims the appellant has made here.

In Alexander, individual HOA members were found to have standing to sue HOA board members when it was alleged those board members directly and as against those homeowners engaged in acts that damaged the individual HOA members bringing suit. On that, Alexander was clear:

[The] homeowners asserted that they sustained damages to their individual property... Because homeowners alleged damage to their own property, they have standing to assert their claims.

Alexander, 181 Wn.App. at 149. Alexander did not hold homeowners may sue individual board members to bring claims that belong to the HOA. Appellant confuses the issues.

The gist of appellant's claims is allegedly respondents failed to collect HOA dues owed to the HOA. Appellant brought no claim, and provided no argument or authority in its opening brief, that respondents committed any act against appellant that gave rise to damage in appellant.

Thus, even if appellant's factual allegations were admitted, appellant has no standing to bring the claims specifically brought here.

It is respectfully suggested appellant's argument on this point is truly frivolous. Appellant has seized on a fly specked portion of Alexander holding individual homeowners may sue individual board

members directly, while ignoring the other 52 pages of the opinion making it clear such a claim may be made only as to damage sustained by the individual homeowner. If appellant's counsel discerned the two different Trial Judges told him (the attorney) that he was incorrect in his reading of Alexander, that is why.

Putting aside the failure of appellate procedure that constitutes appellant's opening brief by relying exclusively on the two Judges' offhand oral remarks, appellant's argument has support of neither the transcript or the case it relies on. Even a cursory review of either the transcript or Alexander immediately reveal that. Appellant and counsel ought to be sanctioned. As demonstrated in the clerk's papers, appellant and its attorney have engaged in a years long crusade of vexatious and baseless litigation against respondents. This appeal, standing on the shoulders of not reading or otherwise mischaracterizing both the transcript and case law, is the pinnacle of that long-standing course of conduct.

C. RESPONDENTS RAISED A MYRIAD OF ISSUES INDEPENDENTLY JUSTIFYING SUMMARY JUDGMENT

Given appellant in its opening brief provided no authority or argument the other issues raised on summary judgment did not justify dismissal, respondents need not defend them here. Without waiver of that, respondents will for completeness identify a few issues.

i. **The Allegedly Uncollected HOA Fees Appellant's Lawsuit Relied On Were In Fact Collected**

Preliminarily, the context of this lawsuit and appellant's appeal is the allegation that respondents as board members of a homeowners association breached duties by failing to collect fees (dues and assessments) from a different member of the HOA allegedly in exchange for voting respondents onto the HOA board.

Respondents moved for summary judgment presenting evidence the fees appellant contended were not collected as the lynchpin of its entire case, were in fact collected. The fees appellant frivolously asserts were never paid, were owed by James and Judith Betournay. CP 415. The HOA dutifully filed a lien on the Betournays' unit for the unpaid fees. CP 415. The Betournays could no longer afford to keep their unit and attempted to negotiate a deed to the lender in lieu of foreclosure. CP 415-416. To facilitate that, they asked the HOA to release its lien on the property so the lender could accept the deed in lieu of foreclosure. CP 415-416. There was no agreement the fees were not owed and need not be paid. Id. and CP 41. The HOA agreed to remove its security interest to facilitate the Betournays' property transfer but that was to obtain payment of the fees. The Betournays could not afford to pay the fees – they could not even afford to keep their condo. Thus, the HOA removed the lien, did

not agree to waive the fees, and when the new purchaser of the property obtained title it was required to and in fact did pay \$12,194.84 to the HOA representing the full fees owed by the Betournays. CP 416, 749.

Therefore, even within appellant's case theory that there could be a breach for not collecting fees, the claim failed on its face: the fees were collected in full. Appellant created no question of fact on this issue. The lynchpin of the entire lawsuit was simply false. The lawsuit, and this appeal over it, are frivolous.

ii. **The Claims Made Were Decided Adversely To Appellant In Prior Litigation – It Was Estopped From Raising Them Again**

The manager of the appellant (Mr. Graham) in an earlier lawsuit personally alleged he was wrongly removed from the HOA board by respondents by “basically vote buying by the Rankos who are offering to release liens for dues to owners show to with electing (them) to the board.” CP 308-309. That is the same argument made by Mr. Graham's LLC (the appellant) here; that Mr. Graham was removed by buying votes. CP 1-11. However, before summary judgment was granted in this case, on April 17, 2015 the Superior Court ruled in the previous lawsuit that Mr. Graham (the owner of the LLC suing here) was validly removed” at an “annual meeting.” That is the same claim made in this case.

Collateral estoppel prevents the same claim being made twice and is applied if the following questions are answered in the affirmative:

(1) Was the issue decided in the prior adjudication identical with the one presented in the action in question? (2) Was there a final judgment on the merits? (3) Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication? (4) Will the application of the doctrine not work an injustice on the party against whom the doctrine is to be applied?

Clausing v. Clausing, 47 Wn.App. 676, 680-681 (1987).

(1) The issue decided in the prior adjudication, despite any minor difference in syntax appellant might identify, is the same: did respondents exchange waiving HOA fees for HOA votes.

(2) There was a final judgment on the merits in the prior case by way of a summary judgment order.

(3) Mr. Graham is in privity with the party in this case because he manages the LLC that is the appellant in this case.

(4) There is no hardship against appellant by the application of collateral estoppel.

Appellant's claims were also barred by res judicata. Even if a minor difference may be parsed out in the syntax used between the two lawsuits, if there is a difference such a claim could and should have been made in the earlier lawsuit. A subsequent action shall be dismissed when "the relief sought could have and should have been determined in a prior

action.” Schoeman v. New York Life Ins. Co., 106 Wn.2d 855, 859 (1986).

There are four elements to res judicata; a concurrence in the (1) subject matter; (2) cause of action; (3) persons and parties; and (4) the quality of the persons or against whom the claim is made. Id. at 858. All are present here.

In the case at bar, appellant alleges there was a breach of duty by respondents regarding the collection of HOA fees in exchange for votes. Even assuming that is true, that could have and should have been made a claim (assuming it was not, it was) in the earlier litigation that found Mr. Graham was not improperly removed from the HOA because there was no vote buying as alleged. The parties are all essentially the same; the only difference is Mr. Graham is now cleverly suing through the LLC he controls versus using his own name as he did in the prior lawsuit as the LLC’s manager.

Appellant cannot have it both ways. Either the allegation of the present lawsuit is the same as in the prior lawsuit adversely decided. Or the allegation of the present lawsuit should have been made in the prior lawsuit but was not. In either event, by application of either collateral estoppel or res judicata, appellant was barred asserting the claims made here and the Trial Court was justified dismissing them on summary

judgment. Appellant and its lawyer cannot use the subterfuge of using different names, to make the same claims repeatedly.

iii. The Appellant Sued The Wrong Parties

In its complaint, appellant alleged the individual respondents breached their duty by not collecting HOA fees. Even if true, these individual respondents did not engage in that conduct. None of these individuals belong to the HOA. Not Webster, CP 536-537, or the Rankos. CP 308-309. Instead, those individuals are members of LLCs and it is the LLCs that belong to the HOA. If there was a breach of duty in not collecting fees, it was by those LLCs, not the individuals appellant sued.¹ The individuals sued are merely managers/owners of the LLCs.

Making appellant's failure of pleading worse, it did not sue a necessary party as required by CR 12(b)(7). Despite the fact the gist of appellant's lawsuit was that HOA fees were not collected by the HOA, of fees due to the HOA, appellant did not even sue the HOA.

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¹ This is an issue distinct from Alexander. At best, Alexander would allow an injured homeowner to sue a board member who by their conduct directly injured the homeowner. However, in Alexander the board members sued were in fact owners within the HOA individually and thus were on the board individually. In this case, appellant ignores the actual homeowners were LLCs and thus it was not the individual humans who sat on the board who were the Board members but instead the LLCs that owned the individual condominiums that were the Board members. The humans sitting in the chairs were merely the managers/owners of those LLCs – they were not there in their individual capacities.

D. RESPONDENT'S ACTUAL FEES AND COSTS SHOULD BE AWARDED – AN ADDITIONAL SANCTION SHOULD BE CONSIDERED

Pursuant to RAP 18.1 respondents ask for their actual fees and costs under statute, contract, and RAP 18.9.

Appellant invoked the Condominium Act (RCW 64.34.455) which provides for an award of attorney's fees to the prevailing party. Below, respondents were awarded their actual fees and costs in obtaining dismissal of appellant's claims. Fees are also available under the parties' HOA agreement. Provided the summary judgment dismissal orders are affirmed, respondents are no less entitled to those fees on appeal.

Respondents respectfully move this court for an order awarding fees and costs and setting forth the mechanism whereby respondents may prove those fees and costs up. It is respectfully suggested respondents should be given leave to file a statement of those fees and costs to the clerk of this court. Alternatively, this court could remand to the Trial Court for a determination.

Further, it is respectfully submitted fees and costs, if not an additional sanction, should be ordered in accord with RAP 18.9(a). Respondents will not belabor the point as argument supporting this inheres in the foregoing.

Appellant's failure to identify any order and assign it as error, or make any argument that the myriad of other reasons offered on summary judgment supporting the decision were error, makes this appeal so devoid of merit as to indeed be without a good faith basis in fact or law under RAP 18.9(a).

The underlying core of the appeal, that the Trial Court made an offhand oral remark that was supposedly error, that was neither said nor error if said, is frivolous.

As the materials in the Clerk's Papers demonstrate, which respondents will not take time to recount in detail here, appellant and its attorney have been engaged in a years long crusade to harass respondents through an ongoing course of vexatious litigation. Appellant and its attorney have sued the respondents a variety of times, on exactly the same claims, engaging in the fraud and artifice of slightly changing the syntax of the allegations when what is at issue in each case was clearly the same. Further, they have closed their eyes to objective facts (the HOA fees were collected), have misstated the law (Alexander), and simply misrepresented what the Trial Judges said below on summary judgment.

It is suggested to be plain that neither appellant or its attorney are deterred by simply losing every case they have filed against respondents. Some additional deterrent is necessary. Respondents will not gainsay

what that should be. But, if filing a multiplicity of lawsuits over a span of years, losing every one, and already being ordered to pay fees (in this case below) is not sufficient deterrent, it is respectfully suggested only a dramatic and meaningful deterrent will have any effect.

In this context, respondents do not seek to profit. The court may order the proceeds of a sanction paid to the general fund of the State. However, this years long course of litigation harassment needs to stop.

DATED this 22nd day of September, 2017.

McGAUGHEY BRIDGES DUNLAP, PLLC

A handwritten signature in blue ink, appearing to read 'D. Bridges', written over a horizontal line.

By:

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September 22, 2017 - 1:31 PM

Transmittal Information

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Appellate Court Case Number: 49815-4
Appellate Court Case Title: 2nd Half LLC, Appellant v. Heather Rankos, Respondent
Superior Court Case Number: 15-2-13053-1

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