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No. 72711-7-1

Skagit County Superior Court No. 10-2-00587-3

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

Edward M. Goodman and Bernice S. Goodman, husband and wife,

Plaintiff/Respondent,

v.

Michael J. Goodman and Mary F. Goodman, husband and wife,

Defendant/Appellants.

RESPONDENTS' BRIEF

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COUNTY OF SKAGIT
STATE OF WASHINGTON
B

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- APPENDIX A Notice of Appeal to Court of Appeals, dated February 15, 2012
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- APPENDIX C Washington Supreme Court Cause Number 91287-4, Ruling Denying Review, July 2, 2015
- APPENDIX D Washington Supreme Court Cause Number 88811-6, Ruling Denying Review, June 25, 2013
- APPENDIX E Court of Appeals, Division 1, Order Denying Motion to Reverse and Denying Motion to Stay Trial Court Proceedings, April 23, 2013
- APPENDIX F Appellants Motion to Reverse Trial Court Order Denying Affidavit of Prejudice, February 3, 2013
- APPENDIX G Appellants Emergency Motion For Stay of Trial Court Proceedings, February 13, 2013
- APPENDIX H Order Granting Defendant's Motion to Dismiss, Superior Court Cause Number 11-2-02193, June 30, 2015
- APPENDIX I Court of Appeals, Division One, Cause Number 73115-7-1, Commissioner's Ruling Dismissing Appeal, April 28, 2015
- APPENDIX J Court of Appeals Division One, Cause Number 67403-0-1, Order Denying Motion To Modify, November 22, 2011
- APPENDIX K Court of Appeals Division One, Cause Number 70093-6-1, Mandate, January 24, 2014

A. INTRODUCTION

This is the second appeal of the same Superior Court matter filed by Appellant Mary Goodman. The first appeal to this Court of this matter was in Cause Number 68416-7-1, which affirmed the trial court, review denied by the Washington State Supreme Court in Cause Number 88811-6. Mary Goodman was a party to that appeal dated February 15, 2012.

Appendix A.

Over the past three and a half years many other appeals have been filed by Mary Goodman's husband and sons both to this Court and the Washington State Supreme Court. In all instances the trial court has been affirmed.

B. STATEMENT OF THE CASE

This case involves a real property dispute between family members. Edward Goodman and Michael Goodman are brothers. CP 192-211, Finding 3. The subject real property is adjacent to Lake Campbell in rural Skagit County and originally consisted of 26 acres. CP 192-211, Findings 1 and 2. In 1977 the property was conveyed to Plaintiffs Edward and Bernice Goodman by Ruth Goodman, mother of Edward and Michael. CP 192-211, Finding 11. In 1979 the brothers shared the expense of hiring a surveyor to short plat the 26 acres and four lots were created. CP 192-211, Findings 15 and 16. The brothers shared the expense of building a road to the undeveloped portion of the property from the County road with

the intention that it would provide access to future home sites and the lake front. CP 192-211, Findings 29, 31 and 32. A portion of the road was paved in 1979 and became the first vehicle access to the interior of the subject property. CP 192-211, Findings 34 and 35.

After the road was completed Edward Goodman placed a trailer at the top of the hill where he planned to one day build a home. CP 192-211, Findings 37. The short plat was completed in 1980. CP 192-211, Finding 21.

The brothers agreed that whoever started home construction first would have his choice of lots. Defendant Michael Goodman started construction first and selected Lot 2, which Plaintiffs conveyed to Michael and Mary Goodman by quit claim deed in 1980 as a gift. CP 192-211, Findings 22 and 41. The deed contained no express easement, but there was a notation on the plat map providing for an easement over lot 2 for benefit of lot 3, which was owned by Edward Goodman. CP 192-211, Findings 23, 24 and 42. The road became a shared driveway and is the only practical or feasible access to Lot 3, which is the lot owned by Edward and Bernice Goodman. CP 192-211, Findings 52 and 53.

Edward Goodman installed a septic tank and drain field on Lot 2, which was approved by the County in 1979. The location of the septic system is shown on the short plat. CP 192-211, Findings 68, 69 and 74.

The septic system was installed on Lot 2 (Michael's lot) because Lot 3 (Edward's lot) is on a big rock and did not perc. CP 192-211, Findings 70. Edward and Bernice paid the cost of installing the septic system. CP 192-211, Finding 72.

The brothers worked together to install utilities in and adjacent to the shared driveway. They shared these costs, except the cost of the septic line which was paid by Edward Goodman. CP 192-211, Finding 71. The septic system was connected to a trailer that Edward parked on Lot 2 until he built a home on the lot in 1991. CP 192-211, Finding 80.

The two families, including wives and children, peacefully co-existed on Lots 2 and 3 until March 2010, when Michael Goodman began to investigate building an accessory dwelling unit on Lot 2. Michael confronted his brother while he was inspecting his septic system adjacent to the shared driveway. CP 192-211, Findings 85 and 86. The confrontation started the litigation between the parties and the issuance of a temporary restraining order against Michael and Mary Goodman and their adult sons. CP 192-211, Findings 87 and 88.

C. APPELLANT NOT ENTITLED TO SECOND APPEAL & RESPONSE TO APPELLANT'S MOTION IN BRIEF

This appeal was filed allegedly in response to the entry of a Judgment entered on October 8, 2014. Appellant sought review "*of the*

Judgment entered on October 8, 2014.” See **Appendix B**. The Brief of Appellant raises one assignment of error, which is that “*Judge Susan K. Cook erred to deny the affidavit of prejudice and motion.*¹” That issue has been reviewed by this Court and the Supreme Court on multiple occasions and the trial court has been affirmed. The assignment of error has nothing to do with the issue raised in the Notice of Appeal. Appellant used the entry of the Judgment in the trial court as an additional opportunity to appeal an issue that has been resolved multiple times.

The most recent decision by the Supreme Court in this litigation is attached as **Appendix C** and was entered July 2, 2015. The Commissioner’s Ruling gives a brief outline of the history of the litigation, including the issue of the affidavit of prejudice.

The affidavit of prejudice issue was reviewed by the Supreme Court earlier in a Ruling Denying Review dated June 25, 2013. See **Appendix D**. The Commissioner noted that Michael and Mary Goodman “inundated the Court of Appeals with motions, including a February 4, 2013, ‘Motion to Reverse Trial Court Order Denying Affidavit of Prejudice’” and denied discretionary review.

¹ Brief Of Appellant, page 10, Assignment of Errors No. 1.

This Court denied two motions filed by Michael and Mary Goodman by order entered April 23, 2013. See **Appendix E**. Those motions both addressed the affidavit of prejudice issue. See **Appendix F and G**.

The issue of the affidavit of prejudice is *res judicata*. Our Supreme Court has defined the doctrine as follows:

Res judicata is the rule, not the exception:

“ ‘The general doctrine is that the plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.’ ”

Schoeman v. N.Y. Life Ins. Co., 106 Wash.2d 855, 859, 726 P.2d 1 (1986) (quoting *Sayward v. Thayer*, 9 Wash. 22, 24, 36 P. 966, 38 P. 137 (1894)). However, res judicata does not bar claims arising out of different causes of action, or intend “to deny the litigant his or her day in court.” *Id.* at 860, 726 P.2d 1.

The threshold requirement of res judicata is a final judgment on the merits in the prior suit. *Id.* Once that threshold is met, res judicata requires sameness of subject matter, cause of action, people and parties, and “the quality of the persons for or against whom the claim is made.” *Rains v. State*, 100 Wash.2d 660, 663, 674 P.2d 165 (1983).

Hisle v. Todd Pac. Shipyards Corp., 151 Wn. 2d 853, 865-66, 93 P.3d 108, 114-15 (2004)

Appellant Mary F. Goodman was a party to these earlier appeals and had her day in court on this issue. At this very late date Appellant is

asking for another appellate review of the identical issue (affidavit of prejudice) involving identical parties.

D. APPEAL IS UNTIMELY

The only Assignment of Error is about a pre-trial event that occurred June 3, 2010. This issue was resolved by the Order Denying Motion To Reverse And Denying Motion To Stay Trial Court Proceedings entered by this Court on April 23, 2013. See **Appendix E**. Not only is this a matter resolved on the prior appeal filed by Appellant and her husband, it is untimely to file an appeal at this late date. RAP 5.2(a).

E. APPEAL NOT OF A FINAL JUDGMENT

The rules allow a party to file an appeal with this Court of a “Final Judgment”. RAP 2.2(a)(1). What was appealed is a Judgment entered October 8, 2014, long after the final decision in this matter. As stated above, the Assignment of Error has nothing to do with the issue raised in the Notice of Appeal. Appellant used the entry of the Judgment in the trial court as an additional opportunity to appeal an issue that has been resolved multiple times. RAP 2.2(a)(1) Decision Of The Superior Court That May Be Appealed states:

(a) Generally. Unless otherwise prohibited by statute or court rule and except as provided in sections (b) and (c), a party may appeal from only the following superior court decisions:

(1) Final Judgment. The final judgment entered in any action or proceeding, regardless of whether the judgment reserves for future determination an award of attorney fees or costs.

Our Supreme Court addresses the definition of “final judgment” in *Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn. 2d 481, 200 P.3d 683 (2009) in determining whether a voluntary dismissal was a “final judgment” and stated:

In ordinary usage, a “final judgment” is “[a] court's last action that settles the rights of the parties and disposes of all issues in controversy....” Black's Law Dictionary 859 (8th ed.2004).

Wachovia SBA Lending, Inc. v. Kraft, 165 Wn. 2d 481, 492, 200 P.3d 683, 688 (2009)

The entry of a judgment upon an award of attorney fees and costs was not the final judgment of the trial court in this matter. The final judgment was the Findings of Fact And Conclusions of Law And Order entered January 18, 2012 which resolved all the issues brought to trial that were in controversy. CP 192-211. The entry of a judgment against Defendants who did not pay fees and costs as ordered by the Court is not a final judgment subject to appeal.

F. MOTION TO STRIKE PORTIONS OF APPELLANT’S BRIEF

Appellant has made statements that are not supported by the record. In some instances the statements are untrue, but since they are not

in the record Respondents should not be forced to respond to such accusations and this Court should not consider assertions that are not part of the record below. Respondents ask the Court to strike the following from Appellant's Brief:

- “. . . Judge Cook signed an agreed order out of court.” Page 1
- “. . . Judge Cook signed an agreed order out of court, in a hallway.” Page 10
- “Mary used to live in the same neighborhood as Judge Susan Cook and even worked at the local Island Hospital before Judge Cook's legal career (Mary was an EMT and Susan Cook was a nurse).” Page 8.
- “Mary's property is destroyed. The subject property has lost 93% of the land value - \$480,000 - and does not leave sufficient remainder land. . . . The property title is no longer marketable.” Page 9
- “. . . the agreed order was signed out of court in the hallway . . .” Page 15

These references are not in the record and are more than mere argument based on the record below. The reference to loss of land value argument was made several years after trial, is not under oath and are not competent testimony.

G. MOTION TO STRIKE REPORT OF PROCEEDINGS

In an effort to promote a sympathetic profile Appellant has submitted the report of proceedings of a hearing on the October 8, 2014 before Judge Susan Cook on a motion for entry of a judgment against Defendants for a prior award of attorney fees. The transcript was not prepared by a person who purports to be a “court approved transcriber” as required by RAP 9.2(a). Appellant used that opportunity to cross examine the trial judge about events that occurred more than four (4) years prior related to the affidavit of prejudice. Appellant then made a presentation about damage to the marketability of her property allegedly caused by the decision of the trial judge. She also makes allegations about how and when a prior court order was entered.

Appellant was not under oath, this is simply her argument in response to a motion for entry of a judgment. There was no cross examination of the Appellant. This all occurred years after the event which is the only subject of the Assignment of Error in Appellant’s Brief. The report of proceedings of the October 8, 2014 hearing should be stricken.

H. TRIAL COURT EXERCISED DISCRETION

This Court has resolved the affidavit of prejudice issue, but Respondents will provide a substantive response to Appellant’s continuing argument about the trial court denial. Judge Cook determined that the

affidavit was not timely because she had already made a discretionary ruling on April 23, 2010. The verbatim report of proceedings support's the trial judge's determination.

Appellant relies on the name of the April 23, 2010 order and not on the facts that preceded entry of the order. Appellant relies on two Washington Supreme Court cases to argue that since the April 23, 2010 was an "agreed" order, the judge exercised no discretion. She selectively quotes only a portion² of the holding in *State v. Parra*, 122 Wn. 2d 590, 859 P.2d 1231 (1993), which distinguishes the earlier case of *State ex rel. Floe v. Studebaker*, 17 Wash.2d 8, 134 P.2d 718 (1943). In *Parra*, supra, the Supreme Court stated:

The distinction between the agreement reached in *Floe* and the omnibus order here is that the parties had not resolved the issues between themselves.

State v. Parra, 122 Wn. 2d 590, 600, 859 P.2d 1231, 1237 (1993)

The parties in the instant case clearly had not resolved their differences when they came into court for a show cause hearing on April 23, 2010. Legal counsel for Appellant objected³ several times during the

² Brief of Appellant, page 15.

³ April 23, 2010 hearing RP at page 2, lines 13 and 24; page 3, line 24.

hearing. Legal counsel told the court several time that his clients disputed⁴ the proposed order. He told the court the prior restraining and show cause orders were illegal⁵. Counsel for Appellant argued that the restraining order should be “some kind of a mutual order.” (RP6)

As Judge Cook noted there was much emotion and advocacy over the temporary restraining order at the show cause hearing. She at one point told counsel for Appellant to “take a deep breath” (PR 7) and invited him to “settle down” (RP 4) during the hearing. This was not simply a matter of entering a routine agreed order as Appellant now suggests.

It should also be noted that Judge Cook had entered two prior orders on April 13 and April 9, 2010 that were not contested and were service on the defendants.

I. MOTION FOR ATTORNEY FEES

Pursuant to RAP 18.9 Respondents seek an award of attorney fees in this frivolous appeal. Attorney fees have been granted by the trial court, this Court and the Supreme Court against Appellant and her husband and their sons. After 5 years of litigation and multiple appeals the Michael and Mary Goodman family continue to pursue appeals which require Respondents to pay lawyers to defend. This is a strategic abuse of the civil

⁴ April 23, 2010 hearing RP at page 4, lines 21 and 24; page 5, lines 12 and 15.

⁵ April 23, 2015, page 7, line 18.

process by Appellant and her family involving current appeals and litigation on multiple levels, including the following:

- Michael J. Goodman, Petitioner, Washington Supreme Court Cause Number 91287-4, Ruling Denying Review, July 2, 2015. See **Appendix C**.
- Tyson Goodman, Plaintiff, Skagit County Superior Court Cause Number 11-2-02193-1, Order Granting Defendant's Motion To Dismiss⁶, June 30, 2015. (**Appendix H**)
- Chance Goodman, Appellant, Court of Appeals, Division One, Cause Number 73115-7-1, Commissioner's Ruling Dismissing Appeal, April 28, 2015 (**Appendix I**). Followed by Motion To Modify Commissioner's Ruling, dated May 28, 2015 filed by legal counsel for Chance Goodman.

That is a list of the current litigation sought by Michael and Mary Goodman and their two sons. There have been earlier appeals filed by Michael and Mary Goodman and their children, including the following:

- Tyson Goodman, Petitioner, Court of Appeals Division One, Cause Number 67403-0-1, Order Denying Motion To Modify, November 22, 2011. (**Appendix J**)

⁶ The trial court judge found that Tyson Goodman's complaint "exists only to harass the defendants. The Plaintiff has abused the court, the defendants and the civil process."

- Michael Goodman, Appellant, Court of Appeals Division One, Cause Number 70093-6-1, Mandate, January 24, 2014.

(Appendix K)

Respondents have endured years of appeals filed by Appellant both individually and as a community with her husband, also filed by her husband individually and by both of their sons. They have refused to pay sanctions and attorney fees ordered by this court and the trial court. The purpose of this frivolous appeal is to delay and harass Respondents. This Court has held:

Our rules of appellate procedure are designed to promote the considered adjudication of legal issues raised by the parties. They are not designed to place unjustified burdens, financial and otherwise, upon opposing parties nor are they designed to provide recreational activity for litigants. RAP 18.9(a) provides that an appellate court

on its own initiative or on motion of a party may order a party or counsel who uses these rules for the purpose of delay or who fails to comply with these rules to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply.

Such terms and damages are appropriate here. Our award recognizes, however, that Rich would incur some burdens and costs even had the appeal been processed in a normal manner. Consequently, we award Rich \$1,000 in compensatory damages, attorney's fees of \$4,000, and costs on appeal. See *Trohimovich v. Director of the Dep't of Labor & Indus.*, 21 Wash.App. 243, 584 P.2d 467 (1978); *Harvey v. Unger*, 13 Wash.App. 44, 533 P.2d 403 (1975).

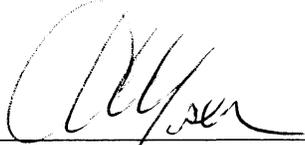
Rich v. Starczewski, 29 Wn. App. 244, 250, 628 P.2d 831, 835
(1981)

Appellant's claim of error by the trial court has been fully adjudicated and this untimely appeal was filed for the sole purpose of delay and harassment of Respondents.

J. CONCLUSION

The Court should grant the motions contained herein, dismiss the appeal as untimely and *res judicata*. The Court should also award attorney fees to Respondents.

DATED this 29 day of July, 2015.



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FEB 16 2012

C. THOMAS MOSER
LAW OFFICE

SUPERIOR COURT OF WASHINGTON
COUNTY OF SKAGIT

EDWARD M. GOODMAN and)
BERNICE S. GOOMAN, husband)
and wife,)
)
Plaintiffs,)

Vs.)

NO: 10-2-00587-3

MICHAEL J. GOODMAN and)
MARY F. GOODMAN, husband)
and wife,)
)
Defendants.)

NOTICE OF APPEAL TO
COURT OF APPEALS

Michael J. and Mary F. Goodman, defendants, seeks review by
the designated appellate court of the FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER entered on January 18, 2012.

A copy of the decision is attached to this notice.

Dated: February 15th 2012

Michael J. Goodman

Mary F. Goodman

Michael J. and Mary F. Goodman, Pro Se Defendants
13785 Goodman lane
Anacortes, WA. 98221
360-293-3298

C. Thomas Moser, Attorney of record for Plaintiffs
1204 Cleveland Ave.
Mount Vernon, WA. 98273

FILED

SKAGIT COUNTY SUPERIOR COURT
NANCY K. SCOTT
SKAGIT COUNTY CLERK
MOUNT VERNON WA

10-2-00587-3

Rept. Date	11/06/2014	Acct. Date	11/06/2014	Time	02:02 PM
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SUPERIOR COURT OF WASHINGTON
FOR SKAGIT COUNTY

EDWARD M. GOODMAN, Et ux.,)	No. 10-2-00587-3
Plaintiffs,)	
vs.)	NOTICE OF APPEAL TO
MICHAEL J. GOODMAN, Et ux.,)	COURT OF APPEALS
<u>Defendants.)</u>	

Mary F. Goodman, Defendant, seeks review by the Court of Appeals, Division One of the State of Washington of the Judgment entered on October 8, 2014.

A copy of the decision is attached to this notice.

Dated this 6 day of November, 2014.

Mary F Goodman
Mary F. Goodman, Defendant

Mary F. Goodman, Defendant/Appellant
13785 Goodman Lane
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IN THE SUPERIOR COURT, STATE OF WASHINGTON, SKAGIT COUNTY

EDWARD M. GOODMAN, and BERNICE S.)
GOODMAN, husband and wife,)

Plaintiffs,

vs.

MICHAEL J. GOODMAN and MARY F.)
GOODMAN, husband and wife,)

Defendants.)

Case No.: 10-2-00587-3

JUDGMENT

JUDGMENT SUMMARY

- 1. Judgment Creditors: Edward M. Goodman and Bernice S. Goodman
- 2. Judgment Debtors: Michael J. Goodman and Mary F. Goodman
- 3. Principal judgment amount \$21,128.66
- 4. Interest to date of judgment \$ —
- 5. Attorney's fees \$ —
- 6. Costs \$ —
- 7. Other recovery amounts \$ —
- 8. Principal judgment shall bear interest at 12% per annum.
- 9. Attorney fees, costs and other recovery amounts shall bear interest at 12% per annum.
- 10. Attorney for Judgment Creditors DAVID L. DAY
- 11. Attorney for Judgment Debtors Pro Se

1 IT IS HEREBY ORDERED, ADJUDGED AND DECREED, the Plaintiff have and recover
2 Judgment against the Defendants, Michael J. Goodman and Mary F. Goodman, husband and
3 wife, in the principal sum of \$21,128.66, plus costs and attorneys fees in the sum of \$ 0,
4 other recovery amounts in the amount of \$ 0, and interest in the sum of \$ 0 for a total
5 Judgment of \$ ^{21,128.66} together with interest thereon at the rate of 12% per annum on the
6 principal and 12% on the costs and attorney fees from the date of this Judgment until paid.

7 DATED this 8 day of October 2014.

8
9 Susan K. Cook
10 Honorable Susan K. Cook

11 Presented By:

12 FAIRHAVEN LEGAL ASSOCIATES, P.S.

13
14 David L. Day
15 DAVID L. DAY, WSBA #8361
16 Attorney for Plaintiff

17 Object mary f. goodn
18 Mary Goodman, Def. Pro Se

19 An affidavit of
20 Prejudice was
21 filed June 1, 2010,
22 Judge Susan K. Cook
23 lacks jurisdiction
24 in Case no. 10-2-00587-
25

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

EDWARD M. GOODMAN and
BERNICE S. GOODMAN,

Respondents,

v.

MICHAEL J. GOODMAN, Petitioner,

and

MARY GOODMAN, CHANCE
GOODMAN, TYSON GOODMAN,
Defendants.

FILED

JUL -2 2015

CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

NO. 91287-4

RULING DENYING REVIEW

After a bench trial, the Skagit County Superior Court quieted title in Edward and Bernice Goodman to non-exclusive easements on petitioner Michael Goodman's property for a shared driveway and a septic system and drain field. The Court of Appeals affirmed the superior court in an unpublished opinion. Michael¹ filed a petition for review in which the only issue presented for review was whether Michael filed a timely affidavit of prejudice and the superior court judge should have been disqualified from hearing the matter. This court denied review and awarded the

¹ First names are used where necessary for clarity. No disrespect is intended.

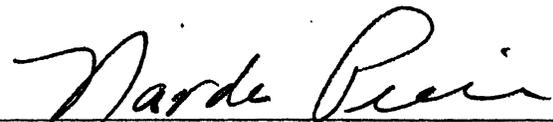
respondents attorney fees and expenses pursuant to RAP 18.1. The Court of Appeals issued the mandate on September 17, 2014. Michael filed a motion to recall the mandate on December 4, 2014. His motion observed that although the court's opinion addressed his assigned error to the superior court's conclusion that usage of these easements was reasonably necessary, the court's opinion did not explicitly mention the superior court's findings of fact that an easement on a different adjacent lot could be used to reach the northern part of the property of Edward and Bernice. Michael contended the Court of Appeals "missed trial court findings of fact 46 and 47, the useable easement to Ed's property," and that this was an inadvertent mistake under RAP 12.9(b). The Court of Appeals denied the motion, and Michael now seeks this court's discretionary review. Edward and Bernice seek an award of attorney fees incurred in answering the motion for discretionary review.

The appellate court may recall a mandate to correct an inadvertent mistake or to modify a decision obtained by the fraud of a party or counsel in the appellate court. RAP 12.9(b). The Court of Appeals does not have authority to recall a mandate for the purpose of reexamining a case on its merits. *See Shumway v. Payne*, 136 Wn.2d 383, 393, 964 P.2d 349 (1998). There is nothing to suggest that the Court of Appeals mistakenly overlooked the findings of fact that Michael now cites. The Court of Appeals noted Michael's challenge to the superior court's conclusion regarding reasonable necessity and his arguments regarding the relative costs of substitutes, and also noted the superior court's findings related to how the topography of the lot affected the feasibility of alternative access. The Court of Appeals then wrote, "Absolute necessity is not required to establish an implied easement," citing *Evich v. Kovacevich*, 33 Wn.2d 151, 157-58, 204 P.2d 839 (1949). Clearly, the opinion did not assume there were no conceivable substitutes. The Court of Appeals did not err or depart from accepted practice by denying the motion to recall the mandate, and this

court's review is not warranted under the criteria of RAP 13.5(b) (considerations governing acceptance of review).

Edward and Bernice have requested fees for answering Michael's motion for discretionary review pursuant to RAP 18.1(j). This rule allows attorney fees for answering a petition for review, not for answering a motion for discretionary review. See RAP 18.1(j) (attorney fees for answering a petition for review). Another rule, RAP 18.9, allows an appellate court to order a party who uses the rules for the purpose of delay or who files frivolous appellate actions to pay terms or compensatory damages to any other party who has been harmed. See *Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*, 146 Wn.2d 370, 384-85, 46 P.3d 789 (2002); *Advocates for Responsible Dev. v. W. Wash. Growth Mgmt. Hr'gs Bd.*, 170 Wn.2d 577, 580, 245 P.3d 764 (2010). An appellate action is frivolous if, considering the entire record, the court is convinced that it presents no debatable issues upon which reasonable minds might differ and is so devoid of merit that there is no possibility of reversal. Here, the motion for discretionary review is devoid of merit and is frivolous.

Accordingly, the motion for discretionary review is denied. Pursuant to RAP 18.9(a), the respondents Edward and Bernice are awarded reasonable attorney fees and expenses for responding to the motion for discretionary review, to be paid by Michael in an amount to be set in accordance with the procedures of RAP 18.1.


COMMISSIONER

July 2, 2015

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

EDWARD M. GOODMAN and
BERNICE S. GOODMAN, husband and
wife,

Respondents,

v.

MICHAEL J. GOODMAN and MARY F.
GOODMAN, husband and wife,

Petitioners,

and

CHANCE GOODMAN, a single man;
and TYSON GOODMAN, a single man,

Defendants.

NO. 88811-6

RULING DENYING REVIEW

FILED
2013 JUN 25 A 11:42
BY RONALD R. CARPENTER
CLERK

Michael Goodman seeks review of an order denying his motion to reverse a June 2010 trial court order.

This matter involves a dispute between brothers Edward and Michael Goodman over property located at Lake Campbell in Skagit County. Defendants Michael and Mary Goodman (Michael)¹ appealed Judge Susan Cook's January 2012 decision granting plaintiffs Edward and Bernice Goodman (Edward) the right to use a non-exclusive easement and shared driveway and the right to use a septic system area and permanently enjoining the defendants from hindering or blocking the plaintiffs' use of the easements. The appeal has been briefed and apparently awaits decision. Meanwhile, Michael has inundated the Court of Appeals with motions, including a

¹ First names will be used only for the sake of clarity.

665/138

February 4, 2013, “Motion to Reverse Trial Court Order Denying Affidavit of Prejudice.” That motion challenged Judge Cook’s June 3, 2010, order denying Tyson Goodman’s affidavit of prejudice. (Michael’s sons Chance and Tyson Goodman were named defendants at the time, but it appears that the claims against them were bifurcated and later dismissed.) Judge Cook denied the affidavit on grounds that she had earlier entered a discretionary ruling in the case, making Tyson’s motion untimely. The Court of Appeals denied the motion to reverse by order dated April 23, 2013. Michael now seeks this court’s review of that decision.

Michael argues that Judge Cook should have granted the affidavit of prejudice because she had only previously entered an agreed temporary restraining order involving no exercise of discretion. But it appears that prior to entry of the agreed order Judge Cook had issued a continuance order on April 9 keeping an earlier temporary restraining order in place and another temporary restraining order on April 13.² Michael suggests (without citation to the record) that those rulings came before the defendants had appeared in the case. But it is difficult to tell from the record when Tyson Goodman was served. More importantly, Michael does not explain why his motion challenging the denial of the affidavit of prejudice should be considered timely, since Judge Cook entered her order of denial on June 3, 2010. Review of a trial court decision not subject to appeal must be initiated by notice filed within 30 days. RAP 5.2(b). Perhaps it could be argued that the motion should be considered part of the ongoing appeal from the trial court’s January 2012 decision. Michael likely could have assigned error to the June 3, 2010, order in his brief on

² Edward argues that Michael should not be permitted to challenge the June 3, 2010, order because only Tyson Goodman filed an affidavit of prejudice. But this court has held that the plaintiffs or defendants in a lawsuit may file only one such affidavit as a class. *LaMon v. Butler*, 112 Wn.2d 193, 201-204, 770 P.2d 1027, *cert. denied*, 493 U.S. 814 (1989). And in consolidated juvenile adjudicatory proceeding, the Court of Appeals held that an affidavit of prejudice filed by one juvenile respondent may properly be imputed to his or her corespondents. *State v. Detrick*, 90 Wn. App. 939, 954 P.2d 949 (1998).

appeal. *See* RAP 2.4(b) (appellate court will review trial court order not designated in notice of appeal if the order prejudicially affects the decision designated in notice). But error must be assigned in the brief, and the appellate court may decide the case only on the basis of issues raised in the briefs. RAP 10.3(a)(4), 12.1(a). A party simply cannot, as part of an ongoing appeal, file separate motions disputing trial court rulings not challenged by assignment of error on appeal.

The Court of Appeals did not err or depart from accepted practice by denying the motion to reverse. RAP 13.5(b) (considerations governing acceptance of review). Accordingly, the motion for discretionary review is denied.³


COMMISSIONER

June 25, 2013

³ Edward seeks reasonable attorney fees for Michael's "continuing series of appeals." But he fails to support this request with argument or citation to relevant authority. Accordingly, the request is denied.

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

EDWARD M. GOODMAN and
BERNICE S. GOODMAN, husband
and wife,

Respondents,

v.

MICHAEL J. GOODMAN and MARY F.
GOODMAN, husband and wife,

Appellants.

No. 68416-7-I

ORDER DENYING MOTION
TO REVERSE AND DENYING
MOTION TO STAY TRIAL
COURT PROCEEDINGS

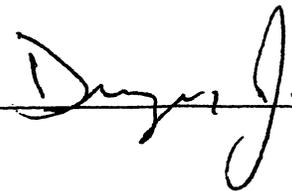
Appellants Michael and Mary Goodman have filed a "Motion to Reverse
Trial Court" and an "Emergency Motion for Stay of Trial Court Proceedings."

We have considered the motions and have determined that both motions should
be denied.

Now therefore it is hereby

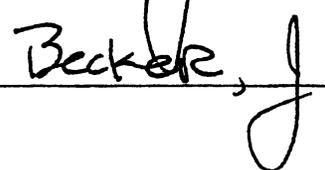
ORDERED that appellants' motion to reverse and emergency motion for a
stay of trial court proceedings are both denied.

Done this 23rd day of April, 2013.



Appendix 1





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COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2013 APR 23 PM 3:20

APPENDIX E

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FEB 06 2013

**C. THOMAS MOSER
LAW OFFICE**

No. 68416-7-1

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

EDWARD M. GOODMAN, et ux.,)	
)	
Respondents,)	
)	APPELLANTS MOTION
V.)	TO REVERSE TRIAL
)	COURT ORDER
MICHAEL J. GOODMAN, et ux., et al.,)	DENYING AFFIDAVIT
)	OF PREJUDICE
Appellants.)	
)	
_____)	

1. IDENTITY OF MOVING PARTY

Michael, appellant asks for the relief designated in part 2.

2. STATEMENT OF RELIEF SOUGHT

Appellant seeks an order from this court to reverse the trial court order denying the defendants affidavit of prejudice to disqualify the judge, stay proceedings, strike the record and remand for new trial.

3. FACTS RELEVANT TO MOTION

On April 23, 2010 the only order entered on the superior court docket for this case under this judge was agreed. Appendix – 1, (CP 443-444).

On June 1, 2010 the defendants filed an affidavit of prejudice to disqualify the judge. Appendix – 2, (CP 201).

On June 3, 2010 the judge denied the affidavit of prejudice. Appendix – 3, (CP 530).

4. GROUNDS FOR RELIEF AND ARGUMENT

Appellants were entitled to a change of judge under RCW 4.12.040 and .050, the court should grant the motion, reverse the order denying the motion for a change of judge, stay trial court proceedings, strike the record and remand for new trial.

Under RCW 4.12.040 and .050, a party in a superior court proceeding is entitled to one change of judge upon the timely filing of an affidavit of prejudice. See *In re Marriage of Tye*, 121 Wn. App. 817, 820, 90 P. 3d 1145 (2004); *Harbor Enters., Inc. v. Gudjonsson*, 116 Wn.2d 283, 285, 803 P.3d 798 (1991). An affidavit of prejudice is timely filed and called to the courts attention “before the judge presiding has made any order or ruling involving discretion.” RCW 4.12.050, Appendix - 4.

It is well established that the trial court does not exercise discretion for purpose of an affidavit of prejudice when it enters an agreed order or stipulation involving certain pre-trial preliminary issues. See State ex rel. Floe v. Studebaker, 17 Wn.2d 8, 16-17, 134 P.2d 718 (1943) (stipulated order consolidating two court actions did not invoke trial court's discretion). Our Supreme Court has observed that

Many issues may be resolved between the parties and presented to the court in the form of an agreed order. These matters will generally resolve pretrial disputes regarding such issues as admissibility of evidence, discovery, identity of witnesses, and anticipated defenses. If the parties have resolved such issues among themselves and have not invoked the discretion of the court for such resolution, then the parties will not have been alerted to any possible disposition that a judge may have toward their case.

State v. Parra, 122 Wn.2d 590, 600, 859 P.2d 1231 (1993).

Generally, the trial court does not exercise discretion for the purpose of an affidavit of prejudice when entering agreed orders or stipulations on "matters relating merely to the conduct of a pending proceeding, or to the designation of issues involved, affecting only the rights or convenience of the parties, not involving any interference with the duties and functions of the court." Id. At 603.

At the time it denied the affidavit of prejudice, the trial court had entered only an agreed order. The agreed order did not call upon the trial court to exercise its discretion. The court erred in denying the affidavit of prejudice.

DATED this 3rd day of February, 2013.

Respectfully submitted,

Michael J. Goodman

Michael J. Goodman

pro se, appellant

13785 Goodman lane

Anacortes, WA 98221

Ph. 360-293-3298

RECEIVED

FEB 15 2013

C. THOMAS MOSER
LAW OFFICE

No. 68416-7-1

COURT OF APPEALS,
DIVISION ONE
OF THE STATE OF WASHINGTON

EDWARD M. GOODMAN, et ux.,)	
)	APPELLANTS
Respondents,)	EMERGENCY MOTION
)	FOR STAY OF TRIAL
V.)	COURT PROCEEDINGS
)	
MICHAEL J. GOODMAN, et ux., et al.,)	
)	
Appellants.)	
)	
_____)	

1. IDENTITY OF MOVING PARTY

Michael, appellant asks for the relief designated in part 2.

2. STATEMENT OF RELIEF SOUGHT

Appellant seeks an order from this court to stay trial court proceedings pending a ruling or order on "appellants motion to reverse trial court order denying affidavit of prejudice" filed in this court on February, 4th 2013.

3. FACTS RELEVANT TO MOTION

On February 4, 2013 the appellants filed an objection to the trial court denying their affidavit of prejudice for a change of judge. However, there are still motions pending and being filed in the trial court before this judge at this time.

4. GROUNDS FOR RELIEF AND ARGUMENT

RAP 7.3 permits the appellate court the authority to perform all acts necessary or appropriate to secure the fair and orderly review of a case. RAP 8.3 permits the appellate court the authority to issue orders before or after acceptance of review to insure effective and equitable review, including authority to grant injunctive or other relief to a party.

DATED this 13th day of February, 2013.

Respectfully submitted,

Michael J. Goodman

Michael J. Goodman
pro se, appellant
13785 Goodman lane
Anacortes, WA 98221
Ph. 360-293-3298

FILED
SKAGIT COUNTY CLERK
SKAGIT COUNTY, WA

2015 JUN 30 AM 10:36
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JUL 02 2015

By: mail

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SKAGIT

TYSON GOODMAN;

Plaintiff,

v.

EDWARD GOODMAN;

Defendant.

NO. 11-2-02193-1

**ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS**

~~{Proposed}~~

(Clerk's Action Required)

This Court, having been fully advised on the defendant's Motion to Dismiss, and having reviewed the following:

1. Defendant's Motion to Dismiss;
2. Declaration of Mark A. Horey in Support of defendants' Motion to Dismiss,

with exhibits attached thereto;

3. Plaintiff's Response to Motion to Dismiss
4. Defendant's Reply: Motion to Dismiss

//

ORDER GRANTING DEFENDANT'S MOTION
TO DISMISS

No. 11-2-02193-1

1

LAW OFFICE OF
ANDREA HOLBURN BERNARDING
1730 Minor Avenue, Suite 1130
Seattle, Washington 98101
(206) 403-4800

APPENDIX H

* Findings below.

This Court hereby GRANTS defendant's Motion to Dismiss. Tyson Goodman's

Complaint against defendant Edward Goodman is hereby dismissed with Prejudice.

* The Plaintiff has intentionally + w/o explanation failed to pay sanctions ordered by the Court. He has failed to engage in discovery. His responses to defendant's discovery have been slow and inadequate. Plaintiff's claims are based on mere supposition and have no basis in evidence. They are willful merit. This matter exists only to harass the Defendant.

EXECUTED this _____ day of 6/30 2015.

The Plaintiff has abused this court, the defendant, + the civil process.

SKAGIT COUNTY SUPERIOR COURT JUDGE

Presented by:

LAW OFFICE OF ANDREA HOLBURN BERNARDING



Mark A. Horey, WSBA #33558
Attorneys for defendant Edward M. Goodman

Kelly M. Madigan #40024

Approved by:

Tyson Goodman, Pro Se plaintiff

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

No. 11-2-02193-1

LAW OFFICE OF ANDREA HOLBURN BERNARDING
1730 Minor Avenue, Suite 1130
Seattle, Washington 98101
(206) 403-4800

agree. This case is dismissed. Edward's and Bernice's request for attorney fees is denied at this time without prejudice for them to seek relief in the trial court.

FACTS

In March 2010, Edward and Bernice filed a quiet title action in Skagit County Superior Court against Michael, Mary, and their two sons Chance and Tyson. On June 3, 2010, Judge Susan Cook denied an affidavit of prejudice filed by Tyson on the ground that the judge had previously made a discretionary ruling in the case after all four defendants had been served. In October 2012, the trial court dismissed the claims against Chance and Tyson on a CR 41(a) motion filed by plaintiffs Edward and Bernice.

Meanwhile, in September 2010, Chance filed a third-party complaint for defamation against Wayne Olsen. Chance's third-party claim was based on Olsen's report to law enforcement that Chance assaulted him when Olsen attempted to serve him with legal documents in this property dispute litigation. In March 2012, the trial court dismissed Chance's third-party lawsuit on summary judgment and awarded Olsen damages under Washington's anti-SLAPP (strategic lawsuits against public participation) statute and attorney fees. Chance did not oppose Judge Cook's consideration of Olsen's summary judgment motion. Upon Chance's appeal, this Court affirmed the dismissal (No. 68711-5-1) (mandate issued in January 2014).

In January 2012, after a bench trial, the trial court entered a decision quieting title in favor of Edward and Bernice against Michael and Mary. The trial court determined that Edward established implied easements for use of the shared driveway and the septic system and drain field on Michael's property. The court quieted title to the easements in Edward and enjoined Michael from interfering with Edward's use of the

easements. Michael and Mary appealed the decision to this Court (No. 68416-7).

While their appeal was pending, Michael and Mary inundated this Court with motions, including a "Motion to Reverse Trial Court Order Denying Affidavit of Prejudice." That motion challenged Judge Cook's June 3, 2010 pre-trial order denying Tyson's affidavit of prejudice. By order of April 23, 2013, this Court denied the motion. Michael and Mary sought discretionary review from that denial. The Supreme Court denied review. Then Supreme Court Commissioner Steven Goff stated, among other things that Michael and Mary "cannot, as part of an ongoing appeal, file separate motions disputing trial court rulings not challenged by assignment of error on appeal."¹

In November 2013, this Court issued an unpublished opinion affirming the trial court's decision (No. 68416-7). This Court awarded attorney fees to Edward and Bernice for responding to Michael's and Mary's frivolous appeal. The Supreme Court denied review (No. 91287-4). A mandate was issued in September 2014. This Court denied Michael's and Mary's motion to recall the mandate.²

In January 2015, Chance filed in the trial court a "Motion to Challenge Jurisdiction of Judge Cook and Honor Affidavit of Prejudice." Chance challenged Judge Cook's June 2010 pre-trial denial of Tyson's affidavit of prejudice. The trial court denied Chance's motion. In February 2015, Chance filed a notice of appeal to this Court.

By letter of March 11, 2015, this Court noted that the order designated in Chance's notice of appeal appeared not reviewable as a matter of right. This Court

¹ Ruling Denying Review (Supreme Court, No. 88811-6) at 3. A copy of the ruling is attached to Edward and Bernice's response to Chance's appeal as appendix E and Chance's supplemental brief in support of appeal as appendix A-2 to A-5.

² It appears that Michael's and Mary's motion for discretionary review from the denial to recall the mandate is currently pending in the Supreme Court.

directed the parties to address appealability with supporting documentation.

Edward and Bernice filed a response to Chance's appeal. They argue that Chance's appeal should be dismissed as untimely and barred by the principles of res judicata. Chance filed a response, arguing that his appeal is not barred by res judicata because he was not a party to the appeal filed by his parents Michael and Mary. Third-party defendant Olsen also filed a response, arguing, among other things, that Chance's appeal is untimely and barred by res judicata.

DECISION

A party must file a notice of appeal within 30 days of the decision for which the party seeks review.³ The doctrine of res judicata rests on the principle "that a matter which has been litigated, or *on which there has been an opportunity to litigate*, in a former action in a court of competent jurisdiction, should not be permitted to be litigated again."⁴ Dismissal on res judicata grounds is appropriate where the later action is identical with a prior action in four respects: (1) persons or parties; (2) causes of action; (3) subject matter; and (4) the quality of the persons for or against whom the claim is made.⁵ The party asserting res judicata bears the burden of proof.⁶

Here, a final judgment determining the parties' property dispute was issued in January 2012, and a mandate was issued in September 2014. During Michael's and Mary's appeal from the judgment, this Court denied their motion to reverse Judge Cook's June 2010 denial of an affidavit of prejudice – the very decision Chance now seeks to challenge. Chance argues that res judicata does not bar his challenge

³ RAP 5.2(a).

⁴ Ensley v. Pitcher, 152 Wn. App. 891, 899, 222 P.3d 99 (2009) (citation omitted).

⁵ Ensley, 152 Wn. App. at 902.

⁶ Id.

because he was not a party to his parents' appeal. I disagree.

Chance filed his "Motion to Challenge Jurisdiction of Judge Cook and Honor Affidavit of Prejudice" as a party (defendant). If he was aggrieved by Judge Cook's pre-trial denial of an affidavit of prejudice and wished to challenge that decision, he had to file a notice of appeal from the January 2012 final judgment within 30 days. He did not do so. Chance may not now challenge the pre-trial ruling through a "Motion to Challenge Jurisdiction of Judge Cook and Affidavit of Prejudice."

Further, Chance does not explain how he was aggrieved by the pre-trial denial of an affidavit of prejudice, where the claims against him were dismissed before the trial. Only an "aggrieved party" may seek review by this Court.⁷ "An aggrieved party is one whose proprietary, pecuniary, or personal rights are substantially affected."⁸

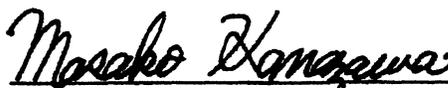
Edward and Bernice seek attorney fees for responding to Chance's appeal. They argue that Chance's appeal is part of an ongoing pattern of litigation abuse and harassment against them. Edward's and Bernice's request for attorney fees is denied at this time without prejudice for them to seek relief in the trial court.

Therefore, it is

ORDERED that this case is dismissed. It is further

ORDERED that Edward's and Bernice's request for attorney fees is denied at this time without prejudice for them to seek relief in the trial court.

Done this 28th day of April, 2015.



Court Commissioner

2015 APR 28 PM 2:44
COURT OF APPEALS DIV.
STATE OF WASHINGTON

⁷ RAP 3.1.

⁸ Aguirre v. AT & T Wireless Servs., 109 Wn. App. 80, 85, 33 P.3d 1110 (2001).

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

EDWARD M. GOODMAN and BERNICE
S. GOODMAN, husband and wife,

Respondents,

v.

MICHAEL J. GOODMAN and MARY F.
GOODMAN, husband and wife; and
CHANCE GOODMAN, a single man,

Defendants,

TYSON GOODMAN, a single man,

Petitioner.

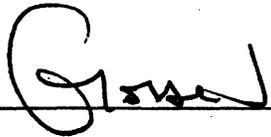
No. 67403-0-1

ORDER DENYING MOTION
TO MODIFY

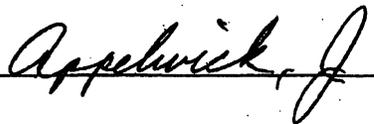
Petitioner Tyson Goodman has filed a motion to modify the commissioner's September 6, 2011 ruling denying his motion for discretionary review. The respondents, Edward and Bernice Goodman, have not filed a response. We have considered the motion under RAP 17.7 and have determined that it should be denied. Now, therefore, it is hereby

ORDERED that the motion to modify is denied.

Done this 22ND day of November, 2011.







FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2011 NOV 22 AM 11:44

Page 2 of 2

70093-6-I, Edward M. Goodman and Bernice S. Goodman v. Michael J. Goodman

Mandate

January 24, 2014

c: Michael J. Goodman
C. Thomas Moser



IN TESTIMONY WHEREOF, I have hereunto set my hand
and affixed the seal of said Court at Seattle, this 24th day
of January, 2014.


RICHARD D. JOHNSON

Court Administrator/Clerk of the Court of Appeals,
State of Washington, Division I.

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

EDWARD M. GOODMAN and)
BERNICE S. GOODMAN, husband)
and wife,)

Respondents,)

Vs.)

MICHAEL J. GOODMAN and)
MARY F. GOODMAN, husband)
and wife,)

Appellants.)

DECLARATION OF
SERVICE

2015 JUL 30 AM 10:38
COURT OF APPEALS
STATE OF WASHINGTON

I certify under penalty of perjury under the laws of the state of Washington that I am over the age of eighteen years and not a party to this action. I certify that on July 29, 2015, I caused to be delivered, via First Class Mail, postage prepaid, a copy of Respondents' Brief to the parties listed below, at their addresses of record on the date listed below.

Mike and Mary Goodman
13785 Goodman Lane
Anacortes, WA 98221

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct and that this declaration was executed at Mount Vernon, Washington.

ORIGINAL

DATED this 29 day of July, 2015.



Toni Riedell