

**Court of Appeals No. 73108-4-1**

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IN THE COURT OF APPEALS - STATE OF WASHINGTON  
DIVISION I

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**GREGORY H. KIRSCH,**  
Appellant,

v.

**CRANBERRY FINANCIAL, LLC,**  
a Delaware Limited Liability Company

Defendant/Respondent.

2016 JUN 19 PM 1:31  
COURT OF APPEALS  
STATE OF WASHINGTON

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**REPLY BRIEF OF APPELLANT**

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**I. THE TRIAL COURT HAD JURISDICTION OVER THE PARTIES AND THE SUBJECT MATTER, IT SHOULD HAVE RESOLVED THE DAMAGES CLAIM ON THE MERITS**

The trial court held that Kirsch could not amend his complaint because “This cause of action was resolved as to all claims in the Second Amended Complaint by the order of March 30, 2014, and the judgment was final as of that date.” CP 203. The trial court did not rule, and Cranberry does not argue, that it lacked jurisdiction, or that the case had been dismissed. It ruled that Kirsch had unwittingly lost his claim to damages by prevailing on his claim for quiet title.

Cranberry repeatedly claims that the “case was over” before Kirsch filed his motion to amend the complaint; and apparently had been over, unbeknownst to Kirsch, ever since he prevailed on the quiet title claim. There is no doubt that Kirsch intended to litigate his damages claim, and no doubt Cranberry would have liked the case to be “over”.

Kirsch might be excused for failing to realize the *Order Quieting Title in Plaintiff* would be construed as the termination of his claim for damages, since it was not titled as a final judgment, or as an order of dismissal, and included no language dismissing or terminating his case. It was simply an order vesting title as allowed by CR 70.

Nowhere does Cranberry explain why a court that has jurisdiction over the parties and the subject matter, should not, as the court rules direct, resolve the issues between the parties. No equitable principal or legal precept is served by depriving a party of his day in court.

## **II. CRANBERRY HAD FULL KNOWLEDGE OF THE DAMAGES CLAIM**

Cranberry knew that its refusal to cooperate in removing the deed of trust prevented Kirsch from complying with the dissolution decree, forcing him to make mortgage payments. It was told of the potential claim before Kirsch filed suit in the hope that the potential damages would persuade Cranberry to cooperate, and after filing with the same hope. Preventing the damages claim was the impetus behind Cranberry's failed motion to impose a settlement, where it demanded a "mutual release". CP 80.

Cranberry admits that it knew of the damages claim even before the litigation commenced. (Respondent's Brief at 41-42.) Where a defendant actually knows of a claim for relief the failure of the plaintiff to explicitly plead the claim does not bar the plaintiff from requesting that relief. *Kathryn Learner Family Trust v. Wilson*, 183 Wn.App. 494, 500,

333 P.3d 552, 556 (Div. 3 2014)<sup>1</sup> As the trial court judge remarked, “Everybody knows what the, Mr. Kirsch has been complaining about all along.” It then went on to note that the damages claim was in prior pleadings, and “certainly would have been foreseen by anybody” involved in the case. RP (January 16, 2015) 13.

Instead, of arguing that it didn't know, Cranberry argues that notice of the claim “is irrelevant”, and it would be “absurd to argue” that knowing of the claim would provide notice that the damages claim would be supported by legal theories of recovery. (Respondent's Brief at 41-42) However, notice of the claim is a key factor in determining any potential prejudice to Cranberry.

Cranberry not only had notice of the damages claim, it had the ability to stop the accumulating damages at any time by releasing its cloud upon title. Instead of doing so, it has prolonged this litigation by advocating unsupportable positions. It has convinced the trial court, and argued on appeal, that acceleration of the note vanished when the prior suit was dismissed. After that argument was rejected on appeal, it tried, with its motion to enforce a settlement, to get the trial court to dismiss the case because Kirsch had offered to waive some attorney fees if Cranberry

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<sup>1</sup> Special damages (attorney fees) were not pled but opposing party admitted it knew of the claim.

would immediately reconvey.

Now, Cranberry tries to convince the appellate court that despite knowing of the claim all along, it should not have to face the claim because the CR 70 Order Quieting Title In Plaintiff was a stealth order barring the damage claim. This is the very sort of argument modern pleading rules are intended to prevent.

### **III. LITIGATION IS TO BE DECIDED ON THE MERITS; NOT ON PLEADING TECHNICALITIES**

Even before statehood, Washington prohibited defects in pleadings or proceedings from affecting the substantial rights of a litigant. This statutory mandate, titled “Harmless error disregarded” is expressed in RCW 4.36.240:<sup>2</sup>

The court shall, in every stage of an action, disregard any error or defect in pleadings or proceedings which shall not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect.

Modern rules of pleading and of appellate review are in accord. CR 1, RAP 1.2.

Cranberry argues that the ability of Kirsch to amend his complaint vanished on May 30, 2014 when the CR 70 Order Quieting Title In

<sup>2</sup> This policy is now expressed in RAP 1.2, and 2.4(a), the statute has been superseded as it relates to appellate procedure. RAP 18.22.

Plaintiff was entered. Apparently, even if he had filed the motion to amend before that date, the motion could not have been heard because the case was suddenly “over” upon entry of the CR 70 order; but if the motion to amend had been filed and heard before Kirsch obtained the CR 70 order quieting title, all would have been fine. Cranberry does not explain why this order of proceedings is so defective as to affect a substantial right it possesses.

Prior to entry of the CR 70 order Kirsch filed a two page motion for entry of judgment on the appellate award, and for summary judgment on the quiet title claim. CP 143-144. He did not ask that the court award attorney fees at the trial court level, did not ask for final judgment, and did not ask for dismissal. No contest was expected, as the motion was to implement the appellate decision, and the decision was clear on both points.

On May 12, 2014 Cranberry responded to the motion with a lengthy memorandum arguing that Kirsh was not entitled to attorney fees in the trial court. CP \*<sup>3</sup>. This “response” was essentially a motion to determine whether attorney fees were awardable in the trial court on the quiet title issue.

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<sup>3</sup> Defendant's Memorandum in Opposition to Plaintiff's Motion for Attorney Fees. A supplemental designation will be filed.

On May 21, 2014 Kirsch, even though he had not requested trial court attorney fees in his motion, responded to Cranberry's argument that attorney fees could not be awarded to him in the trial court. CP \*.<sup>4</sup> The result of Cranberry moving for a determination of the availability of trial court attorney fees was an interim judgment as to attorney fees related to the quiet title issue. CP 281-262. Cranberry argues that the result of its motion is an additional reason to bar the damages claim.

It appears that Cranberry, by moving for a determination of trial court attorney fees in its response, intended to create an argument that the case was concluded, before it would have to defend against the damages claim. This is consistent with its demand for a mutual release in its motion to enforce a nonexistent settlement. CP 80.

After the CR 70 order quieting title was entered, Cranberry could have, but did not, file a motion requesting a final order of dismissal. If it had, and the motion had been granted, a judgment or order of dismissal would have clearly put an end to the litigation. *Catlin v. United States*, 324 U.S. 229, 65 S.Ct. 631, 89 L.Ed. 911 (1945). The final order it proposed prior to the first appeal did just that, making it a final appealable

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<sup>4</sup> Response to Defendant's Memorandum in Opposition to Plaintiff's Motion for Attorney Fees. A supplemental designation will be filed.

order. CP \*.<sup>5</sup> Kirsch, of course, would have opposed any order dismissing the case or barring his damages claim.

The order granting quiet title to Kirsch was not a final judgment. It was an order vesting title in Kirsch pursuant to CR 70.<sup>6</sup> If Cranberry thought the case was over why didn't it insist that language terminating the case be included in the order quieting title, or propose a different order?

In paragraph 3.4 of the answer to Cranberry's counterclaims Kirsch sought "Such other and different relief as the court deems to be just and appropriate." CP 238. Because the case was not dismissed, Kirsch should not have been denied an opportunity to further plead the other and different relief he sought, especially where both parties knew of the damages claim.

#### **IV. THE TRIAL COURT ABUSED ITS DISCRETION BY NOT CONSIDERING THE LACK OF PREJUDICE**

The touchstone for the denial of a motion to amend is the prejudice such an amendment would cause to the nonmoving party. Factors which

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5 Order Dismissing Plaintiff/CounterClaim Defendant Gregory H. Kirsch's Claims with Prejudice. A supplemental designation will be filed.

6 If real or personal property is within the state, the court ... may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect of a conveyance executed in due form of law. CR 70.

may be considered in determining whether permitting amendment would cause prejudice include undue delay, unfair surprise, and jury confusion. *Herron v. Tribune*, 108 Wash.2d 162, 165-66, 736 P.2d 249 (1987). Failure to consider these factors is an abuse of discretion. *Tagliani v. Colwell*, 10 Wn.App. 227, 517 P.2d 207(1973).

The trial court's ruling does not include consideration of the required factors. CP 205-206. Cranberry concedes that the trial court did not consider the required factors. (Respondent's Brief at 44.) The trial court abused its discretion by failing to consider lack of prejudice when denying the motion to amend.

The court could remand the case for consideration of the required factors, however, as Cranberry had the opportunity to demonstrate undue prejudice, and even on appeal fails to point to any undue prejudice, the court should remand with instruction to allow amendment of the complaint.

**V. ALLOWING AMENDMENT OF THE COMPLAINT WILL NOT PREJUDICE CRANBERRY**

Cranberry did not submit a declaration or other evidence supporting a claim of prejudice in the trial court. CP 176-182. On appeal it makes general claims of prejudice, largely unsupported by citation to

the record. (Respondent's Brief at 38-44.)

Succinctly, its claims are:

**Delay.** Cranberry claims that delay would be the cause of its undue prejudice, but the case has been on appeal for as long as it has been in the trial court.<sup>7</sup> If appellate review constituted undue delay then pleadings could not be amended after an appeal. However, pleadings can be amended after remand from the appellate court to include new causes of action. *Ennis v. Ring*, 56 Wn.2d 465, 353 P.2d 950 (1959).

Delay, excusable or not, in and of itself is not sufficient reason to deny a motion to amend, even a delay of over five years. *Caruso v. Local Union No. 690*, 100 Wn.2d 343, 349, 670 P.2d 343 (1983). Cranberry fails to explain how it has suffered actual prejudice by unwarranted delay, or why that delay would be the fault of Kirsch.

**Trial Preparation.** Cranberry contends that it will be unduly prejudiced in the conduct of discovery. No discovery has yet been conducted in the case. Discovery on the insular damages claim would be no different than on any other claim. Damages were ongoing until the order quieting title was entered; Cranberry cannot demonstrate that it will

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<sup>7</sup> This case was filed in January of 2012, a Notice of Appeal was filed February 21, 2013, the mandate was received by the trial court March 27, 2014, and the most recent appeal was filed February 12, 2015.

be hindered in the conduct of discovery.

**Appeal Rights.** Cranberry does not offer any evidence that it intended to appeal any of the prior rulings. It made a similar claim (that it missed an appeal deadline) when it requested that the trial court enforce the nonexistent settlement agreement. CP 93.

If Cranberry wanted to appeal, it could have done so, nothing prevented it from filing an appeal, or requesting cross review. However, it is difficult to see that there was anything to appeal as quiet title and entitlement to attorney fees had already been reviewed by the Court of Appeals.

**Paid Judgments.** Cranberry paid the appellate award prior to filing its response to the Kirsch motion for entry of orders implementing the appellate court opinion. CP \*.<sup>8</sup> It moved for determination of the availability of trial court attorney fees in the same response, and when the fees so far were determined, paid the award. It is evident that the attorney fee award was not a final judgment as it included no costs—the plaintiff would not have presented a final judgment without including its costs. CP 261. Satisfactions for both awards were not filed until after Cranberry had

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<sup>8</sup> Defendant's Memorandum in Opposition to Plaintiff's Motion for Attorney Fees, page 5. A supplemental designation will be filed.

received a copy of the amended complaint.<sup>9</sup> CP 192.

An award of attorney fees related to the damages claim will have to be determined when the claim is resolved. If an attorney fee judgment results, the losing party will have to pay it. Nothing about Cranberry's decision to pay the awards should deprive Kirsch of his day in court on the damages claim.

Cranberry makes only general claims of prejudice. General claims of prejudice, unrelated to any *actual* prejudice, are insufficient to support denial of leave to amend. *Caruso v. Local 690*, 100 Wash.2d 343,349, 670 P.2d 240 (1983). Nothing that has occurred will prejudice Cranberry in the defense of the damages claims.

The true test of whether to allow the amendment is whether the opposing party is, or can be, prepared to meet the new issues. *In re Campbell*, 19. Wn.2d 300, 142 P.2d 492 (1943). Cranberry does not deny that it can be prepared to meet the damages claim.

## **VI. NEITHER CR 60 NOR A SUMMARY JUDGMENT DECISION PREVENT TRIAL ON THE MERITS**

Cranberry attempts to preclude Kirsch from having his damages claim heard on the merits, in either the present or a future suit. This is the

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<sup>9</sup> Cranberry received the Amended Complaint by email on November 10, 2014, and filed the satisfactions later in the month. CP 192, 264, 268.

latest in a long litany of attempts to use procedural arguments to prevent trial on the merits.<sup>10</sup> Prominent in the respondent's brief are arguments based on CR 60, and on entry of the CR 70 quiet title order.

Cranberry argues that, having fought through years of intransigence by Cranberry, and finally achieved quiet title, Kirsch had to get relief from the quiet title order under CR 60 before he could amend his complaint. It then implies that none of the factors in CR 60 would allow relief. It argues that a motion that is fruitless, futile, and unsupportable must be made and granted, before Kirsch can pursue relief to which he is entitled.

It is the CR 70 quiet title order that stopped the accumulation of damages against Cranberry by relieving Kirsch of the obligation to make mortgage payments. Kirsch had been trying to get that relief for years; Cranberry fought against it for years. Is Cranberry proposing that the order be modified so that more damages can accrue? What possible benefit would be obtained by anyone through a CR 60 motion attacking the order quieting title?

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<sup>10</sup>The litany includes convincing the trial court that acceleration disappears if a lawsuit is not pursued, that an enforceable agreement exists when the offered terms are not accepted, that despite the appellate court ruling trial court attorney fees have been waived, and the arguments here.

Cranberry continues to argue that a summary judgment ruling somehow prevents amendment of a complaint. It cites, but does not discuss, cases where amendment was allowed after summary judgment, such as *Estate of Randmel v. Pounds*, 38 Wn.App. 401,685 P.2d 638 (1984).

Cranberry attempts to distinguish other cases allowing amendment after summary judgment such as *Tagliani v. Colwell*, 10 Wn.App. 227, 517 P.2d 207(1973) and *Foman v. Davis*, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962). Both of these courts observed that the outright refusal to grant leave to amend, without any justifying reason, is not an exercise of discretion; it is an abuse of discretion and inconsistent with the spirit of the civil rules.

Depriving Kirsch of his day in court on the damages claim was an abuse of discretion and inconsistent with the spirit of the civil rules. Neither CR 60, nor achieving quiet title, provide a procedural knock-out blow depriving him of a hearing on the merits of his damages claim.

## **VII. CONCLUSION**

The trial court abused its discretion when it failed to consider whether amendment of the complaint would prejudice the defendant by

causing undue delay, unfair surprise, or jury confusion. The matter should be remanded to the trial court with instruction to allow amendment of the complaint. Kirsch should be granted attorney fees and costs on appeal.

RESPECTFULLY SUBMITTED this 15 day of January, 2016.

  
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