

67141-3

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CASE # 67141-3-I

COURT OF APPEALS, DIVISION 1 OF THE STATE OF WASHINGTON

JOHN and SHARLA ANN SPOELSTRA

Plaintiffs/ Respondents

v.

DANIEL GAHN AND JANE DOE GAHN,
husband and wife, and the
marital community composed thereof,

Defendant/Appellant

APPELLANT'S OPENING BRIEF

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STATE OF WASHINGTON
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(a). Mr. Gahn was engaging in the unauthorized practice of law in his dealings with Mr. Spoelstra. As such this court orders him to disgorge his fees.

(b). The Quit Claim Deed (Exhibit 1), recorded under Auditor’s File Number 2005080705 is set aside and void; and title to the property in question is quieted in favor of the Plaintiffs (CP Vol I, page 69).

No. 2 The trial court erred in denying Dan Gahn’s right to a jury trial pursuant to the State of Washington Constitution, Article I, Section 21, to determine the Plaintiffs’ claim that Dan Gahn was engaged in the unauthorized practice of law (CP Vol II, pages 201-202).

No. 3 The trial court erred in denying Dan Gahn’s Motion for New Trial or Reconsideration Pursuant to CR 59(a). (CP Vol I, pages 1-2).

No. 4 The trial court erred in not following RCW 64.04.010 in the construction of the words set forth in the Quitclaim Deed. The court in its findings that the property was given to secure fees was based upon parol evidence given by John Spoelstra that the deed was given as a security for fees which contradicted the clear language in the Quitclaim Deed (Ex 1, page 1) and in John Spoelstra’s Declaration (Ex 3) that the property was given for consideration (CP Vol I, pages 67-68).

No. 5 The trial court erred in applying parol or extrinsic evidence which was not admissible to add to, subtract from, vary, or contradict the written language in the Quit Claim Deed that was valid (CP Vol I, pages 67-68).

No. 6 The trial court erred in failing to set forth in its findings of facts any facts that would constitute a violation of the unauthorized practice of law pursuant to state law or court rules or any conclusions of law showing how Dan Gahn was in violation of any state law or court rules or negligent or failed his duties in his dealings with the plaintiffs.

No. 7 The trial court erred when it failed to follow the procedure set forth in CR 54(f)(2) by signing the Order on Verdict knowing that the defendant was not served a copy of the proposed order and SCLCR 52(a)

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No. 9 The trial court erred in its findings of facts stating that: " In fact, Mr. Gahn did intervene and did appear in court as a party in interest in the Kaufman litigation pursuant to the rights conferred on him by the Quit Claim Deed." No testimony by either party supports this finding nor was there any documentation entered that would support this finding.

No. 10 The trial court erred in not submitting to the jury the question, was the defendant Gahn engaged in the unauthorized practice of law?

No. 11 The trial court erred in denying the defendant's Motion for Judgment as a Matter of Law dismissing plaintiffs' claim for the unauthorized practice of law. (CP Vol. 1, pages 86-87)

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Issue No. 2. Did the trial court fail to set forth in its findings of facts and conclusions of law what state statute, court rules or duties that the defendants were in violation of or failed to perform that was the unauthorized practice of law that injured the plaintiffs? (Assignment of Error Nos. 3 and 7)

Issue No. 3. Was there irregularity in the proceedings of the trial court to the prejudice of the defendants when the trial court signed the Order on the Verdict knowing that the defendants did not receive a copy of the proposed order as mandated by CR 54(f)(2) Notice of Presentation. No order or judgment shall be signed or entered until opposing counsel have been given 5 days' notice of presentation and served with a copy of the proposed order or judgment, and SCLCR52(a)? (Assignment of Error Nos. 3 and 7)

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Issue No. 5. Was the trial court prohibited pursuant to RCW 64.04.010 to add to, subtract from, vary, or contradict the written language in the Quit Claim Deed in order to give legal effect to an alleged oral agreement put forth by John Spoelstra that the property was given as a security. (Assignment of Error No . 4)

Issue No. 6. Was the trial court precluded from the use of parol evidence to add to, subtract from, modify, or contradict the terms of the fully integrated written Quitclaim Deed? (Assignment of Error No. 5)

Issue No. 7. Was Dan Gahn denied his Constitutional right to a jury trial on plaintiffs’ issue of the unauthorized practice of law pursuant to the State of Washington Constitution, Article I, Section 21? (Assignment of Error No. 2)

Issue No. 8. Was Gahn entitled to have the trial court instruct the jury on his theory of the case that a person with legal skills, but who is not an attorney, and who works under the supervision of a lawyer performing various tasks relating to the practice of law, is not practicing law? (Assignment of Error No. 12)

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A. ASSIGNMENTS OF ERROR

No. 1 The trial court erred in issuing an order concluding that:

(a). Mr. Gahn was engaging in the unauthorized practice of law in his dealings with Mr. Spoelstra. As such this court orders him to disgorge his fees.

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No. 10 The trial court erred in not submitting to the jury the question, was the defendant Gahn engaged in the unauthorized practice of law?

No. 11 The trial court erred in denying the defendant's Motion for Judgment as a Matter of Law dismissing plaintiffs' claim for the unauthorized practice of law. (CP Vol. 1, pages 86-87)

No. 12 The trial court erred in not allowing Gahn's jury instruction no. 1 (CP Vol I, page 82) which denied Gahn the right to present the theory of his defense to the jury.

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Issue No. 1. Was the trial court's determination of facts erroneous and unsupported by substantial evidence, and should not be binding or treated as verities on appeal? (Assignment of Error Nos. 8 and 9)

Issue No. 2. Did the trial court fail to set forth in its findings of facts and conclusions of law what state statute, court rules or duties that the defendants were in violation of or failed to perform that was the unauthorized practice of law that injured the plaintiffs? (Assignment of Error Nos. 3 and 7)

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B. STATEMENT OF THE CASE

On August 25, 2004 John and Sharla Spoelstra through their attorney, Jane Koler, filed a lawsuit against Dan Gahn claiming that Gahn committed fraud, extortion, the unauthorized practice of law, unjust enrichment and negligent misrepresentation in obtaining property from the Spoelstras.

Spaelstras further sought injunctive relief

On October 25, 2004 Gahn filed with the lower court and served upon the Spaelstras' attorney Jane Koler an Answer and Affirmative Defenses to Plaintiffs' Complaint and a Counterclaim alleging that the Spaelstras committed slander of title, fraud and malicious prosecution. Gahn further sued for quiet title. (CP Vol. II, pages 210-232)

On 11/8/07 defendant filed a Motion for Summary Judgment. On 11/29/07 plaintiffs' filed an Opposition to Motion for Summary Judgment. On 12/26/07 a Motion for Summary Judgment was set on for hearing before the Honorable Judge James Allendoefer. Judge Allendoefer dismissed plaintiffs' claims for extortion, unjust enrichment, injunctive relief and negligent misrepresentation. Judge Allendoefer ruled that Mr. Spaelstra said at least in writing that he had voluntarily deeded the property to Mr. Gahn and that because Mr. Spaelstra is now trying to take back his declarations (Ex 3) and his deed (Ex 1) he must suffer the unclean hands consequence.(See excerpt of Allendoefer's ruling, CP Vol I, page 19, lines 17-22) Judge Allendoefer further dismissed defendant's claims for slander of title, fraud and malicious prosecution.

On 5/21/08 plaintiffs filed an Amended Complaint which maintained the claims for fraud and the unauthorized practice of law. The Amended Complaint added a new cause of action under the Consumer Protection Act. (CP Vol II, pages 203-209)

On 5/26/10 defendant, timely, filed a demand for a jury trial of

twelve. (CP Vol II, pages 201-202)

The jury trial was commenced on 2/01/11 before Judge Joseph P. Wilson.

Defendants submitted to the trial court a trial brief (CP Vol I, pages 98-99). Within the trial brief defendants set forth Judge Allendoefer's ruling on defendants' Motion for Summary Judgment. Judge Allendoefer also ruled as follows:

Mr. Gahn is correct that you can't come to a court in equity with unclean hands. Mr. Spoelstra said at least once in writing that he had voluntarily deeded the property to Mr. Gahn, and Olympic Pipeline was entitled to rely upon that. Mr. Spoelstra is now trying to take back his declarations and take back his deed. He must suffer the unclean hands consequence. (See excerpt of Allendoefer's ruling, CP Vol I, page 19, lines 17-22)

Defendants' Trial Brief stated that: "Judge Allendoefer's ruling, as a matter of res judicata, has tried and determined that the writings, the Quitclaim Deed (Ex 1) and the Plaintiffs' Declaration in Support of Dan Gahn's Motion to Intervene (Ex3), were the Spoelstras. Judge Allendoefer's ruling stripped the plaintiffs of the right to seek equitable relief."

At the close of the plaintiffs' case in chief the defendant filed motions for directed verdict on plaintiffs' claim under the Consumer Protection Act for fraud (CP Vol I, pages 96-97), the unauthorized practice of law (CP Vol I, pages 86-87) and an oral motion to dismiss plaintiffs' claim for fraud. Judge Wilson dismissed the plaintiffs' claims under the Consumer Protection Act and the plaintiffs' claim for fraud but denied plaintiffs' motion to dismiss the unauthorized practice of law. The only remaining issue left to

determine was the unauthorized practice of law.

Judge Wilson submitted the special interrogatory to the jury, “ Did Gahn engage in the practice of law in his dealings with Mr. Spoelstra from 2002 until the signing of the Quit Claim Deed?”.Also, incorporated in the interrogatory was a jury instruction that was submitted by the defendant which stated, “Further, a party to a legal document may select, prepare or draft that document without fear of liability for unauthorized practice of law. (CP Vol I, page 73)

The trial court denied defendants’ jury instruction no. 1:

“However, a person with legal skills, but who is not an attorney, and who works under the supervision of a lawyer performing various tasks relating to the practice of law, is not practicing law.”(CP Vol I, page 82)

And defendants’ jury instruction no. 2:

“Further, a party to a legal document may select, prepare or draft that document without fear of liability for unauthorized practice of law.” (CP Vol I, page 83)

And a jury instruction based upon GR 24:

(c) Nonlawyer assistants: nothing in this rule shall affect the ability of nonlawyer assistants to act under the supervision of a lawyer in compliance with Rule 5.3 of the Rulse of Professional Conduct.

(d) General information: nothing in this rule shall affect the ability of a person or entity to provide information of a general nature about the law and legal procedures to members of the public. (CP Vol I, page 85)

Within the trial court’s jury instructions, the only jury instruction, number 4, concerning the definition of practice of law submitted by Judge Wilson to the jury, set forth seven elements as to what constitutes the practice of law which is as follows: 1) Participation in court proceedings for

another; 2) Holding oneself out as an attorney; 3) Advertising legal services; 4) Conferring with clients; 5) Giving legal advice to clients; 6) giving legal counsel to clients; and 7) Selection, drafting, or completion of legal documents or agreements which affect the legal rights of a person. The jury instruction was basically a reinstatement of GR 24(a). (CP Vol I, page 79)

This question should never have been submitted to a jury. There was no dispute on the fact that the work performed by Gahn under the supervision of St. Mary fell within the definition of the practice of law. Gahn admitted that he drafted legal documents and forms in response to Snohomish County's Motion for Summary Judgment (RP pages 110- 111). All were done under the supervision of Randall St Mary. Defendants do not contend that the verdict of the jury is incorrect. The defendants were not defending against the allegations of the practice of law but were defending against the allegations of the unauthorized practice of law. This question was not submitted to the jury and should have been.

After the decision of the jury that the defendants did practice law Judge Wilson dismissed the jury and conducted a non jury trial on the plaintiffs' allegations that the defendants committed the unauthorized practice of law. Judge Wilson entered an oral verdict that the defendants did perform the unauthorized practice of law in their dealings with Spoelstras. The Court ordered the Spoelstras to draft the order.

On or about 2/9/11 defendants received a letter from Judge Wilson's law clerk (CP Vol I, page 72) stating, "I am writing to inform you that Judge

Wilson is scheduling a hearing for presentation of the order from the above entitled case. The hearing will take place in Dept. 5 on February 24, 2011 at 9:00 am.”.

Judge Wilson on behalf of the plaintiffs, drafted and submitted the Order on Verdict (CP Vol I, pages 67-89). At the February 24, 2011 hearing Judge Wilson signed the order knowing that the defendants had not received a copy of the order five days previous to the signing in violation of CR 54(f)(2).and SCLCR 52(a)(1). The defendants, to their prejudice, were denied the right to review and submit changes to the findings of facts and conclusions of law.

On March 7, 2011 defendants filed a Motion for New Trial or Reconsideration Pursuant to CR 59(a) (CP Vol I, pages 3-66). Defendants requested a new trial or in the alternative a motion for reconsideration pursuant to CR 59(a)(1), (5), (7) or an order dismissing the plaintiffs’ cause of action for the unauthorized practice of law. Defendants raised the following issues in their motion:

Issue 1. **CR 59(a)(1)** Irregularity in the proceedings of the court based on the Court’s failure to comply with the mandates set forth in CR 54(f)(2) for not serving a copy of the proposed order/judgment five days prior to the hearing. (CP Vol I, pages 3-4)

Issue 2. The defendants would have raised a written objection to the misrepresented facts and the defects in the order as follows: (CP Vol I, page 4-8)

Issue 3. **CR 59(a)(5)** Damages so excessive or inadequate as unmistakably to indicate that the verdict must have been the result of passion or prejudice (CP Vol I, pages 8-12)

Issue 4. **CR 59(a)(7)** That there is no evidence or reasonable inference from

the evidence to justify the verdict or the decision, or that it is contrary to law; (CP Vol I, pages 12-15)

Issue 5. **CR 59(a)(8)** Error in law occurring at the trial and objected to at the time by the party making the application. (CP Vol I, pages 15-16)

Defendants attached to the motion, as a supporting document, a portion of Judge Allendoefer's oral ruling. Judge Allendoefer had a complete copy of the transcribed oral ruling on the summary judgment motion placed on file with the clerk of the court on 1/25/08 and made part of the lower court's record for the purpose of clarity in Judge Allendoefer's findings of facts and conclusions of law. Also attached was a complete copy of Randall St. Mary's Deposition.

On 4/11/11 Judge Wilson entered a memorandum decision denying defendants Motion for New Trial or Reconsideration Pursuant to CR 59(a). (CP Vol I, pages 1-2)

C. ARGUMENT

Issue No. 1. Was the trial court's determination of facts erroneous and unsupported by substantial evidence, and should not be binding or treated as verities on appeal? (Assignment of Error Nos. 8 and 9)

The defendants, in their Motion for New Trial or Reconsideration, did challenge Judge Wilson's findings and facts as being false and misleading. (CP Vol I, pages 4-6)

The rule of law concerning the treatment of the trial court's findings of facts on appeal is set forth in State v. Thetford 109 Wn.2d 392, November 12, 1987 and cases cited therein as follows:

Normally, a trial court's findings of fact will be upheld on appeal so long

as they are supported by substantial evidence. *Nichols Hills Bank v. McCool*, 104 Wn.2d 78, 82, 701 P.2d 1114 (1985). Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the stated premise. *Ridgeview Properties v. Starbuck*, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982).

It is the defendants contention that the trial courts findings of facts are not supported by substantial evidence and the following sets forth the erroneous findings of facts which are not supported by substantial evidence from the record:

On finding number 1 Mr. Gahn advised Mr. Spoelstra that in order for Mr. Gahn to continue working on his legal matters Mr. Spoelstra would have secure payment of his fees, in the approximate amount of \$40,000.

This finding is not supported by the record and is an intentional misstatement of Gahn's testimony. The use of the word advise is for the purpose of making it look as if it was legal advice when in fact Gahn testified that:

“I informed John that I would no longer perform any work for him until he paid me for the work that I did under Randall St. Mary.”
(RP 116, lines 16-18)

Further, Gahn never used the phrases in his testimony “work on his legal matters” or “would secure payment of fees” . The statement in the order, “Mr. Gahn advised Mr. Spoelstra that in order for Mr. Gahn to continue working on his legal matters, Mr. Spoelstra would have to secure payment of his fees, in the approximate amount of \$40,000.” is a misrepresentation of the testimony of Dan Gahn. Dan Gahn testified that it was John Spoelstra who made the proposal that he would look through his properties, pick one and deed it to the defendants for past services performed.

“And so John said he would be willing to give us a piece of property at that time for the payment, for consideration, ...”

(RP 116, lines 23-25)

Defendant Gahn testified that they didn't really want the property for payment for previous work performed but would accept the property for payment in full as consideration for previous work performed (RP 117, lines 2-14). which is reflected on the Quitclaim Deed. Defendant Gahn testified that the entire idea for payment was the concept of John Spoelstra not Dan Gahn. Gahn never testified that the payment for the debt was a security. The payment was for consideration given. Judge Wilson's finding number 1 is not supported by the record and is a total distortion and misrepresentation of the facts.

On finding number 2 that in order to secure said fees, Mr. Gahn would accept a Quit Claim Deed on a piece of property selected by Mr. Spoelstra and that the property selected should be one involved in the Kaufman litigation.

Neither Spoelstra nor Gahn testified, That in order to secure said fees, Mr. Gahn would accept a Quit Claim Deed on a piece of property selected by Mr. Spoelstra. Gahn testified:

“And so John said he would be willing to give us a piece of property at that time for the payment, for consideration, ...”
(RP 116, lines 23-25)

“So this payment of the property didn't represent any future work, it only represented payment that was performed under Randall St. Mary.” (RP 119, lines 19-23)

John Spoelstra and Sharla Spoelstra testified in their Declaration which is marked as trial court's (Ex 3) that:

I, John Spoelstra, and I, Sharla Ann Spoelstra, declare under penalty of perjury under the laws of the State of Washington

that the following is true and correct to the best of my knowledge and belief:

That on or about March 17, 2004 declarants did transfer to Dan Gahn for consideration given all interest in the following real property described as Parcel M within Jerry Coffman's, d/b/a Coffman Construction, lis pendens lien and further set forth as an attached exhibit A7, A8, A9 and A10 to plaintiff Jerry Coffman's complaint. The description of the property is as follows:

It is clear from the testimony of both parties that the property was deeded for consideration given. Further, that the property selected should be one involved in the Kaufman litigation.” Neither John nor Sharla Spoelstra testified that the property selected should be one involved in the Kaufman litigation. The only one who testified to this was Gahn and Gahn testified that :

“Now, John at that time also asked me, he said, Dan, will this give you standing in the Coffman lawsuit, you know, this piece of property? I told John yes, it would give me standing because I could be a party of interest in it.”

Further, the trial court's finding number 2 is not supported by the record.

On finding number 3 that Mr. Gahn represented to Mr. Spoelstra that the Quit Claim Deed would serve two purposes: One, it would secure his fees and two, it would allow Mr. Gahn to intervene in the Kaufman litigation as a party in interest and allow him to argue in court. Both Mr. Gahn and Mr. Spoelstra testified to this dual purpose.

Neither party testified that the Quitclaim Deed would serve two purposes. This finding is not supported by substantial evidence. Gahn never testified that the deed was to secure fees. Gahn never used the word fees.

Again, to restate what Gahn testified to is as follows:

“And so John said he would be willing to give us a piece of property at that time for the payment, for consideration, ...”
(RP 116, lines 23-25)

“So this payment of the property didn’t represent any future work, it only represented payment that was performed under Randall St. Mary.” (RP 119, lines 19-23)

Neither party testified that Gahn represented to the plaintiffs that the Quitclaim Deed would serve a second purpose to intervene into a litigation called Kaufman. This fact is not supported by substantial evidence.

On finding number 4 in fact, Mr. Gahn did intervene and did appear in court as a party in interest in the Kaufman litigation pursuant to the rights conferred on him by the Quit Claim Deed.

This finding by the Court is an out and out lie. There is no testimony by either of the parties or documentary evidence that supports this finding.

On finding number 6 the fees to be secured for work done on behalf of Mr. Spoelstra from 2002 to 2004 totaled approximately \$40,000. However, there has never been a written accounting of the fees incurred that has been produced to Mr. Spoelstra.

Again, the trial court’s finding is not supported by substantial evidence that the Quitclaim Deed was given to secure fees. Both parties have testified that the Quitclaim Deed was given for consideration which constituted payment for work performed, supra. And the Quitclaim Deed states that it was given for consideration. No where in the Quitclaim Deed does it use the verbiage secure, securities or to secure fees.

The trial court’s finding that there has never been a written accounting of the fees incurred that has been produced to Mr. Spoelstra is incorrect.

Gahn testified:

“. . . John had viewed on my computer the amount of hours that we put into this, and he knew that it was \$40,000 owed. He didn’t quibble about it, he didn’t say it was too much money, there was no argument at that time about the \$40,000.”

Gahn showed John Spoelstra a written billing account on the computer of the hours spent that amounted to \$40,000. It was based on this accounting that John Spoelstra agreed to transfer the property as consideration for the \$40,000.

On finding number 8 Mr. Gahn testified that he would return the property to Mr. Spoelstra upon payment of his fees and that he held the Quit Claim for security purposes.”

This finding is not supported by substantial evidence or any evidence.

This is an outright misrepresentation of Gahn’s testimony. Gahn testified that:

“And so John said he would be willing to give us a piece of property at that time for the payment, for consideration, ...”
(RP 116, lines 23-25)

“So this payment of the property didn’t represent any future work, it only represented payment that was performed under Randall St. Mary.” (RP 119, lines 19-23)

It is clear from Gahn’s testimony that it supports the language in the Quitclaim Deed that the property was given for consideration for payment for previous work performed not as a security for fees. Further, Gahn never testified that he would return the property to the Spoelstras upon payment of fees. Gahn testified that:

“ . . .John asked me to hold - - if we put together the deed, to hold the deed and not to sell it until he sold his six properties and he wanted to buy it back, okay, and not to register it with the auditor’s office because he didn’t want to pay taxes on it just buying it back. I agreed. I said, John, I’ll give you the right of first refusal. I won’t - - if you want to buy it back, and I told him I’ll sell it back to you for the amount of money, for the \$40,000. (RP page 118, lines 2-15)

Gahn’s testimony clearly demonstrates that he purchased the property from the Spoelstras and was willing to sell it back to the Spoelstras for \$40,000.

The use of the language 'sell it back' would mean that both parties had agreed that Gahn was the owner and could agree to sell it back. John Spoelstra was not under any obligation to buy it back. The Spoelstras never testified that after they sold their six lots they approached Gahn and presented an offer to buy the property back for the \$40,000.

Issue No. 2. Did the trial court fail to set forth in its findings of facts and conclusions of law what state statute, court rules or duties that the defendants were in violation of or failed to perform that was the unauthorized practice of law that injured the plaintiffs? (Assignment of Error Nos. 3 and 6)

What is missing from the trial court's findings of facts is the where, when and how the unauthorized practice of law took place.

A cause of action for the unauthorized practice of law can be brought under two theories, 1) for attorneys it would be attorney malpractice as stated in Hizey v. Carpenter 119 Wn.2d 251, June 4, 1992.

Attorney and Client -- Malpractice -- Elements -- In General A claim for legal malpractice is established upon proof that (1) there existed an attorney-client relationship giving rise to a duty of care owed by the attorney to the client, (2) the attorney breached that duty by some act or omission, (3) the client was damaged, and (4) the attorney's breach of the duty of care was the proximate cause of the client's damages.

and 2) for non attorneys a party may maintain a cause of action for failure to conform to that standard constitutes actionable negligence as stated in Andersen v. Northwest Bonded Escrows, Inc.:4 Wn. App. 754 April 19, 1971:

Attorney and Client -- Unauthorized Practice -- What Constitutes -- Standard of Care. The practice of law includes legal advice and the preparation of legal instruments and contracts by which legal rights are secured; when unauthorized practice is conducted by a layman, he

is held, at a minimum, to the standards of competency of a lawyer. Failure to conform to that standard constitutes **actionable negligence**.

Obviously, Gahn is not an attorney so theory no. 2 would apply to Gahn as a layman. The Spoelstras' Amended Complaint did not set forth a cause of action for negligence. Spoelstras never testified that Gahn owed them a duty of care and breached that duty of care and were damaged by the breach. In fact, it was the testimony of John Spoelstra when asked if the quality of work performed by Gahn was good, stated, "Dan, I think you're an expert, yes." (RP page 32, lines 12-15). The trial court set forth no finding that, 1) Gahn owed the plaintiffs a duty of care or what that duty of care was pursuant to court rule or law, 2) set forth facts that Gahn failed to conform to a standard and what that standard was and found to be negligent in his duties, as a result the Spoelstras were damaged, 3) or that Gahn's breach of the duty of care was the proximate cause of the Spoelstras' damage. The court's conclusions of law for the unauthorized practice of law cannot be based upon negligent performance for failure to follow the court rules or the law in their dealings with the Spoelstras.

Spoelstras' cause of action for the unauthorized practice of law was not based upon negligence but that Gahn was not licensed to practice law and the services performed by Gahn constituted the practice of law. See plaintiffs' Amended Complaint (CP Vol II, page 204, lines 11-15 and page 205, lines 16-18, page 206, line 13) in paragraphs 4, 11 and 18 which state:

4. Defendant Dan Gahn ("Gahn") is not licensed to practice law in the State of Washington. Gahn has worked for attorney Royce Ferguson as a paralegal and on information and belief, Gahn has provided legal services to the public

for nearly 30 years.

11. The services performed by Gahn for plaintiffs included the review of pleadings, advising the plaintiffs as to their legal rights, drafting pleadings for the plaintiffs to sign and other services that constitute the practice of law.

18. The acts of defendant Gahn constitute the unauthorized practice of law. Based upon the plaintiffs' allegations the trial court, in its finding of facts and conclusions of law, failed to set forth that Gahn is not an attorney licensed to practice law in the State of Washington and did draft pleadings on behalf of the plaintiffs. Further, the trial court failed to set forth in their findings that the work performed by Gahn from 2002-2004 for the Spoelstras was done without a supervising attorney. The reason why the trial court did not include in their findings that Gahn's task relating to the practice of law was not performed under the supervision of an attorney was because the trial court record shows that the work performed by Gahn for the Spoelstras was done under the supervision of Attorney Randall St. Mary. A reading of Randall St. Mary's testimony in his deposition demonstrates that he was Gahn's supervising attorney while assisting him in responding on behalf of the Spoelstras to Snohomish County's summary judgment (see Dp St. Mary, page 16, lines 1-22, page 18, lines 23-25, page 19, line 1, page 20, lines 11-16, page 21, lines 24-25, page 22, lines 1-2 and 9, page 23, lines 5-6, page 24, lines 20-25, page 25, lines 1-2). Also, John Spoelstra testified that the work that went through Randall St. Mary was not the unauthorized practice of law (VP page 31, lines 24-25, page 32, lines 1-2). Gahn testified (VP pages 109-111, starting on line 22 on page 109, ending on line 19 on page 111).

Because Gahn had a supervising attorney the trial court's reliance upon State v. Hunt, 75 Wn. App. 795; and Tegman v. AMI, 107 Wn. App. 868 is misplaced and not applicable. Both the Hunt case and the Tegman case found that the paralegals involved in both cases were guilty of the unauthorized practice of law because the work they performed was not under the supervision of an attorney. Further, the trial court's reliance on the law set forth in Valley/50th Avenue, L.L.C., v. Randall Stewart, 159 Wn. 2d 736 is misplaced and is not applicable to the facts set forth in this case. In Valley the court held that the third party's agreement to pay past due legal fees and execution of the promissory note and deed of trust constituted a business transaction between the law firm and a client implicating RPC 1.8. The transaction for payment of fees between Spoelstras and Gahn did not arise out of an attorney-client business relationship and was not governed by RPC 1.8 but was governed under the rule of law handed down by the Supreme Court in Washington State Bar Asso. v. Great Western Union Federal Sav. & Loan Asso.: 91 Wn.2d 48 November 16, 1978 as follows:

Ordinarily, only those persons who are licensed to practice law in this state may do so without liability for unauthorized practice. RCW 2.48.010 et seq.; APR 5, 7; DRA 6.7. Moreover, both the legislature and this court have recognized that a person may appear and act in any court as his {586 P.2d 876} own attorney without threat of sanction for unauthorized practice. Dlouhy v. Dlouhy, 55 Wn.2d 718, 349 P.2d 1073 (1960); Americus v. McGinnis, 128 Wash. 28, 221 P. 987 (1924); RCW 2.48.190 . Cf. CR 11; RAP 10.1(d), 10.2(e), 10.3(d).

Additionally, we have recognized that a party to a legal document may select, prepare or draft that document without fear of liability for unauthorized practice. See, e.g., In re Droker & Mulholland, supra; Mattieligh v. Poe, 57 Wn.2d 203, 356 P.2d 328, 94 A.L.R.2d 464 (1960); Washington State Bar Ass'n v. Washington Ass'n of Realtors, supra; Paul v. Stanley, supra. This exception to our general prohibition against the

practice of law by laypersons {91 Wn.2d 57} is analogous to the "pro se" exception for court proceedings. Both exceptions are founded upon the belief that a layperson may desire to act on his own behalf with respect to his legal rights and obligations without the benefit of counsel.(emphasis added)

The substantial evidence from the trial court record demonstrates the fact that Randall St. Mary was the attorney of record for the Spoelstras and that the Spoelstras hired Gahn to assist Randall St. Mary. The testimony of Randall St. Mary, concerning Gahn's role as an assistant, when asked, replied:

Question by Gahn, "Did Gahn, myself, assist you in the preparation of the Response to Defendants' Snohomish County and District 6 Motions for Summary Judgment?"(RP page 18, lines 23-25)

Answer by St. Mary, "Yes. (RP page 19, line 1)

Question by Gahn, "Yes. In this here you will notice that it says "Factual Background". Would you agree that I assisted you in putting together the factual background? (RP page 20, lines 11-14)

Answer by St. Mary, "That's my understanding of what John had hired you to do ." (RP page 20, lines 15-16)

Also, Gahn testified that the work performed was under the supervision of Randall St. Mary (VP pages 108-111). John Spoelsta testified that the work performed was under the supervision of Randall St. Mary (VP pages 31-32). There's no disputed fact that the work performed by Gahn was under the supervision of Randall St. Mary and is authorized pursuant to GR 24(c). The plaintiffs never alleged that while Gahn was under the supervision of Randall St. Mary that he failed to comply with the Rules of Professional Conduct. Nothing in the trial court's findings of facts state that Gahn failed to comply with the Rules of Professional Conduct. According to RPC 5.3

Randall St. Mary would be responsible for any breach of the Rules of Professional Conduct. It is undisputed by the trial court record that Gahn was a party to the legal document, helped in the selection and preparation of the Quitclaim Deed as a lay person for the fees owed by the Spoelstras to Gahn. No fees were charged for the preparation of the document.

Gahn contends that if one were to take the trial court's findings of facts, nothing in the trial court's findings of facts constitutes the unauthorized practice of law. The definition of what constitutes unauthorized practice of law is set forth in RPC 5.5 which applies strictly to lawyers not non lawyer assistants. Nothing within the trial court's findings sets forth facts where, when and how Gahn breached RPC 5.5 or RCW 2.48.180.

Issue No. 3. Was there irregularity in the proceedings of the trial court to the prejudice of the defendants when the trial court signed the Order on the Verdict knowing that the defendants did not receive a copy of the proposed order as mandated by CR 54(f)(2) Notice of Presentation. No order or judgment shall be signed or entered until opposing counsel have been given 5 days' notice of presentation and served with a copy of the proposed order or judgment, and SCLCR52(a)? (Assignment of Error Nos. 3 and 7)

CR 54(f)(2) mandates as follows:

Notice of Presentation. No order or judgment shall be signed or entered until opposing counsel have been given 5 days' notice of presentation **and served with a copy of the proposed order or judgment.**

The defendants received a letter from Jesse Collins that Judge Wilson had scheduled a hearing for presentation of order in the above entitled case for February 24, 2011. Defendants waited to receive a copy of the proposed

order for judgment.

According to CR 54(e) it is the duty of the prevailing party to prepare and present a proposed form of order or judgment not later than fifteen days after the entry of the verdict or decision. After the defendants received a copy of the signed court order it was apparent that the plaintiffs did not prepare the order as required by CR 54(e) but the order was drafted and presented by Judge Wilson's court on behalf of the plaintiffs. The court intervened on behalf of the plaintiffs and sent a notice of presentation. The court knew that the plaintiffs would possibly fail in the preparation of an order but the rule is specific that if both the prevailing party and his attorney of record fail to prepare and present the form of order or judgment within the prescribed time any other party may do so without the approval of the attorney of record of the prevailing party. Judge Wilson's interference by submitting a notice of presentation and preparing the Order on the Verdict interfered with the defendants' right to prepare and present the form of order to their prejudice.

Further, SCLCR 5(a)(1) has a failure clause as follows:

... counsel for the prevailing party shall contact the trial court within fifteen (15) days after the court's decision on the merits, to set a hearing on presentation of Findings of Fact and Conclusions of Law. In the absence of compliance, all proceedings may be vacated and set aside and held for naught.

Judge Wilson, when he sent out the notice of presentation and prepared the Findings of Facts and Conclusions of Law on behalf of the plaintiffs, became their counsel according to the above mentioned rules. The rules do not allow for the judges to intervene on either party's behalf in the preparation of the

Findings of Facts and Conclusions of Law to be submitted to the opposing party 5 days before the presentation hearing. Judge Wilson knew that he was going to intentionally violate the rules to the prejudice of the defendants and to the prejudice of the defendants no proposed order was served upon the defendants. Because the defendants did not receive the proposed order within 5 days prior to the hearing date the defendants, in good faith, believed that the hearing was canceled.

Judge Wilson knew that the order, drafted at his direction, was not served on the defendants five days prior to the presentation. The Wilson court, with extreme prejudice to the defendants, intentionally violated Rule 54(f)(2) by withholding the service of the order that further demonstrates that the judgment was the result of Judge Wilson's passion and prejudice against the defendants. The order is distorted and intentionally misrepresents the facts. Also, the order fails to set forth that the court dismissed the plaintiffs' claim for fraud and claim under the Consumer Protection Act. The order should have set forth findings of facts and conclusions of law why the fraud claim was dismissed and the consumer protection claim was dismissed. Failure to do so shows the bias and prejudice of Judge Wilson against the defendant, Dan Gahn. Judge Wilson, at the beginning of the trial, informed Dan Gahn that he knew who he was. Judge Wilson, at the beginning of the trial, asked Dan Gahn why he brought this cause of action into his court. Judge Wilson called Dan Gahn a rebel without a cause and posse comitatus demonstrating that Judge Wilson had already profiled Dan Gahn as a bad

guy.

If Judge Wilson was fair and non biased why didn't he just follow the rules, CR 54(e) and SCLCR 52(a)(1) and allow the plaintiffs, who were the prevailing party, to set the presentation date and prepare the order and if they failed to do so the right to prepare the order passes to the defendants. Judge Wilson did not follow rule CR54(f)(2) when he signed the Order on the Verdict knowing that the defendants did not receive a copy of the proposed order. Had the defendants received a copy of the proposed order defendants would have timely made objections to the incorrect and misleading facts along with pointing out that the order was missing what rules or statutes that the defendant violated or what duty he owed to the plaintiffs that he violated that amounted to the unauthorized practice of law.

Gahn's contention that the trial court's failure to comply with the notice requirements of CR 54(f) voids the court order is supported by Seattle v. Sage, 11 Wn. App. 481 as follows:

The effect of the failure to comply with the notice requirement of CR 54(f) is to void the entry of the judgment and make the action of the trial court ineffectual. Under these circumstances, we deny the motion to dismiss the appeal and review the contentions {11 Wn. App. 483} raised by the City so that the parties will not be put to the useless acts of resubmitting an order of dismissal and reperfecting an appeal to attain again the present posture of the proceedings.

Issue No. 4. Was the practice of law performed by Mr. Gahn while assisting Attorney Randall St. Mary in responding to Snohomish County's Motion for Summary Judgment in Spoelstra v. Drainage District 6, et al. No. 00-2-0780-8 permitted within the defenses set forth in RCW 2.48.180(7) and the exceptions and exclusions of the Washington Court Rules GR 24(b)(11), (c) and RPC 5.3? (Assignment of Error Nos. 1, 3 and 6)

Plaintiffs' facts for their claim of the unauthorized practice of law is set forth in their Amended Complaint (CP Vol II, page 204, lines 11-15 and page 205, lines 16-18, page 206, line 13) in paragraphs 4, 11 and 18 which state:

4. Defendant Dan Gahn ("Gahn") is not licensed to practice law in the State of Washington. Gahn has worked for attorney Royce Ferguson as a paralegal and on information and belief, Gahn has provided legal services to the public for nearly 30 years.

11. The services performed by Gahn for plaintiffs included the review of pleadings, advising the plaintiffs as to their legal rights, drafting pleadings for the plaintiffs to sign and other services that constitute the practice of law.

18. The acts of defendant Gahn constitute the unauthorized practice of law.

Gahn admitted before the jury that he helped draft pleadings (Ex 15) and declarations in support of pleadings in response to Snohomish County's Motion for Summary Judgment (VP pages 110-111) which falls within the definition of the practice of law as set forth in the trial court's jury instruction no. 4 section 7) which states:

7) selection, drafting, or completion of legal documents or agreements which affect the legal rights of a person. (CP Vol I, page 79)

Gahn contends that the record below supports the fact that the work was performed under the supervision of Attorney Randall St. Mary and Randall St. Mary signed the pleadings that were submitted to the court not Gahn. Dan Gahn testified:

"John took me and introduced me to Randall St. Mary. Randall St. Mary was his attorney, and John asked me at that time to work with Randall St. Mary on that case with him, and Randall St. Mary implied it was okay." (RP page 108, line 25 and page 109, lines 1-5)

Further, Gahn testified as to the agreement made between Gahn and Randall St. Mary as to the work that Randall St. Mary apportioned for Gahn to do as follows:

“. . . Randall St. Mary informed me that I was to take on a certain portion of the pleadings that would be done and to put together all the affidavits and the background history of the case.

Now, I have now in my hand Defendant's Exhibit Number 15. The document is the Plaintiff's Response to Snohomish County's Motion for Summary Judgment. The plaintiffs in this response was the plaintiffs here, John and Sharla Spoelstra. Now, in this I had to put together - - I did the factual background on this response. And the factual background is basically - - in order to do this factual background I had to go through these two big large containers of files and dig through them and find out the history and the treatment of the case so that when I wrote up this factual background it would be based upon that. Plus John was thre informing me as to some of the facts that were in the case that were necessary to be in here also.” (RP page 109, line 25, and page 110, lines 1-17)

Gahn further testified that after he prepared a portion of the pleadings that Randall St. Mary was to complete the rest of the pleadings. (RP page 111, lines 1-25) Gahn also testified that the work he performed on behalf of the plaintiffs and was paid for was performed under Attorney Randall St. Mary. (RP page 119, lines 21-23)

Randall St. Mary testified that John Spoelstra introduced Gahn to him. (Dp St. Mary, page 13, lines 20-21) And that all three of them, St. Mary, Spoelstra and Gahn, had meetings. John Spoelstra informed St. Mary that he wanted Gahn to assemble documents, to do research and to assist Randall St. Mary in the preparation of those documents. (Dp St. Mary, page 15, lines 20-22 and page 16, lines 1-22) Randall St. Mary agreed to Gahn assisting him in the preparation of the response pleadings to Snohomish

County's Motion for Summary Judgment. (Dp St. Mary, page 18, lines 23-25, page 19, line 1, page 21, lines 24-25, page 22, lines 1-9 and page 23, lines 5-6) St. Mary also testified that in the preparation of the documents he did oversee all the documents and all the information that went into them. (Dp St. Mary, page 24, lines 20-24) When asked if he could find any reason to believe that Gahn's conduct breached any of the rules professional conduct Randall St. Mary responded, "no" (Dp St. Mary, page 26, lines 8-20).

When asked, "Now, under the Rules did you believe that any of my performance in assisting you would be considered as the unlawful practice of law or the unauthorized practice of law?"

Answered: "Well, no, you were doing factual investigations, I think you are entitled to do that. You can do research, et cetera, et cetera. As long as you are doing it with an attorney, I don't think there's anything inappropriate about that." (Dp St. Mary, page 40, lines 1-9)

Gahn contends that Judge Wilson's ruling that the legal work performed under Randall St. Mary was the unauthorized practice of law is not supported by law and was incorrect. The work performed as an assistant to and being supervised by Randall St. Mary was authorized pursuant to GR 24(c) and RPC 5.3(b),(c) and is supported by RCW 2.48.180(7), which states:

In a proceeding under this section it is a defense if proven by the defendant by a preponderance of the evidence that, at the time of the offense, the conduct alleged was authorized by the rules of professional conduct or the admission to practice rules, or Washington business and professions licensing statutes or rules.

Gahn produced more than a preponderance of evidence that his conduct was supported by the rules of professional conduct.

Issue No. 5. Was the trial court prohibited pursuant to RCW 64.04.010 to add to, subtract from, vary, or contradict the written language in the Quit Claim Deed in order to give legal effect to an alleged oral agreement

**put forth by John Spoelstra that the property was given as a security?
(Assignment of Error No. 4)**

Judge Wilson's findings that Gahn represented that the Quit Claim Deed to the property in question was given as a security for fees is allegedly based upon oral testimony of John Spoelstra and not the plain language in the Deed that the property was given for consideration. Gahn contends that Judge Wilson's findings is barred by RCW 64.04.010 which reads as follows:

Every conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed: PROVIDED, That when real estate, or any interest therein, is held in trust, the terms and conditions of which trust are of record, and the instrument creating such trust authorizes the issuance of certificates or written evidence of any interest in said real estate under said trust, and authorizes the transfer of such certificates or evidence of interest by assignment by the holder thereof by a simple writing or by endorsement on the back of such certificate or evidence of interest or delivery thereof to the vendee, such transfer shall be valid, and all such assignments or transfers hereby authorized and heretofore made in accordance with the provisions of this section are hereby declared to be legal and valid.

Judge Wilson's findings violated the purpose of the statute by allowing parol evidence to overcome the plain language written in the Quit Claim Deed that the property was given for consideration. Judge Wilson had a duty to apply RCW 64.04.010 to the written contractual agreement between Spoelstra and Gahn that was set forth in the Quit Claim Deed. Any other proof based upon oral testimony would violate the purpose of the statute to prevent fraud arising from uncertainty inherent in oral contractual undertakings as stated by the Court of Appeals in Richardson v. Cox: 108 Wn. App. 881: July 10, 2001 and cases cited therein as follows:

We begin by noting the well-established principle in Washington that,

in general, conveyances of real property must be in written form. RCW 64.04.010 . **The original purpose of the real estate statute of frauds was to provide proof that the alleged agreement was made.** Another purpose serves a cautionary function, by bringing home the significance of the conveyance, which would prevent impulsive action. See II E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 6.1, at 85 (1990). **More importantly, the purpose behind the statute is to prevent the fraud that may arise from the uncertainty inherent in oral contractual undertakings.** Miller v. McCamish, 78 Wn.2d 821, 828, 479 P.2d 919 (1971). Because an easement is an interest in land, it must be conveyed by written deed. RCW 64.04.020 ; Berg v. Ting, 125 Wn.2d 544, 551, 886 P.2d 564 (1995).(emphasis added)

Absent a written agreement between Spoelstra and Gahn stating the terms that the property was being conveyed to Gahn as some form of security the Spoelstras are statutorily barred from seeking relief based upon an oral agreement. The statute of frauds was to prevent exactly what is happening before the trial court. It was to prevent oral agreements that were based upon he said, she said or a hand shake that later would end up in court with both parties disputing what was said in an oral agreement. The intent of RCW 64.04.010 was to provide proof that an alleged agreement was made. Absent a writing there is no proof that Spoelstra and Gahn entered into an oral agreement. The only evidence that an alleged oral agreement existed between Spoelstra and Gahn that the Quitclaim Deed was given as a security is based solely upon the testimony of John Spoelstra (RP page 73, line 10) and which was disputed by Gahn who testified that the property was given as payment for consideration given (see Gahn's testimony, RP page 116, lines 23-25). This court has set forth the requirements of the trial court in its construction of a deed and the meanings of every word within the deed if

reasonably possible *Hodgins v. State*, 9 Wn. App. 486 August 6, 1973:

In the construction of a deed, a court must give meaning to every word if reasonably possible. *Fowler v. Tarbet*, 45 Wn.2d 332, 274 P.2d 341 (1954). Further, in the construction of a deed a court is required to carry out the real intention of the parties and, as stated in *Healy v. Everett & Cherry Valley Traction Co.*, 78 Wash. 628, 633, 139 P. 609 (1914), "[i]f a deed admits of more than one construction, it must be construed most strictly against the grantor, and most favorably to the grantee."

Nowhere in the trial court's findings did the court set forth the construction of the language of the deed. The plain language in the deed states that it was given for consideration. The deed does not admit more than one construction, therefore, the construction of the deed must be construed most strictly against the grantor, the Spoelstras, that it was not a security, and most favorable to the grantee, Gahn, that it was for consideration given.

Issue No. 6. Was the trial court precluded from the use of parol evidence to add to, subtract from, modify, or contradict the terms of the fully integrated written Quitclaim Deed (Ex 1)? (Assignment of Error No. 5)

Gahn contends that the trial court violated well established law when it used parol evidence, the oral testimony of John Spoelstra (VP page 73, line 10) and the false representation in the court's findings of facts no. 8 that Gahn testified that he would return the property to Mr. Spoelstra upon payment of his fees and that he held the Quit Claim for security purposes, even though Gahn disputes the trial court's finding no. 8, to conclude in its findings of facts that the deed was given as a security. Gahn testified that the property was given for payment. The well established law that governs the use of parol evidence to establish any material element within a written agreement was handed down by the Supreme Court's ruling in Family

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There is no dispute that an agreement to lease for more than 1 year is within the statute of frauds. RCW 19.36.010 ; RCW 64.04.010 . To satisfy the statute, written memoranda must disclose the subject matter of the contract, the parties, the promise, the terms and conditions, and (in some but not all jurisdictions) the price or consideration. *Bharat Overseas Ltd. v. Dulien Steel Prods., Inc.*, 51 Wn.2d 685, 321 P.2d 266 (1958). Liability cannot be imposed if it is **necessary to use parol evidence to establish any material element** of the undertaking. *Smith v. Twohy*, 70 Wn.2d 721, 425 P.2d 12 (1967).

The trial court, in order to reach its conclusion that the property was given as a security turns a blind eye to Exhibit 3, the Declaration of John and Sharla Spoelstra, who testify in writing and under oath that they did transfer to Dan Gahn for consideration given all interest in the property and Gahn's testimony that John Spoelstra agreed to give the property for payment for consideration (VP page 116, lines 23-25). The trial court also ignores that Gahn testified that the payment of the property didn't represent any future work, it only represented payment that was performed under Randall St. Mary (VP 119, lines 21-23). The trial court further, in order to reach its conclusion that the property was given as a security completely ignores the language in the deed (Ex 1). It is well established in law the duties of a court in the construction of a deed was set forth in Hodgins v. State, 9 Wn. App. 486 August 6, 1973:

In the construction of a deed, a court must give meaning to every word if reasonably possible. *Fowler v. Tarbet*, 45 Wn.2d 332, 274 P.2d 341 (1954). Further, in the construction of a deed a court is required to carry out the real intention of the parties and, as stated in *Healy v. Everett & Cherry Valley Traction Co.*, 78 Wash. 628, 633, 139 P. 609 (1914), "[i]f a deed admits of more than one construction, it must be construed most

strictly against the grantor, and most favorably to the grantee."

If the court's findings are not based upon the language of the deed the only conclusion one can draw is that the court's rationale for its conclusion is based upon parol evidence, which is contrary to well established law.

Issue No. 7. Was Dan Gahn denied his Constitutional right to a jury trial on plaintiffs' issue of the unauthorized practice of law pursuant to the State of Washington Constitution, Article I, Section 21? (Assignment of Error No. 2)

It is undisputed that Gahn filed a timely demand for jury trial pursuant to CR 38(b) (CP Vol II, pages 201-202). Gahn contends that the trial court's use of an advisory jury to answer the question, "Did Mr. Gahn engage in the practice of law in his dealings with Mr. Spoelstra from 2002 until the signing of the Quit Claim Deed?" violated his right to a jury trial pursuant to Article I, Section 21 of the State of Washington Constitution and CR 38(-)(a) on the plaintiffs' allegations that Gahn's acts constituted the unauthorized practice of law. The Supreme Court addressed the issue of the right to a jury trial in civil action in Brown v. Safeway Stores, Inc.: 94 Wn.2d 359 September 25, 1980 . The court ruled as follows:

The Washington State Constitution, article 1, section 21 provides that the right to a jury trial shall remain inviolate. We have consistently interpreted this constitutional provision as guaranteeing those rights to trial by jury which existed at the time of the adoption of the constitution. In re Marriage of Firchau, 88 Wn.2d 109, 114, 558 P.2d 194 (1977); Watkins v. Siler Logging Co., 9 Wn.2d 703, 116 P.2d 315 (1941). Accordingly, there is a right to a jury trial where the civil action is purely legal in nature. Conversely, where the action is purely equitable in nature, there is no right to a trial by jury. Peters v. Dulien Steel Prods., Inc., 39 Wn.2d 889, 239 P.2d 1055 (1952); Dexter Horton Bldg. Co. v. King County, 10 Wn.2d 186, 116 P.2d 507 (1941); Knudsen v. Patton, 26 Wn. App. 134, 137, 611 P.2d 1354 (1980). The overall nature of the action is determined by considering all the issues raised by all of the pleadings.

Seattle v. Pacific States Lumber Co., 166 Wash. 517, 530, 7 P.2d 967 (1932); Santmeyer v. Clemmance, 147 Wash. 354, 266 P. 148 (1928).

The civil action of the unauthorized practice of law would be categorized as purely legal in nature. The issue is based upon a violation of RCW 2.48.180.

(2) The following constitutes unlawful practice of law:

(a) A nonlawyer practices law, or holds himself or herself out as entitled to practice law;

(3) (a) Unlawful practice of law is a crime. A single violation of this section is a gross misdemeanor.

(7) In a proceeding under this section it is a defense if proven by the defendant by a preponderance of the evidence that, at the time of the offense, the conduct alleged was authorized by the rules of professional conduct or the admission to practice rules, or Washington business and professions licensing statutes or rules.

Or a violation of RPC5.5, unauthorized practice of law. Gahn contends that the trial court had a duty pursuant to CR 38(-)(a) to submit to the jury for examination the plaintiffs' issue that the defendant's acts constituted the unauthorized practice of law as set forth in their Amended Complaint (CP Vol II, page 4, line 14). The court's question to the advisory jury, "Did Mr. Gahn engage in the practice of law in his dealings with Mr. Spoelstra from 2002 until the signing of the Quit Claim Deed?" was not plaintiffs' issues as set forth in their Amended Complaint. The court's jury instruction no. 1 (CP Vol I, page 75, paragraph 4) is misleading and incorrect. It states,

"In order to decide whether any **party's claim** has been proved, you must consider all of the evidence that I have admitted that relates to that claim."

The jury was never given the plaintiffs' claim to decide. The plaintiffs' claim was the unauthorized practice of law not the practice of law. Further, the jury

had to make its determination based upon the trial court's jury instruction no. 4 (CP Vol I, page 79) which was the legal definition of the practice of law. The jury was asked to apply the legal definition, i.e. the law, to the facts . If this was purely an equitable question to the jury there would have been no need for the jury to apply the law to the facts. Also, it was not the jury that determined the plaintiffs' issue that Gahn was engaged in the unauthorized practice of law it was Judge Wilson who made that determination in his Order on the Verdict (CP Vol I, page 69). In doing so he violated Gahn's constitutional right to have the jury determine whether or not Gahn was engaged in the unauthorized practice of law.

Issue No. 8. Was Gahn entitled to have the trial court instruct the jury on his theory of the case that a person with legal skills, but who is not an attorney, and who works under the supervision of a lawyer performing various tasks relating to the practice of law, is not practicing law? (Assignment of Error No. 12)

The rule of law concerning jury instructions is set forth in Joyce v. Dep't of Corr 155 Wn.2d 306, September 15, 2005 and cases cited therein which states as follows:

"Jury instructions are sufficient if they allow the parties to argue their theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury of the law to be applied." Hue v. Farmboy Spray Co., 127 Wn.2d 67, 92, 896 P.2d 682 (1995) (citing Adcox v. Children's Orthopedic Hosp. & Med. Ctr., 123 Wn.2d 15, 36, 864 P.2d 921 (1993)) . We review, de novo, jury instructions for errors of law, and error is reversible where it prejudices a party. Id.

Gahn contends that the trial court's denial of Gahn's jury instruction no. 1 (CP Vol I, page 82) denied Gahn the right to argue his theory of the case to the jury to Gahn's prejudice . The jury instruction set forth a legal defense

against the unauthorized practice of law. There was substantial evidence to support the theory that Gahn's various tasks relating to the practice of law were performed under the supervision of Attorney Randall St. Mary. As set forth in testimony above both parties agree that the work performed for the Spoelstras was under the supervision of Randall St. Mary. Even the trial court recognized that there was concession that Gahn worked with Randall St. Mary:

THE COURT: So there's a concession that you worked with Mr. St. Mary on the number of legal issues that Mr. Spoelstra had. What else do you need (VP page 20, lines 5-7)?

Gahn's jury instruction no. 1 (CP page 82) would have informed the jury as follows:

However, a person with legal skills, but who is not an attorney, and who works under the supervision of a lawyer performing various tasks relating to the practice of law, is not practicing law.

The legal authority for Gahn's jury instruction was based upon State v. Hunt, 75 Wn. App. 795 July 28, 1994.

Hunt seems to argue that because he claimed to be a paralegal, RCW 2.48.180 is unconstitutionally vague as applied to him. We disagree. **A paralegal is "[a] person with legal skills, but who is not an attorney, and who works under the supervision of a lawyer in performing various{75 Wn. App. 805} tasks relating to the practice of law** or who is otherwise authorized by law to use those legal skills." Black's Law Dictionary 1111 (6th ed. 1990). **Hunt did not**

And Tegman v. Accident & Med. Invest.::107 Wn. App. 868: August 13, 2001

We agree with the trial court's observation. The label "paralegal" is not in itself a shield from liability. A factual evaluation is necessary to distinguish a paralegal who is working under an attorney's supervision from one who is actually practicing law. **A finding that a paralegal is**

practicing law will not be supported merely by evidence of infrequent contact with the supervising attorney. As long as the paralegal does in fact have a supervising attorney who is responsible for the case, any deficiency in the quality of the supervision or in the quality of the paralegal's work goes to the attorney's negligence, not the paralegal's. In this case,

This jury instruction was also supported by the court rules:

GR 24(c) Nonlawyer Assistants: Nothing in this rule shall affect the ability of nonlawyer assistants to act under the supervision of a lawyer in compliance with Rule 5.3 of the Rules of Professional Conduct.

RPC 5.3 (b), (c)

Judge Wilson gave no reason why he denied this jury instruction. Gahn contends that Judge Wilson knew that if the jury received this instruction, along with the overwhelming evidence, that the various tasks relating to the practice of law performed by Gahn was done under the supervision of Attorney Randall St. Mary that as a matter of law the jury's verdict would have been different.

What is odd is that the trial court knew that the work performed by Gahn was under the supervision of Randall St. Mary. In spite of this fact Judge Wilson, in his conclusions of law, cites the very same cases, Hunt and Tegman, for the basis of his legal authority. The legal rationale in Hunt and Tegman along with the testimonies of Randall St. Mary and Gahn that Gahn performed various tasks relating to the practice of law was done under the supervision of Randall St. Mary supports Gahn's defense against the unauthorized practice of law not the court's decision.

E. CONCLUSION

For reasons set forth above Gahn would respectfully request this

Court to enter the following findings that:

1) The trial court's findings in its Order on the Verdict (CP Vol I, pages 67-69) paragraphs 1,2,3,4,6 and 8 are not supported by substantial evidence and are erroneous.

2) The trial court failed to set forth in its findings of facts and conclusions of law how Mr. Gahn committed the unauthorized practice of law. Nothing in the ruling sets forth specifically that Gahn, in the performance of his work, violated a specific RCW or court rule or that he was negligent in his duty and what that duty was under what rule of law. The court fails to set forth when did Gahn commit the unauthorized practice of law. The trial court sets forth a time frame between 2002 and 2004 that Gahn performed work on behalf of Mr. Spoelstra. It fails to set forth what happened in that time frame, what was the work performed or where it happened and who was involved in that work when it happened. Why is Randall St. Mary missing from this history and his involvement? The trial court's findings stated that Spoelstra owed Gahn \$40,000 but the findings fail to set forth any history on how Gahn earned the \$40,000.

3) That there was irregularity in the proceedings of the trial court when the trial court signed the Order on the Verdict knowing that the defendants did not receive a copy of the proposed order as mandated by CR 54 (f)(2) to the prejudice of the defendants. Because the plaintiffs, who were the prevailing party, failed in their duty to present the order within the prescribed 15 days Judge Wilson's interference by drafting and submitting the order on

behalf of the plaintiffs deprived the defendants the right to draft and submit a proposed order in accordance with SCLCR 52(a)(1). In absence of compliance with SCLCR 52(a)(1) and CR 54 (f)(2) all proceedings are vacated and set aside and held for not and the Order on the Verdict is void.

4) The evidence from the trial court record clearly points to the fact that the tasks relating to the practice of law performed by Gahn were done under the supervision of Attorney Randall St. Mary. Evidence from the trial court record supports the fact that John Spoelstra, in 2002, hired Gahn to assist Attorney Randall St. Mary in responding to Snohomish County's Motion for Summary Judgment in Spoelstra v. Drainage District 6, et al. No. 00-2-0780-8. The work performed by Gahn was done under the supervision of Attorney Randall St. Mary and is authorized pursuant to GR 24(c), State v. Hunt and Tegman v. Accident & Med. Invest.. The trial court erred in its findings and conclusions that Gahn committed the unauthorized practice of law.

5) That the Quit Claim Deed clearly states that the property was given for consideration and not as a security. John and Sharla Spoelstras' Declaration (Ex 3) also confirms that the property was given for consideration not as a security. That the Spoelstras by way of Quit Claim Deed did transfer to Gahn all the right, title, interest in the property. The trial court was prohibited pursuant to RCW 64.04.010 from adding to, subtracting from, varying, or contradicting the written language in the Quit Claim Deed in order to give legal effect to an alleged existence of an oral agreement put forth by John Spoelstra that the property was given as a

security for fees. The property was given for consideration as payment for previously performed work by Gahn and as such no fees were owed. It was error of the trial court to set aside and void the Quit Claim Deed on the basis that it was security for fees.

6) Gahn had a constitutional right to a jury trial on plaintiffs' claim of the unauthorized practice of law. The issue of the unauthorized practice of law is purely legal in nature. The plaintiffs' action for the unauthorized practice of law is not equitable in nature. It was error on the part of the trial court to submit a portion of the plaintiffs' claim to an advisory jury, did Gahn practice law. The jury entered a ruling that Gahn did practice law. Following the jury's ruling Judge Wilson made the determination that Gahn engaged in the unauthorized practice of law in his dealings with the Spoelstras. In doing so the trial court denied Gahn's constitutional right to a jury trial on the plaintiffs' remaining issue, the unauthorized practice of law.

7) The trial court, in its findings, failed to address the construction of the Quitclaim Deed, the language within the Quitclaim Deed or the intention of both parties as set forth in the Quitclaim Deed. It was error on the part of the trial court to use parol evidence, the oral testimony of John Spoelstra, to establish that the Quitclaim Deed was given by the Spoelstras as a security for Gahn's fees. Liability cannot be imposed if it is necessary to use parol evidence to establish any material element of the undertaking between Spoelstra and Gahn within the Quitclaim Deed.

8) There was sufficient evidence from the trial court record that the work performed by Gahn was under the supervision of Randall St. Mary . Even the trial court stated that there was concession between both parties that Gahn worked with St. Mary on a number of Spoelstras' legal issues. The trial court erred when it refused to give Gahn's jury instruction no. 1 that supported the theory of his case and the defense against the unauthorized practice of law.

Gahn would ask the Court to remand the case back to the trial court with instructions dismissing plaintiffs' claim for the unauthorized practice of law and that the trial court's Order on the Verdict is void from its conception. Further, that the trial court is instructed to issue an order to quiet title to the property in favor of Gahn or any other instruction that this Court deems necessary.

Respectfully submitted,

Dated 12/11/11



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