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71845-2

No. 71845-2

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COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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JULIE ANN THOMAS, a single woman,

*Appellant,*

v.

J.R. LeVASSEUR and DONNA LOUISE LeVASSEUR,  
husband and wife, individually and the marital  
community composed thereof,

*Respondents.*

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**BRIEF OF APPELLANT**

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Dan S. Lossing  
Washington State Bar No. 13570  
Inslee Best Doezie & Ryder, P.S.  
Attorneys for Appellant

10900 NE 4<sup>th</sup> Street, Suite 1500  
Bellevue, Washington 98004  
Telephone: (425) 450-4252  
Facsimile: (425) 635-7720

COURT OF APPEALS  
 DIVISION I  
 STATE OF WASHINGTON  
 JAN 11 2012

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## **I. INTRODUCTION**

In June 2012, Julie Ann Thomas (“Thomas”) purchased a condominium in Seattle with a combination of her own funds, money she borrowed from a private lender (which has since been fully repaid) and a loan taken out by her parents, J.R. LeVasseur and Donna LeVasseur (the “LeVasseurs”). The loan to the LeVasseurs was secured by real property that Thomas had owned but which she had transferred to them for the express purpose of borrowing against it to obtain additional funds to purchase the condominium. Through a series of payments to the family business, Thomas has at all times provided the money to the LeVasseurs to service this bank loan.

At closing of the sale, by agreement of the parties title to the condominium was temporarily placed in the LeVasseurs. In late 2013, despite Thomas’ request, the LeVasseurs failed and refused to reconvey the condominium to Thomas.

On January 29, 2014, Thomas filed suit against the LeVasseurs, seeking to have title to the condominium placed in her name, pursuant to causes of action sounding in declaratory judgment and quiet title. Because the litigation related to title to real property, Thomas also filed a lis pendens. The

LeVasseurs' answer to the complaint generally denied Thomas' allegations, contending that they had paid for the condominium and that it rightfully belonged to them.

On March 12, 2014, the LeVasseurs filed a motion for summary judgment seeking dismissal of Thomas' claims, an award of sanctions under CR 11 and attorney fees under RCW 4.28.328. Thomas opposed the summary judgment motion and also requested a continuance of the hearing to permit depositions of the LeVasseurs that had been noted since February 13, 2014.

A summary judgment hearing was held on April 11, 2014 before The Honorable Julie Spector. During colloquy with the trial court, Thomas made an oral motion to amend the complaint to allege breach of contract and specific performance causes of action. At the conclusion of the hearing, the court took the matter under advisement.

On the afternoon of April 11, 2014, counsel for Thomas sought the consent of the LeVasseurs' counsel to file an amended complaint to add breach of contract and specific performance claims. This request was rejected. On April 15, 2014, Thomas filed a motion for order shortening time and a motion for leave to amend.

On April 17, 2014, the trial court entered three orders: (1) granting

Thomas' motion for order shortening time; (2) denying Thomas' motion for leave to amend; and (3) granting the LeVasseurs' motion for summary judgment in its entirety, reserving only the issue of sanctions and the amount of attorney fees.

On April 23, 2014, Thomas filed this appeal of the trial court's April 17, 2014 orders denying the motion for leave to amend and granting summary judgment.

## **II. ASSIGNMENTS OF ERROR**

- A. The trial court erred when it granted summary judgment in favor of the LeVasseurs, dismissing Thomas' claims for declaratory judgment and to quiet title, finding as a matter of law that Thomas could not prevail on either legal theory.
- B. The trial court erred when it denied Thomas' request to continue the summary judgment hearing to permit Thomas to depose the LeVasseurs.
- C. The trial court erred when it found that Thomas and her counsel had violated CR 11 and that the LeVasseurs were entitled to fees under RCW 4.28.328 .
- D. The trial court erred when, without explanation, it denied Thomas' motion for leave to amend her complaint.

### **III. STATEMENT OF THE CASE**

#### **A. Thomas Commenced Suit Alleging that Title to Certain Real Property Should be in Her Name Under Declaratory Judgment and Quiet Title Theories.**

On January 29, 2014, because the LeVasseurs had failed and refused to reconvey title to the Seattle condominium, Thomas filed suit. (CP 1-14). The facts were intentionally sparse and the claims were broadly asserted, seeking declaratory judgment that Thomas should rightfully be on title to the condominium and an order quieting title to the condominium in Thomas. LeVasseur was on notice that Thomas claimed title to the condominium.

On February 13, 2014, Thomas sent out Notices of Deposition for the LeVasseurs, setting their depositions for April 24, 2014. The scheduling of the depositions was designed to allow the LeVasseurs to answer the complaint, to permit Thomas to propound written discovery requests based on the response to the complaint and to have depositions thereafter. (CP 267).

#### **B. The LeVasseurs Filed a Motion for Summary Judgment and for CR 11 Sanctions and Attorney Fees.**

On March 12, 2014, the day after they provided answers to Thomas' first set of written discovery requests, the LeVasseurs filed a motion for summary judgment, seeking dismissal of Thomas' claims, an award of sanctions under CR 11 and an award of attorney fees under RCW 4.28.328.

(CP 35-47).

Among other things, the LeVasseurs claimed that they were the rightful owners of the Seattle condominium and that they paid for it. (CP 48-52). They conveniently failed to attach documents (which they had produced only the previous day) showing numerous and substantial payments by Thomas for the purchase of the condominium including, without limitation, her personal check for the earnest money (CP 176) and wire transfer receipts from Thomas totaling \$542,500 (CP 180, 194). These documents, among others, were attached to the Declaration of Julie Thomas filed in response to the LeVasseurs' motion. (CP 160-223).

**C. Thomas Opposed the LeVasseurs' Motion and Requested a Continuance Under CR 56(f).**

On April 1, 2014, Thomas filed her response to the summary judgment motion (CP 141-55) together with supporting Declarations of Doug Bain (CP 156-9), Julie Thomas (CP 160-223) and Dan Lossing (CP 224-67). Among other things, the Declarations of Doug Bain and Julie Thomas directly contradicted assertions by the LeVasseurs that they had paid for the Seattle condominium and that they were rightfully on title.

The Declaration of Dan Lossing (CP 224-67) filed in opposition to the LeVasseurs' summary judgment motion highlighted the lack of documentary

discovery produced by the LeVasseurs tending to prove that they had any of their own money in the Seattle condominium and explained the nascent status of discovery. The LeVasseurs had provided their responses to written discovery requests only a day before they filed their summary judgment motion, and none of the seventeen witnesses the LeVasseurs identified as having knowledge of the transaction had been deposed. (CP 225).

Thomas' response to the summary judgment motion included a CR 56(f) request to continue the summary judgment hearing to conduct discovery which, at a minimum, would involve the depositions of the LeVasseurs. (CP 149-51; CP 226). The depositions of the LeVasseurs had been scheduled for April 24, 2014 since February 13, 2014. It is worth noting that, according to the Civil Case Schedule, the discovery cutoff was not until February 9, 2015 and the trial date was March 30, 2015, nearly a year away. (CP 17).

**D. At Oral Argument, In Addition to Opposing the Motions, Thomas Requested Leave to Amend.**

At oral argument on April 11, 2014, counsel for Thomas requested the opportunity to amend. Counsel stated his belief that the existing causes of action of declaratory judgment and quiet title were sufficiently broad to provide notice to the LeVasseurs of a challenge to title, but sought the opportunity to amend to add claims for breach of contract and/or specific

performance. (RP page 22, lines 6 to 20). The Clerk's Minute Entry regarding the summary judgment hearing also reflects this request to amend. (CP 293).

At the close of the hearing, the court took the matter under advisement, indicating to counsel that a ruling would be issued within the next week. (RP page 31, line 14 to page 32, line 3).

**E. Before the Court Ruled on the LeVasseurs' Motions, Thomas Filed a Motion for Leave to Amend.**

Under the circumstances, CR 15(a) required either leave of court or consent of the other party to file an amended pleading. On the afternoon of April 11, 2014, counsel for Thomas sought the consent of the LeVasseurs' attorney to file an amended complaint. (CP 314). That request was rejected.

On April 15, 2014, Thomas filed a motion for order shortening time on motion for leave to amend (CP 294-296) and supporting Declaration of Dan Lossing. (CP 297-301). This motion was necessary because Thomas wanted the issue decided before the court ruled on LeVasseurs' summary judgment motion.

Also on April 15, 2014, Thomas filed a motion for leave to amend (CP 302-309) and supporting Declaration of Dan Lossing. (CP 310-343). On April 17, 2014, Thomas filed a reply to the LeVasseurs' response to the motion for leave to amend. (CP 355-359). It is not clear whether the trial

court reviewed this reply before issuing its April 17, 2014 orders.

**F. The Court Granted the LeVasseurs' Summary Judgment Motion and Reserved Sanctions and Fees, Granted Thomas' Motion for Order Shortening Time and Denied Thomas' Motion for Leave to Amend, Without Explanation.**

On April 17, 2014, the trial court issued three orders. According to the Index to Clerk's Papers, they were entered in the following sequence: (1) an order granting Thomas's motion to shorten time (CP 360-1); (2) an order denying Thomas' motion for leave to amend (CP 362-3); and an order granting the LeVasseurs' motion for summary judgment and for sanctions and fees. (CP 363-7).

The form of order denying Thomas' motion for leave to amend was identical to the proposed order submitted by the LeVasseurs. (CP 362-3). It reflected no changes other than the date and the judge's signature. The court did not provide any explanation or justification whatsoever for its decision to deny Thomas' request for leave to amend.

The form of order granting the LeVasseurs' summary judgment motion was also identical to the proposed order submitted by the LeVasseurs. (CP 363-7). Other than the date and the judges' signature, the only revision was the insertion of the word "reserved" on the line indicating the amount of an award to the LeVasseurs.

On April 23, 2014, Thomas appealed the trial court's rulings denying Thomas's motion for leave to amend and granting the LeVasseurs' motion for summary judgment. (CP 368-77).

#### **IV. ARGUMENT AND AUTHORITY**

##### **A. The Trial Court Erred When It Granted the LeVasseurs' Motion for Summary Judgment.**

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###### **1. Standard of Review.**

The court of appeals reviews a trial court's summary judgment ruling de novo and engages in the same inquiry as the trial court. See, *Keith v. Allstate Indemnity Company*, 105 Wn.App. 251, 254, 19 P.3d 1077 (Div. 1 2001). Just as the trial court is obligated to do, the appellate court views the evidence in the light most favorable to the nonmoving party. See, *McNeil v. Powers*, 123 Wn.App. 577, 587, 97 P.3d 760 (Div. 3 2004).

Furthermore, any findings of fact in the trial court's order are superfluous and carry no weight on appeal. See, *Thongchoom v. Graco Children's Products, Inc.*, 117 Wn.App. 299, 309, 71 P.3d 214 (Div. 3 2003); *Hamilton v. Huggins*, 70 Wn.App. 842, 848, 855 P.2d 1216 (Div. 1 1993).

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2. The Trial Court Ignored Multiple Genuine Issues of Material Fact.

Summary judgment should be used with caution, and it should be granted only when there is no genuine issue of material fact:

Summary judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.

*Camicia v. Howard S. Wright Construction Co.*, 179 Wn2d 684, \_\_\_\_, 317 P.3d 987, 991 (2014). In this case, the trial court overlooked the substantial conflicts between the sworn testimony of Julie Thomas and Doug Bain and the Declaration of J.R. LeVasseur regarding one of the central issues in the case (*i.e.*, who paid for the Seattle condominium).

By way of example, in his Declaration J.R. LeVasseur repeatedly asserted that he paid for the condominium. (CP 49, ¶7, ¶13, CP 51, ¶26). These assertions were directly contradicted by the Declaration of Julie Thomas, attaching several documents produced by the LeVasseurs in discovery. (CP 163-5, ¶12, CP 165, ¶13, 14). The parties also disagreed about whether the Seattle condominium was a “gift” from Thomas to the LeVasseurs. (CP 162-3, ¶10). These are but two of the multitude of “genuine disputes of material fact” that existed on the record when the trial court granted the LeVasseurs’ summary judgment motion.

It cannot be said that this case was remotely ripe for summary judgment as of April 17, 2014. Under the de novo standard of review, and examining the facts in the light most favorable to Thomas, the trial court's order granting summary judgment must be reversed.

**B. The Trial Court Erred When It Denied Thomas' CR 56(f) Request for Continuance.**

1. Standard of Review.

A trial court's decision regarding whether to grant a continuance to permit discovery in connection with a summary judgment proceeding is discretionary, and is subject to reversal for abuse of discretion. See, *Mutual of Enumclaw Insurance Co. v. Patrick Archer Construction, Inc.*, 123 Wn.App. 728, 743, 97 P.3d 751 (Div. 1 2004); *Hewitt v. Hewitt*, 78 Wn.App. 447, 455, 896 P.2d 1312 (Div. 1 1995). See, also, *Coggle v. Snow*, 56 Wn.App. 499, 504, 784 P.2d 554 (Div. 1 1990).

2. The Trial Court Improperly Denied Thomas' Request for a Continuance.

Civil Rule 56(f) is designed to assure that a summary judgment decision by the trial court is based on a complete record:

**(f) When Affidavits Are Unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the

court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

In *Coggle v. Snow*, 56 Wn.App. 499, 504, 784 P.2d 554 (Div. 1 1990), the plaintiff commenced suit alleging negligence and several other theories arising out of medical care. More than two years later, defendant filed a summary judgment motion. Plaintiff sought a continuance under CR 56(f) seeking a thirty to forty-five day continuance of the motion because plaintiff was unable to obtain a physician's affidavit. The trial court denied the request for continuance, granted defendant's summary judgment motion and denied plaintiff's subsequent motion for reconsideration.

This Court reversed and remanded for trial. Regarding the trial court's exercise of discretion:

CR 56(f) states that where affidavits of the party opposing the motion for summary judgment show reasons why the party cannot present facts justifying its opposition, the court may refuse the motion for summary judgment order a continuance in order to obtain affidavits or the depositions. Where a party knows of the existence of a material witness and shows good reason why the witness' affidavit cannot be obtained in time for the summary judgment proceeding, the court has a duty to give the party a reasonable opportunity to complete the record before ruling on the case.

...

In considering the application of CR 56(f), we note the trend of modern law is to interpret court rules and statutes to allow decision on the merits of the case. (Citation omitted) In addition, the superior court rules are to be construed to secure the just, speedy and inexpensive determination of every action. CR 1.

56 Wn.App. at 507-8. See, also, *Turner v. Kohler*, 54 Wn.App. 688, 693, 775 P.2d 474 (Div. 1 1989). The earlier case of *Sternoff Metals Corporation v. Vertecs Corporation*, 39 Wn.App. 333, 341, 693 P.2d 175 (Div. 1 1984) provides further guidance regarding the exercise of the trial court's discretion.

Where a party has shown a good reason why certain evidence cannot be obtained in time for a summary judgment proceeding, the trial court has a duty to give the party a reasonable opportunity to complete his record before ruling on the motion, especially where the continuance would not result in a further delay of the trial.

39 Wn.App. at 341.

The Declaration of Dan Lossing (CP 224-6) sets forth good cause for why evidence could not be obtained in time for the summary judgment proceeding. The LeVasseurs had answered the complaint on February 28, 2014 and Thomas' discovery requests were propounded two days thereafter. The LeVasseurs did not answer those discovery requests or produce documents they claimed were responsive to those requests until March 11, 2014, one day before they filed the summary judgment motion.

On February 13, 2014, Thomas had noted the depositions of the LeVasseurs, setting them out to April 24, 2014 to permit the LeVasseurs to answer the complaint and to allow time for Thomas to propound discovery and receive responses before the depositions. The LeVasseurs' summary judgment motion – set for April 11, 2014, a mere two weeks before the long-scheduled depositions of the LeVasseurs – essentially hijacked that efficient discovery process. As a direct consequence, Thomas was also deprived of any opportunity to present deposition testimony as part of her response to the summary judgment motion.

In sum, Thomas was not permitted a reasonable opportunity to complete the record before the court rendered a ruling on the summary judgment. Thomas respectfully submits that the trial court had a duty to grant her a reasonable opportunity and that its refusal to do so constitutes reversible error.

**C. The Trial Court Erred When it Found a CR 11 Violation and that the LeVasseurs Were Entitled to Attorney Fees Under RCW 4.28.328.**

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1. Standard of Review.

A trial court's decision regarding whether or not to impose sanctions is subject to review for abuse of discretion. *Washington State Physicians*

*Insurance Exchange & Association v. Fisons Corp.*, 122 Wn.2d 299, 338, 858 P.2d 1054 (1993). The trial court's decision constitutes abuse of discretion when its order is manifestly unreasonable or based upon untenable grounds. *Watson v. Maier*, 64 Wn.App. 889, 896, 827 P.2d 311 (Div. 2 1992).

The trial court's ruling that the LeVasseurs' were entitled to attorney fees under RCW 4.28.328 should be viewed as a component of the court's ruling on summary judgment. Accordingly, Thomas respectfully submits that the court could not determine liability on this issue unless it found no genuine issue of material fact, viewing the facts in the light most favorable to Thomas. See, *Keith v Allstate Indemnity Company*, 105 Wn.App. 251, 254, 19 P.3d 1077 (Div. 1 2001); *McNeil v. Powers*, 123 Wn.App. 577, 587, 97 P.3d 760 (Div. 3 2004).

2. The Trial Court's Finding of a CR 11 Violation Constituted an Abuse of Discretion.

Even with the heightened standard of review of "abuse of discretion," the trial court's ruling regarding a CR 11 violation was error. A claim is factually baseless when no reasonable attorney, after reasonable factual inquiry, would have made assertions in the pleading. A pleading is legally frivolous when it is not based on a plausible view of the law. See, *Rhinehart*

*v. Seattle Times*, 59 Wn.App. 332, 340, 798 P.2d 1155 (Div. 1 1990).

In determining whether a pleading violates CR 11, the court must consider the intent of the rule and the potential chilling effect that a finding of CR 11 violation may have. See, *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 219, 829 P.2d 1099 (1992). The trial court should impose sanctions only when it is patently clear that a claim has absolutely no chance of success. See, *Skimming v. Boxer*, 119 Wn.App. 748, 755, 82 P.3d 707 (Div. 3 2004).

Here, although the court “reserved” an award of sanctions and fees, it determined that Thomas and her attorney violated CR 11. This, despite the fact that: (1) the case was less than three months old; (2) depositions of the LeVasseurs, which were noted shortly after the case commenced, had not taken place; (3) Thomas had pleaded the essential facts and broad legal theories of declaratory judgment and quiet title; and (4) Thomas sought leave to amend both at the summary judgment hearing and immediately thereafter.

The Washington Supreme Court has held that attorney and judges who perceive a possible violation of CR 11 must, among other things, allow an opportunity to mitigate the sanction by amending or withdrawing the offending pleading. See, *Biggs v. Vail*, 124 Wn.2d 193, 198, 876 P.2d 448 (1994). Moreover, a court should be reluctant to impose sanctions for factual

errors or deficiencies in a complaint before there has been an opportunity for discovery. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 222, 829 P.2d 1099 (1992).

Here, Thomas commenced this action on January 29, 2014 and promptly noted the depositions of the LeVasseurs. The timing of those depositions was expressly designed to allow time for the LeVasseurs to answer the complaint, and for Thomas to propound written discovery requests and receive responses before the depositions occurred. (CP 267). The LeVasseurs' summary judgment motion, filed less than two weeks after they answered the complaint, precluded these depositions and prevented further discovery.

At the hearing on the summary judgment motion, Thomas argued that her existing claims of declaratory judgment and quiet title were valid and asserted in good faith, based on the available information and in the absence of discovery. Thomas' counsel further stated that other claims had not been asserted because he did not believe the facts known before filing would justify them. (VRP page 22, line 21 to page 24, line 20). Counsel for Thomas also advised the court that he intended to seek leave to amend the complaint to assert claims of breach of contract and for specific performance. (VRP

page 22, lines 6 to 20; CP 293).

Thomas' original claims were broadly stated and were supported by facts as further set forth in the Declarations of Doug Bain (CP 156-9) and Julie Thomas (CP 160-223), filed in response to the LeVasseurs' summary judgment motion. The trial court apparently disregarded the fact that Thomas' complaint was filed without the benefit of knowing the LeVasseurs' position and without benefit of depositions once that position was asserted in the LeVasseurs' answer to the complaint.

Thomas' claims were based upon a reasonable investigation of the facts and the law. In part, the complaint relied upon representations of Thomas and others, subsequently confirmed in sworn Declarations filed in opposition to the summary judgment motion. The broad causes of action of declaratory judgment and quiet title were justified and clearly placed the LeVasseurs on notice of a bona fide dispute regarding title to the Seattle condominium.

Had Thomas been permitted to amend her complaint, those claims regarding title to the same property would have been re-framed as arising out of breach of contract and/or specific performance. Thomas respectfully submits that the trial court's finding that she and her counsel violated CR 11

constitutes an abuse of discretion and must be reversed.

3. The Trial Court's Ruling That the LeVasseurs Were Entitled to Attorney Fees Under RCW 4.28.328 Was Error.

The trial court's summary judgment order required Thomas to pay attorney fees to the LeVasseurs (in an amount reserved) pursuant to RCW4.28.328(2) and/or (3). Thomas respectfully submits that was error.

By its plain language RCW 4.28.328(2) does not (and cannot) apply, since this action clearly involves "...the title to real property." Nor do the LeVasseurs fare any better under RCW 4.28.328(3). In *South Kitsap Family Worship Center v. Weir*, 135 Wn.App. 900, 145 P.3d 935 (2006), the court noted:

Under the lis pendens statute, claimants may be liable for damages and attorney fees to a party who prevails in defense of the action, unless the claimants establish a substantial justification for the filing. RCW 4.28.328(3). Damages and fees are appropriate where the claimants provide no evidence of a legal right to the property. (Citation omitted). But where the claimants have a reasonable, good faith basis in law or in fact for believing they have an interest in the property, a lis pendens is substantially justified. (Citations omitted).

135 Wn.App. at 911-12.

Here, the Declarations submitted by Thomas in opposition to defendants' summary judgment motion amply demonstrate a "reasonable,

good faith basis” for her belief that she has an interest in the property. Indeed, Thomas respectfully submits that she will ultimately prove that title to the condominium should be in her name.

Even on the basis of the limited information available at the time of the LeVasseurs’ summary judgment motion, the trial court could not find, as a matter of law, that there were no circumstances under which the LeVasseurs could prove that Thomas filed a lis pendens without substantial justification. The portion of the April 17, 2014 summary judgment order finding that the LeVasseurs are entitled to attorneys fees under RCW 4.28.328 must be reversed.

**D. The Trial Court Erred When, Without Explanation, It Denied Thomas’ Motion for Leave to Amend.**

1. Standard of Review.

A motion for leave to amend is reviewed under an abuse of discretion standard. The trial court’s decision will be reversed when it is manifestly unreasonable, or exercised on untenable grounds or for untenable reasons. *Lincoln v. Transamerica Investment Corp.*, 89 Wn.2d 571, 577, 573 P.2d 1316 (1978); *Tex Enterprises, Inc. v. Brockway Standard, Inc.*, 110 Wn.App. 197, 203-4, 39 P.3d 362 (Div.1 2002), rev’d on other grounds 149 Wn.2d 204, 66 P.3d 625 (2003); *Mullen v. North Pacific Bank*, 25 Wn.App. 864, 878-9, 610 P.2d 1175 (Div. 2 1980).

2. The Trial Court's Denial of Thomas' Motion for Leave to Amend Constituted an Abuse of Discretion.

Washington is a notice pleading state. Civil Rule 8(a) provides:

**(a) Claims for Relief.** A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross claim, or third party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief and (2) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

Civil Rule 15, entitled "Amended and Supplemental Pleadings," highlights that the purpose of the court rules is to provide a means for resolving issues, not to impose procedural roadblocks. Civil Rule 15(a) states:

**(a) Amendments.** A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served, or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. *Otherwise, a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.* If a party moves to amend a pleading, a copy of the proposed amended pleading, denominated "proposed" and unsigned, shall be attached to the motion. (Emphasis added)

The purpose of court pleadings is to allow decisions to be made on the merits

of the case, not to impose technical barriers. The rule providing for amendment of pleadings was designed to permit amendment except where prejudice to the opposing party would result. *Caruso v. Local Union No. 690 of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 100 Wn.2d 343, 349, 670 P.2d 240 (1983).

Despite subsequent amendments to Civil Rule 15, *Adams v. Allstate Insurance Company*, 58 Wash. 659, 672, 364 P.2d 804 (1961), remains instructive, as the later amendments to Washington's rule did not impact the salient point:

'Rule 15(a) of the Federal Rules of Civil Procedure relied upon by the trial court explicitly provides that leave of court to amend 'shall be freely given when justice so requires.' The Federal Rules respecting amendments to pleadings should be given a liberal construction so that cases are decided on the merits rather than on bare pleadings. (Citation omitted) Leave to amend should be freely given unless it appears to a certainty that plaintiff would not be entitled to any relief under any state of facts which could be proved in support of his claim. *Kingwood Oil Co. v. Bell*, 7 Cir., 205 F.2d 8, 13. In *Kingwood*, we stated, at page 13, 'No matter how likely it may seem that a plaintiff may be unable to prove his case, he is entitled, upon averring a claim, to an opportunity to prove it.'

58 Wn.2d at 672.

The Washington Supreme Court has said that the test of whether the

trial court should grant leave to amend is whether the opposing party is prepared to meet the new issue. See, *Quackenbush v. State*, 72 Wash. 670, 672, 434 P.2d 736 (1967). Leave to amend should be freely given unless it would result in prejudice to the nonmoving party. See, *Kirkham v. Smith*, 106 Wn.App. 177, 181, 23 P.3d 10 (Div. 1 2001).

Here, defendants have alleged no prejudice and none can be shown. When Thomas submitted her motion for leave to amend (both orally and in writing) this case was less than three months old. No ruling had been made on the LeVasseurs' summary judgment motion. Other than the production of less than 100 pages of documents, no discovery had taken place and the LeVasseurs had not been deposed. The LeVasseurs' counsel acknowledged in a colloquy with the trial court at the summary judgment hearing that there would be no harm if the court were to grant the LeVasseurs' summary judgment motion and permit Thomas to amend. (RP page 25, line 22 to page 26, line 21). Clearly, no prejudice to the LeVasseurs would result from the requested amendment.

In *Tagliani v. Colwell*, 10 Wn.App. 227, 233, 517 P.2d 207 (Div. 3 1973), plaintiff brought an action for damages resulting from personal injuries. Five months later, defendants filed a summary judgment motion. At

the hearing approximately a month later, the trial court orally granted defendants' motion. In the following month, plaintiff filed a motion for reconsideration and a motion for leave to amend to add parties and causes of action. The trial court thereafter denied plaintiff's motions and entered the order granting summary judgment in favor of defendants.

In reversing the trial court, the appellate court cited at length from *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962):

If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory move on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. – the leave sought should, as the rules require, be 'freely given.' Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but *outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely an abuse of that discretion and inconsistent with the spirit of the Federal Rules.* (Emphasis added)

10 Wn.App. at 233. See, also, *Rodriguez v. Loudeye Corp.*, 144 Wn.App. 709, 729, 189 P.3d 168 (Div. 1 2008); *Walla v. Johnson*, 50 Wn.App. 879, 885, 751 P.2d 334 (Div. 1 1988).

This Court has held that, depending on the timing of the motion for leave to amend, the trial court may consider the merit or futility of the proposed amended claim. In *Denny's Restaurants, Inc. v. Security Union Title Insurance Company*, 71 Wn.App. 194, 212, 859 P.2d 619 (Div. 1 1993), the court noted:

Under CR 15(a), the court may in its discretion allow a party to amend a complaint when justice so requires. *If the party moves to amend after summary judgment has been granted, the trial court may consider the merit or futility of the amended claim.* (Citation omitted).

...

The trial court denied Denny's claim based upon *Doyle v. Planned Parenthood*, apparently finding the mutual mistake claim had no merit. We find, however, that the mutual mistake claim is not without merit and raises issues of fact as to the parties' intent.

71 Wn.App. at 212. (Emphasis added)

In contrast to the scenario in *Denny's Restaurants* and *Doyle*, Thomas' motion for leave to amend was made before the summary judgment order was entered – both orally at the summary judgment hearing and again by written motion. Accordingly, if the trial court considered the alleged “merit or futility of the amended claim,” it should not have done so.

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The rationale for the trial court's denial of Thomas' motion for leave to amend is unknown. The order denying leave to amend provided no explanation for the ruling, which is tantamount to abuse of discretion *per se*.

Although the grant or denial of an opportunity to amend is within the discretion of the trial court, "outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the federal rules." (Citations omitted)

*Walla v. Johnson*, 50 Wn.App. 879, 885, 751 P.2d 334 (Div. 1 1988).

In light of the liberal construction of CR 15(a), the circumstances unique to this case and the court's lack of justification for its decision, the court's order denying Thomas leave to amend was an abuse of its discretion and must be reversed.

## **V. CONCLUSION**

Based on the foregoing arguments, this Court should reverse the trial court's decision granting summary judgment; its determination that Thomas and her counsel violated CR 11; and its ruling that the LeVasseurs are entitled to an award of attorney fees under RCW 4.28.328. The Court should also reverse the trial court's decision denying Thomas's motion for leave to amend.

RESPECTFULLY SUBMITTED this 6<sup>th</sup> day of August, 2014.

INSLEE, BEST, DOEZIE & RYDER, P.S.

A handwritten signature in black ink, appearing to read "Dan S. Lossing", written over a horizontal line.

Dan S. Lossing  
Washington State Bar No. 13570  
Attorneys for Appellant, Julie Ann Thomas

10900 NE 4<sup>th</sup> Street, Suite 1500  
Bellevue, Washington 98004