

72225-5

72225-5

No. 72225-5-1-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

Karl Benz and Catherine Riley,
Appellants,

v.

John Rashleigh, an individual, Peter C. Ojala, an individual, Carson Law
Group, P.S., a Washington Corporation, and Does 1 thru V, inclusive,
Respondents.

ON APPEAL/REVIEW FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY
No. 14-2-04141-9

BRIEF OF RESPONDENTS

Patricia K. Buchanan WSBA #19892
PATTERSON, BUCHANAN, FOBES & LEITCH,
INC., P.S.
2112 Third Ave, Suite 500
Seattle, WA 98121
Phone: 206-462-6700
Attorneys for Respondents Peter Ojala
and Carson Law Group, P.S.



ORIGINAL

TABLE OF CONTENTS

TABLE OF CONTENTS..... i
TABLE OF AUTHORITIES iii
I. INTRODUCTION 1
II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1
III. FACTUAL BACKGROUND..... 3
IV. ARGUMENT 7
 A. Trade or Commerce Under the Consumer Protection Act Does Not Include Legal Services That Are Not Entrepreneurial So The Trial Court Did Not Err in Dismissing Plaintiff’s Consumer Protection Act Claim Based Upon Alleged Perjury by Ojala and Carson Law Group 8
 B. The Trial Court Did Not Err in Dismissing Benz and Riley’s Claim for Perjury Against Ojala Because There Is No Private Right of Action for Damages Caused by Perjury and Therefore Benz and Riley Failed to State a Claim Upon Which Relief Can Be Granted 11
 C. Witnesses and Parties in Court Proceedings Have Absolute Immunity So the Trial Court Did Not Err in Dismissing Benz and Riley’s Claim for Damages Resulting from Ojala’s Alleged Perjury... 13
 D. Even if There Were a Private Right of Action for Perjury Benz and Riley Failed to Allege Ojala Made a Materially False Statement Where It Is Undisputed That the House Was Vacant and the Power Shut-Off So There is No Genuine Issue of Material Fact 14
 E. Because There Exists No Private Right of Action for Perjury Benz and Riley’s Claim of Conspiracy Fails to State a Claim Upon Which Relief Can Be Granted..... 16
 F. The Trial Court Did Not Err When It Adopted and Incorporated King County Order Affirming Dismissal of Plaintiff’s CR 60 Motion and Stipulation to Jurisdiction and Service 17

G. The Trial Court Did Not Err in Imposing CR 11 Sanctions
against Benz and Riley 19

H. The Court of Appeals Must Sanction Benz and Riley for
Continuing to Pursue Frivolous Claims 21

V. CONCLUSION..... 213

TABLE OF AUTHORITIES

Cases

<i>All Star Gas, Inc. v. Bechard</i> , 100 Wn. App. 732, 998 P.2d 367 (2000).....	16
<i>Benke v. Ahrens</i> , 172 Wn. App. 281, 294 P.3d 729 (2012).....	9
<i>Bercier v. Kiga</i> , 127 Wn. App. 809, 824, 103 P. 3d 232 (2004) review denied, 155 Wn. 2d 1015 (2005).....	19
<i>Bruce v. Byrne-Stevens & Associates Engineers, Inc.</i> , 113 Wn.2d 123, 776 P.2d 666 (1989).....	13
<i>Deatherage v. Examining Board of Psychology</i> 134 Wn.2d 131, 135 (1997).....	14
<i>Dexter v. Spokane County Health Dist.</i> 76 Wn. App. 372, 884 P.2d 1353 (1994).....	12
<i>FMC Technologies, Inc. v. Edwards</i> , 464 F.Supp.2d 1063 (W.D.Wash. 2006).....	14, 17
<i>Griffith v. Centex Real Estate Corp.</i> , 93 Wn. App. 202, 969 P.2d 486 (1998).....	7, 9
<i>Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.</i> , 105 Wn.2d 778, 719 P.2d 531 (1986).....	9

<i>Harvey v. Obermeit</i> , 163 Wn. App. 311, 261 P.3d 671, 675 (2011).....	18
<i>In re Recall of Pearsall-Stipek</i> , 141 Wn.2d 756, 10 P.3d 1034 (2000).....	15
<i>Jackson v. R.G. Whipple, Inc.</i> , 225 Conn. 705, 627 A.2d 374 (1993)	10
<i>Jeckle v. Crotty</i> , 120 Wn.App. 374, 85 P.3d 931 (2004).....	10
<i>Larsen Chelsey Realty Co. v. Larsen</i> , 232 Conn. 480, 656 A.2d 1009 (1995)	11
<i>Leingang v. Pierce County Med. Bureau, Inc.</i> , 131 Wn.2d 133, 930 P.2d 288.....	9
<i>McNeal v. Allen</i> , 95 Wn.2d 265, 621 P.2d 1285 (1980).....	14
<i>Michael v. Mosquera-Lacy</i> , 165 Wn.2d 595, 200 P.3d 695 (2009).....	10
<i>Miller v. Badgley</i> , 51 Wn. App. 285, 300, 753 P.2d 530 (1988).....	20
<i>Neighborhood Alliance of Spokane County v. County of Spokane</i> , 172 Wn.2d 702, 261 P.3d 119 (2011).....	7
<i>Presidential Estates Apartment Assocs. v. Barrett</i> , 129 Wn.2d 320, 330, 917 P.2d 100 (1996).....	21
<i>Seven Gables Corp. v. MGM/UA Entm't Co.</i> , 106 Wn.2d 1, 721 P.2d 1 (1986).....	7

<i>Short v. Demopolis</i> , 103 Wn.2d 52, 691 P.2d 163 (1984).....	10
<i>Snohomish County v. Rugg</i> , 115 Wn. App. 218, 61 P.3d 1184 (2002).....	7
<i>State v. Peeler</i> , 7 Wn. App. 270, 499 P.2d 90 (1972).....	18
<i>State ex rel. Quick-Ruben v. Verharen</i> , 136 Wn.2d 888, 969 P.2d 64 (1998).....	21
<i>Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp.</i> , 122 Wn. 2d 299, 858 P.23 1054 (1993).....	19
<i>Watson v. Maier</i> , 64 Wn. App. 889, 827 P.2d 311 (1992).....	19
<i>W.G. Platts, Inc. v. Platts</i> , 73 Wn.2d 434, 438 P.2d 867 (1968).....	11, 17
<i>Wilson Court Ltd. P.S. v. Tony Maroni's, Inc.</i> , 134 Wn.2d 692, 952 P.2d 590 (1998).....	7

Statutes

CUTPA (Connecticut Unfair Trade Practices Act)	10
RCW 2.44.010	18
RCW 4.24.535	1
RCW 9A.72.....	11
RCW 9A.72.020.....	14
CONSUMER PROTECTION ACT (CPA).....	2, 7-12, 14, 21, 22

RCW 19.86.010(2).....	9
RCW 19.86.020	8
RAP 10.3(a)(6).....	19
RAP 18.1.....	21
RAP 18.9.....	21
RAP 18.9(a)	21, 22
Rules	
CR 2A	18
CR 11	2, 3, 4, 19, 20,21
CR 12(b)(5).....	18
CR 56	7
CR 60	13, 17

I. INTRODUCTION

Appellants Karl Benz (“Benz”) and Catherine Riley (“Riley”) have appealed the trial court order granting Respondents Peter C. Ojala and Carson Law Group, P.S.’s motion for dismissal, summary judgment and sanctions.

On June 17, 2014 Ojala and Carson Law Group filed a Special Motion to Strike Pursuant to RCW 4.24.535 and Motion for Summary Dismissal. (CP 280) The trial court granted the motion dismissing plaintiffs’ claims with prejudice, granting sanctions against plaintiffs Riley and Benz and granting summary judgment in favor of the defendants. (CP 57) The trial court incorporated a King County Superior Court Order entered against Benz and Riley regarding service of process in supplemental proceedings. (CP 57)

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Benz and Riley assign error to the trial court’s order incorporating the order from King County Superior Court Case No. 12-2-06975-1, dismissing Benz and Riley’s complaint with prejudice, granting summary judgment to Ojala, an attorney at Carson Law Group, and Carson Law Group. The Court also granted sanctions against Benz and Riley.

This court should affirm the superior court's order dismissing Benz and Riley's claims with prejudice, granting summary judgment for Ojala and Carson Law Group, granting CR 11 Sanctions against Benz and Riley, and adopting and incorporating King County Chief Civil Judge Spearman's Order of June 19, 2014 and order sanctions for attorney's fees and costs on appeal.

Ojala and Carson Law Group reformulate the issues in this appellate matter as follows:

- A. Whether the Court should affirm the grant of summary judgment against Benz and Riley's Consumer Protection Act claims against Ojala and Carson Law Group for acts performed as attorneys for the Town of Skykomish because ordinary legal services are not considered trade or commerce under the CPA? Yes.**
- B. Whether the Court should affirm the order dismissing Benz and Riley's claim against Ojala for perjury where there is no private right of action for perjury and thus Benz and Riley failed to state a claim upon which relief can be granted? Yes.**
- C. Whether the Court should affirm the dismissal of Benz and Riley's claim against Ojala for perjury where Ojala has witness immunity as a participant in a court proceeding? Yes.**
- D. Even if there is no private right of action for perjury, and there is not, did the trial court err in finding Benz and Riley failed to demonstrate any genuine issue of material fact? No.**
- E. Whether the trial court erred in dismissing Benz and Riley's claim of conspiracy to commit perjury where there exists no cause of action for conspiracy to commit perjury and therefore**

Benz and Riley failed to state a claim upon which relief can be granted? No.

F. Whether the trial court erred in incorporating the King County Superior Court order dated June 19, 2014 finding that Benz and Riley submitted to jurisdiction of the court and waived their objections to service? No.

G. Whether the trial court erred in imposing CR 11 sanctions against Benz and Riley? No.

H. Whether the appellate court should sanction Benz and Riley for continuing frivolous litigation? Yes.

III. FACTUAL BACKGROUND

Town's Public Nuisance Abatement Action

The Town of Skykomish filed a lawsuit to abate a public nuisance building owned and/or managed by Benz and Riley's entities (the "Benz Entities"). (CP 257). The defendants in that King County matter, entities owned or controlled by Benz and Riley, filed counter claims in the King County matter against the Town of Skykomish. (CP 258) The Town prevailed on a summary judgment motion on its claims against the entities therein. (CP 258) The King County court entered CR 11 sanctions and judgments against the Benz entities and individually against Benz and Riley and against their attorney. (CP 258) The Benz Entities, Benz and Riley did not appeal those sanctions or judgments. (CP 258) Ultimately,

the King County court granted the entities' counsel withdrawal nunc pro tunc, and vacated the CR 11 judgments entered against the attorney and law firm. (CP 258)

The Town began supplemental proceedings in King County Superior Court to enforce those judgments against, among others, Benz and Riley who were deemed individual judgment debtors. (CP 258) As part of that process, Carson Law Group, the Town's legal counsel, attempted service of the supplemental proceedings on Benz and Riley, who was the registered agent for the entities. The Benz Entities had changed their registered agent office to a residence in Tacoma. (CP 171) Carson Law Group retained a process server to serve the entities and individuals at the Salmon Beach address in Tacoma because that was the last known address for Benz and Riley, and the address of Skykomish Hotel, LLC's registered agent at the time (CP 166) Ojala did not know or have any reason to know that Benz or Riley was travelling. (CP 167)

Rashleigh, a registered process server, attempted service at the Salmon Beach address. (CP 330) Rashleigh was unable to serve Benz or Riley at the address. (CP 331) In Rashleigh's affidavit of service he was "unable to affect service for the following reasons: a. The residence appeared to be abandoned. There was no furniture present in the house.

b. The electricity has been turned off based on residence being red tagged for non-payment.” (CP 331) Ojala and Carson Law Group moved the court for an order allowing service via email due to their inability to properly serve the petition for supplemental proceedings on Benz and Riley. The court granted the order. (CP 141, 273)

Benz and Riley hired counsel, the late Kenneth Berger, to specially appear and defend against the supplemental proceedings and challenge the service of process. (CP 198) Kenneth Berger specially appeared on behalf of the entities and on behalf of the individuals. (CP 198) Benz and Riley expressly waived their arguments and defense to improper service claims because they, through their attorney of record in the supplemental proceedings, stipulated to proper service by expressly waiving these defenses, and agreed to an examination by written statements in that matter. (CP 199-202) Benz and Riley sought to have the stipulated order set aside in King County Superior Court but the order was affirmed on June 18, 2014. (CP 66-77, 98-100)

Current Action by Benz and Riley

Meanwhile, in May 2014, Benz and Riley filed this action in the Snohomish County Superior Court. (CP 322-328) Benz and Riley claim that Ojala committed perjury and conspiracy by enlisting the services of a

process server and by filing a declaration in support of a motion to obtain service of process via electronic mail in the King County Superior Court. (CP 322-328) Benz and Riley's claim against Carson Law Group alleges that it entered into a conspiracy with Ojala and Rashleigh to falsify an Affidavit of Attempted Service. (CP 327)

On May 15, 2014 Benz and Riley filed this action in the Snohomish County Superior Court alleging perjury and conspiracy against Rashleigh, Ojala and Carson Law Group among others. (CP 322-328) On June 17, 2014, Snohomish County Superior Court Judge Richard Okrent granted Rashleigh's dismissal for failure to state a claim. (CP 163) On June 17, 2014, Ojala and the Carson Law Group filed a motion for summary judgment. (CP 280-300) On July 22, 2014, Judge Okrent granted the motion for summary judgment and dismissed all of Benz and Riley's claims against the defendants with prejudice and adopted the order from the King County Superior Court Case dated June 18, 2014, which found that Benz and Riley had waived their objections to improper service. (CP 57-60) On August 20, 2014, Benz and Riley filed this appeal. (CP 49-56)

IV. ARGUMENT

This Court reviews a grant of summary judgment under the de novo standard. *Wilson Court Ltd. P.S. v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 698, 952 P.2d 590 (1998). The court engages in the same inquiry as the trial court without deference to the conclusion of the trial court. *Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wn.2d 702, 712, 261 P.3d 119 (2011). Summary judgment shall be granted if there is no genuine issue as to any material fact. CR 56. Even if there are matters being generally best suited for the finder of fact, a motion for summary judgment should be granted if, from all the evidence, reasonable persons could reach only one result. *Snohomish County v. Rugg*, 113 Wn. App. 218 (2002). *Griffith v. Centex Real Estate Corp.*, 969 P.2d 486, 93 Wn. App. 202 (1998). To establish the existence of a genuine issue of material fact, the nonmoving party “may not rely on speculation, [or] argumentative assertions that unresolved factual issues remain.” *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

The primary issues are (1) whether a lawyer’s statements made in a court proceeding are subject to a cause of action under the Consumer Protection Act, (2) whether there is a private right of action for damages

caused by perjury, (3) whether a participant in a court proceeding has witness immunity which precludes a claim of perjury against them, (4) whether Benz and Riley demonstrated any genuine issue of material fact, (5) whether there is a cause of action for conspiracy to commit perjury, (6) whether the court may incorporate another court's order, and (7) whether the court erred in granting sanctions.

Because there is no private right of action for perjury or conspiracy to commit perjury, Benz and Riley failed to state a claim upon which relief can be granted and this appeal should be denied and the order affirmed. Moreover, even if there were a private right of action for perjury or conspiracy to commit perjury, the trial court did not err in granting summary judgment because the circumstances of this case shown in the records, including counsel's declarations, support summary judgment as there was no genuine issue of material fact about the alleged perjury.

A. Trade or Commerce Under the Consumer Protection Act Does Not Include Legal Services That Are Not Entrepreneurial So The Trial Court Did Not Err in Dismissing Plaintiff's Claim for Perjury Against Ojala and Carson Law Group

Benz and Riley have claimed the allegedly deceptive and misleading statements or "perjury" violates RCW 19.86.020 known commonly as the Consumer Protection Act ("CPA"). Whether an action

by a defendant violates the CPA is a question of law. *Griffith v. Centex Real Estate Corp.*, 93 Wn. App. 202, 214, 969 P.2d 486 (1998) (citing *Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wn.2d 133, 150, 930 P.2d 288 (1997)). Under the CPA, unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful. RCW 19.86.020.

To successfully allege and prove a CPA violation, a plaintiff must establish five elements: (1) an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) affecting the public interest; (4) injury to plaintiff in his or her business or property; and (5) a causal link between the unfair or deceptive act and the injury suffered. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 784, 719 P.2d 531 (1986). Benz and Riley cannot prove any of the elements of a claim for deceptive business practices for alleged perjury or conspiracy committed by Ojala or Carson Law Group.

Trade or commerce is defined in the CPA as “the sale of assets or services, and any commerce directly or indirectly affecting the people of the state of Washington.” RCW 19.86.010(2). The performance of legal services within a court proceeding is not “trade or commerce” in Washington. *Benke v. Ahrens*, 172 Wn. App. 281, 293, 294 P.3d 729 (2012). The CPA only applies to the entrepreneurial aspect of law.

Michael v. Mosquera-Lacy, 165 Wn.2d 595, 603, 200 P.3d 695 (2009). The alleged unfair lawyer's actions were not made in any "entrepreneurial" aspect of the practice of law, such as over-billing clients or an opposing party's unauthorized attorney's fees or collection costs. *Short v. Demopolis*, 103 Wn.2d 52, 61, 691 P.2d 163 (1984). In fact, challenging an opposing party's attorney's affidavit in a court proceeding, in a separate court action, interferes with the attorney-client relationship and is not a permissible CPA claim. *Jeckle v. Crotty*, 120 Wn. App. 374, 384, 85 P.3d 931 (2004). In *Jeckle*, the court discussed this infringement upon the attorney-client relationship:

Specifically, allowing a plaintiff to sue his or her adversary's attorney under a consumer theory infringes on the attorney-client relationship. The Connecticut court has "declined to recognize the right of th[e] client's opponent to sue the attorney under CUTPA [Connecticut Unfair Trade Practices Act] on the basis of the professional services the attorney had rendered for the client."

Jeckle, 120 Wn. App. at 384, 85 P.3d 931, 937 (2004) (citing *Larsen Chelsey Realty Co. v. Larsen*, 232 Conn. 480, 496, 656 A.2d 1009 (1995)); see also *Jackson v. R.G. Whipple, Inc.*, 225 Conn. 705, 627 A.2d 374, 385 (1993).

Here, there is no attorney-client relationship or entrepreneurial relationship between Ojala and Carson Law Group on the one side, and Benz and Riley on the other. Ojala and Carson Law Group were performing their duties as legal counsel for the Town of Skykomish to collect a judgment against Benz and Riley for frivolous filings in the Town's prosecution of a lawful nuisance abatement lawsuit in King County. The filing of an affidavit regarding attempted service was not an entrepreneurial activity. Benz and Riley have failed to allege that filing an affidavit "occurred in trade or commerce" and thus cannot prevail on their Consumer Protection Act claim.

B. The Trial Court Did Not Err in Dismissing Benz and Riley's Claim for Perjury Against Ojala or Carson Law Group Because There Is No Private Right of Action for Perjury

Perjury is a public offense and punishable in criminal proceedings. RCW 9A.72. "The general rule is that in absence of a statute there exists no private cause of action to recover "damages caused by perjury, false swearing, subornation of perjury, or an attempt to suborn perjury, whether committed in the course of, or in connection with, a civil action or suit, a criminal prosecution or other proceeding, and whether the perjurer was a party to, or a witness in, the action or proceeding." *W.G. Platts, Inc. v. Platts*, 73 Wn.2d 434, 440, 438 P.2d 867 (1968) (citing 70 C.J.S. Perjury §

92 (1951)). There is a strong public policy reason why the courts do not allow a private right of action for perjury.

Were such a theory of recovery available, many cases would be tried at least twice; first on the merits and then to see who lied at trial. If a party could sue another party for perjury, there is no reason why a party (or anyone else aggrieved by the perjury) could not sue a nonparty. There would be no finality to litigation, the costs of suit would expand, and witnesses would be reluctant to testify. The only workable remedy for perjury is reopening the first proceeding under CR 60 or a criminal charge, not an independent private right of action.

Dexter v. Spokane County Health Dist., 76 Wn. App. 372, 375-376, 884 P.2d 1353 (1994).

Benz and Riley have no grounds for a private right of action for perjury regardless of whether they try and fit it into a claim under the Consumer Protection Act. Benz and Riley already filed a CR 60 motion to vacate in the King County court with a request to refer for criminal prosecution alleging the exact same issues of perjury and conspiracy. (CP 66-77) The motion was denied because Benz and Riley cited no basis and provided no persuasive evidence for the court to grant the relief requested. (CP 98-100) The order denying Benz and Riley's motion was adopted by

Superior Court Judge Okrent in the order which is the subject of this appeal. (CP 59)

Benz and Riley's arguments and evidence have not changed from one action to the next. Benz and Riley cannot allege a claim for perjury because no private cause of action exists for damages caused by perjury.

C. Witnesses and Parties in Court Proceedings Have Absolute Immunity So the Trial Court Did Not Err in Dismissing Benz and Riley's Claim for Damages Resulting from Alleged Perjury

The general rule is that witnesses in judicial proceedings are "absolutely immune from suit based on their testimony." *Bruce v. Byrne Stevens & Assocs. Eng'rs, Inc.*, 113 Wn.2d 123, 125, 776 P.2d 666 (1989). Witnesses are immune from any civil liability for statements made in the course of judicial proceedings. *Deatherage v. Examining Board of Psychology*, 134 Wn.2d 131, 135 (1997). The purpose of the rule is to preserve the integrity of the judicial process." *Bruce v. Byrne-Stevens & Assocs. Eng'rs, Inc.*, 113 Wn.2d at 126. This immunity is not just against defamation lawsuits, but applies to claims for negligent or intentional infliction of emotional distress and other causes of action. *Id.* "Allegedly libelous statements, spoken or written by a party or counsel in the course of a judicial proceeding, are absolutely privileged if they are pertinent or material to the redress or relief sought, whether or not the statements are

legally sufficient to obtain that relief.” *McNeal v. Allen*, 95 Wn.2d 265, 267, 621 P.2d 1285 (1980); see also *FMC Technologies, Inc. v. Edwards*, 464 F.Supp.2d 1063, 1067 (W.D. Wash. 2006). The privilege extends to allegations made in pleadings. *Id.*

Ojala’s declaration and actions taken by Carson Law Group in the civil proceedings to obtain proper service upon Benz and Riley are absolutely privileged as the statements were made during the course of the judicial debtor proceeding. And Ojala’s statements were pertinent to the granting of service via electronic mail and thus are absolutely immune from claims for damages.

The trial court did not err on the dismissal of the CPA claims based upon perjury or conspiracy. This court must affirm the summary dismissal.

D. Even if There Were a Private Right of Action for Perjury Benz and Riley Failed to Demonstrate Any Genuine Issue of Material Fact Where It Is Undisputed That the House Was Vacant and the Power Shut-Off

Even if a claim of perjury could be raised in a civil action Benz and Riley would not be able to allege all the elements of the crime. A person is guilty of the crime of perjury in the first degree if he 1) makes a materially false statement 2) which he knows to be false 3) in any official proceeding 4) under oath or authorized by law. RCW 9A.72.020. “A

statement is material if it could have affected the course or outcome of the proceeding . . .” *In re Recall of Pearsall-Stipek*, 141 Wn.2d 756, 772, 10 P.3d 1034 (2000).

Benz and Riley take issue with two statements made by Ojala in his affidavit: Ojala described the location for attempted service as 1) “vacant, containing no furniture”, and (2) was “red-tagged for non-payment.” (CP 325) Benz and Riley do not deny that their home was vacant or the power had been turned off. (CP 123) The statement as to there being no furniture in the home is not material as to whether or not the home was vacant. Benz and Riley, by their own admission, had been traveling for an extended period of time and not at the home or even in the state. (CP 112, 121, 122, 124, 325). Benz and Riley admitted the property had been vacant since Fall 2013. (CP 122) The statement that the home was “vacant, containing no furniture” is not materially false as it is undisputed that the home was vacant. Benz and Riley do not deny that the electric meter at the home was red-tagged and shut off. (CP 325 para 21) Benz and Riley only dispute the reason *why* the meter was red-tagged. (CP 325)

As a result of the fact that Benz and Riley had the ability to communicate with the court via email, the court granted a motion to serve

Benz and Riley via electronic mail. (CP 188) Benz and Riley have failed to allege the statements in question were materially false and therefore have failed to allege any of the four necessary elements of the crime of perjury or any other valid civil claim. Thus, the trial court properly dismissed the claims on summary judgment because Benz and Riley have failed to show a genuine issue of material fact. Summary judgment should be affirmed on the claims of perjury in the deceptive acts and business practices context.

E. Because There Exists No Private Right of Action for Perjury Benz and Riley's Claim of Conspiracy Fails State a Claim Upon Which Relief Can Be Granted

To establish a claim for civil conspiracy, the Plaintiffs must prove by clear, cogent, and convincing evidence that (1) two or more people combined to accomplish an unlawful purpose, or combined to accomplish a lawful purpose by unlawful means; and (2) the conspirators entered into an agreement to accomplish the conspiracy.” *All Star Gas, Inc. v. Bechard*, 100 Wn. App. 732, 740, 998 P.2d 367 (2000). Benz and Riley allege that Rashleigh, Ojala and Carson Law Group, P.S. conspired to commit perjury in the proceedings in King County Superior Court.

The unlawful purpose Benz and Riley allege is perjury. However, the conspiracy to give or procure the giving of false testimony is not

actionable. *W.G. Platts* at 440. And a party cannot frame perjury as a conspiracy to get around the general rule that there is no cause of action for conspiracy to commit perjury. *Id.* “It cannot be that a conspiracy to do a thing is actionable when the thing itself would not be.” *FMC Technologies* at 1069.

Here, Benz and Riley allege that Rashleigh, Ojala and Carson Law Group, P.S. “knowingly and willfully conspired and agreed among themselves to falsify an Affidavit of Attempted Service.” (CP 327 para 29). As stated above there is no right of action for conspiracy to commit perjury. Plaintiffs cannot show an unlawful purpose or unlawful means, of establishing any unconstitutional or unlawful action against them. Ojala and Carson Law Group did not conspire or commit perjury with (or without) Rashleigh. Thus, Benz and Riley fail to allege all the elements for a claim of conspiracy, and the trial court’s summary dismissal of the conspiracy claims must be affirmed.

F. The Trial Court Did Not Err When It Adopted and Incorporated King County Order Affirming Dismissal of Plaintiff’s CR 60 Motion and Stipulation to Jurisdiction and Service

Benz and Riley waived their objections to service of process in the King County Superior Court and therefore Judge Okrent correctly adopted the findings in that case regarding the same perjury and conspiracy claims

filed by Benz and Riley. (CP 58) CR 2A governs agreements regarding court proceedings signed by an attorney of record. A lawyer appears in a trial court as the representative and alter ego of his client. The interest of orderly procedure requires that when counsel acts for his client it be presumed that he acts with authority. *State v. Peeler*, 7 Wn. App. 270, 274, 499 P.2d 90, 92 (1972). Moreover, RCW 2.44.010 provides:

“An attorney and counselor has authority: (1) [t]o bind his or her client in any of the proceedings in an action or special proceeding by his or her agreement duly made, or entered upon the minutes of the court; but the court shall disregard all agreements and stipulations in relation to the conduct of, or any proceedings in, an action or special proceeding unless such agreement or stipulation be made in open court, or in presence of the clerk, and entered in the minutes by him or her, or signed by the party against whom the same is alleged, or his or her attorney.”

Improper service is a defense that can be waived. *See, Harvey v. Obermeit*, 163 Wn. App. 311, 323, 261 P.3d 671, 675 (2011) (defense of insufficient service of process is waived if not asserted in a responsive pleading or motion under CR 12(b)(5)).

Benz and Riley challenged the propriety of the supplemental proceedings, including the electronic service, but abandoned and waived those defenses after stipulating to the supplemental jurisdiction of the

King County court, and agreeing to answer questions in writing or otherwise appearing on July 2, 2014 pursuant to stipulation and agreed order. (CP 198-203). The trial court did not err in incorporating the King County Superior Court Order into the findings.

G. The Trial Court Did Not Err in Imposing CR 11 Sanctions against Benz and Riley

Civil Rule 11 states that sanctions may be granted against a person or persons if their pleadings, motions, or other documents filed with the court are interposed for an improper purpose, such as to harass or cause unnecessary delay or needlessly increase the cost of litigation. A trial court's decision regarding CR 11 sanctions is reviewed for an abuse of discretion. *Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp.*, 122 Wn. 2d 299, 858 P.2d 1054 (1993). Abuse of discretion occurs when an order is manifestly unreasonable or based upon tenable grounds. *Watson v. Maier*, 64 Wn. App. 889, 827 P.2d 311 (1992).

Here, Benz and Riley do not even argue on appeal that the sanctions order arising from the dismissal order was either manifestly unreasonable or based upon tenable grounds. (See Appellants' Brief, ps. 11-27) "An appellant's brief must include...argument supporting the issues presented for review, and citations to legal authority." (See RAP 10.3(a)(6); *Bercier v. Kiga*, 127 Wn. App. 809, 824, 103 P. 3d 232 (2004),

review denied, 155 Wn. 2d 1015 (2005)). Given that Benz and Riley have not raised the issue on appeal in their supporting brief, this court need not consider the arguments and should defer to the trial court's decision.

Even assuming Benz and Riley did not waive this issue on appeal, Benz and Riley cannot demonstrate the CR 11 sanctions order was manifestly unreasonable or based upon untenable grounds. First, the trial court incorporated the King County Superior Court order regarding service upon Benz and Riley which completely refutes any allegation of impropriety as to service in the supplemental proceedings. (CP 58) And the trial court is in the best position to make the determination about the prior orders and "the underlying taste of the litigation" to assess sanctions requests. *Miller v. Badgley*, 51 Wn. App. 285, 300, 753 P.2d 530 (1988) citing *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1174 (D.C. Cir. 1985). Thus, the trial court's decision should not be reversed and should stand given its unique understanding of the various actions filed by Benz and Riley.

Finally, Benz and Riley cannot dispute the fact that this action interfered with Ojala and Carson Law Group's attorney client relationship with the Town of Skykomish. This action arises directly out of the King County Superior Court action where Ojala and Carson Law Group's

client, the Town of Skykomish, has prevailed on an action for abatement against the entities owned by Benz and Riley. Benz and Riley failed to utilize the judicial system for due process instead filing frivolous claims causing undue delay, even after stipulating to service. The trial court did not err by imposing CR 11 sanctions against Benz and Riley.

H. The Court Must Grant Sanctions on Appeal Based Upon the Continuous and Ongoing Repetition of Frivolous Filings Including This Frivolous Appeal

Pursuant to RAP 18.1 and RAP 18.9, the appellate court may assess terms or compensatory damages against a party. One of the grounds for awarding sanctions is filing a frivolous appeal. (RAP 18.9(a)) “An appeal is frivolous if there are no debatable issues upon which reasonable minds might differ and it is so totally devoid of merit that there [is] no reasonable possibility of reversal.” *State ex rel. Quick-Ruben v. Verharen*, 136 Wn.2d 888, 905, 969 P.2d 64 (1998) citing *Presidential Estates Apartment Assocs. v. Barrett*, 129 Wn.2d 320, 330, 917 P.2d 100 (1996)). Here, there was no reasonable possibility of reversal because Ojala and Carson Law Group are entitled to absolute witness immunity. Similarly, the CPA claims alleged under theories of conspiracy and perjury fail as matters of law because such claims do not exist or cannot be alleged against Ojala or Carson Law Group (as set forth above). Thus,

Ojala and Carson Law Group are entitled to attorney fees under RAP 18.9(a).

Here, Benz and Riley do not present any debatable issues of law and fact on appeal. In fact, Benz and Riley regurgitate the same tired story of conspiracy without any support for their legal claims in either law or fact. For instance, Benz and Riley continue to present detailed factual arguments on issues of fact related to perjury. (See Appellants' Brief ps. 5-7) However, Washington State does not recognize a civil claim for perjury. And Carson Law Group and Ojala are entitled to absolute immunity for such statements, and Benz and Riley simply ignore this basic common law principle.

Finally, despite warnings from the trial court that "this suit was imposed for improper purposes of delay and to interfere with the attorney-client relationship" Benz and Riley filed an appeal. (CP 59) And Benz and Riley mismatch legal and factual claims without presenting any cogent argument to this court on issues such as why absolute immunity does not apply or how they can overcome the deficiency of the alleged perjury and conspiracy claims.

The trial court also warned Benz and Riley by stating that "sanctions are necessary to deter repetition of the conduct and comparable

conduct of persons similarly situated as the Plaintiffs herein.” (CP 59) On this basis alone, the Court should sanction Benz and Riley for repeating the same improper behavior without any plausible legal or factual argument to justify reversal of summary dismissal.

Based upon the ongoing frivolous filings, this court must sanction Benz and Riley for continuing to pursue frivolous claims despite specific findings of improper filings and resulting sanctions from the superior court level.

V. CONCLUSION

The trial court’s order dismissing Benz and Riley’s complaint with prejudice, granting summary judgment in favor of Ojala and Carson Law Group, incorporating the King County Superior Court order, and granting sanctions against Benz and Riley should be affirmed. This court should also sanction Benz and Riley for continuing this frivolous litigation against Carson Law Group and Ojala.

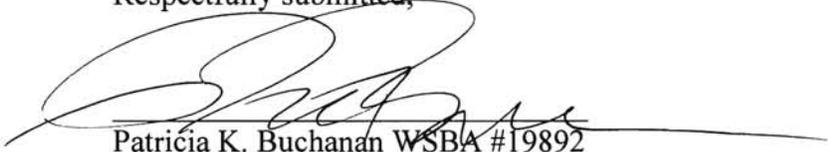
//////

//////

//////

Dated this 22nd day of December, 2014.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Patricia K. Buchanan', is written over a horizontal line. The signature is fluid and cursive.

Patricia K. Buchanan WSBA #19892
PATTERSON, BUCHANAN, FOBES & LEITCH, INC., P.S.
2112 Third Ave, Suite 500
Seattle, WA 98121
Phone: 206-462-6700
Attorneys for Respondents Peter Ojala and Carson Law Group,
P.S.

CERTIFICATE OF SERVICE

I, Suzy C. Windes, declare upon personal knowledge under penalty of perjury that I am over the age of 18 and otherwise competent to testify, and that on the date provided below I caused the original of the foregoing to be filed with the clerk of the court and a true and correct copy to be delivered to Appellant and all counsel via the method(s) listed below and addressed as follows:

Mr. Karl Benz
2885 Sandford Ave SW
#29339
Grandville, MI 49418

- Electronic Mail
- ABC Legal Messenger Service
- Regular U.S. Mail
- Other: _____

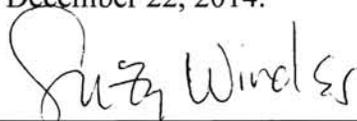
Catherine Riley
2885 Sandford Ave SW
#29339
Grandville, MI 49418

- Electronic Mail
- ABC Legal Messenger Service
- Regular U.S. Mail
- Other: _____

Deane William Minor
Tuohy Minor Kruse PLLC
2821 Wetmore Avenue
Everett, WA 98201

- Electronic Mail
- ABC Legal Messenger Service
- Regular U.S. Mail
- Other: _____

Dated in Seattle, Washington on December 22, 2014.



Suzy C. Windes, Legal Assistant