

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
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No. 39460-0-II

COURT OF APPEALS, DIVISION TWO  
STATE OF WASHINGTON

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DAVID CARPENTER, Plaintiff,

Appellant,

v.

DAVID GLENN and REBECCA GLENN, husband and wife, Defendants,

Respondents.

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REPLY BRIEF OF APPELLANT

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**ORIGINAL**

60-29-71 (11)

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## ASSIGNMENTS OF ERROR

1. The trial court erred in granting Glenn's cross motion for summary judgment on April 17, 2009.
2. The trial court erred by not viewing all facts and inferences in favor of the non-moving party.
3. The court erred in granting bona fide purchaser status to a gift transferee.

## ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

1. Does a court have authority to grant a cross motion for summary judgment on eight days notice over the non-moving party's objection? (Assignment of Error 1.)
2. Did Plaintiff waive the 56 day notice requirement of CR 56? (Assignment of Error 1.)
3. Was Plaintiff prejudiced by non-compliance with the notice requirement of CR 56? (Assignment of Error 1.)
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## STATEMENT OF THE CASE – MOTION TO STRIKE

In their Brief of Respondent (*BR*,) Respondents' take no issue with Appellant's Statement of the Case except to supplement it. The majority of their supplementation is related to their claim that the parties had agreed to a "rent to own" deal. *BR 4*. Carpenter denies that there was ever any such agreement. *CP 53* Respondents point to no written evidence of such an agreement, whereas Carpenter has fully documented his rental agreement with Respondents. *CP 90-100*. If this is an issue of material fact, it Carpenter's version clearly should have been accepted when granting summary judgment to Glenn.

Lastly, Respondents attempt to add testimony from their counsel that appears nowhere, in the original proceedings or elsewhere. Carpenter therefore moves that this statement, the final paragraph of Respondents' Statement of the Case section of their brief – be stricken.

## ARGUMENT

### 1. STANDARD OF REVIEW:

No Reply to this section of the Brief of Respondents is needed.

### 2. THE COURT DID NOT HAVE AUTHORITY TO GRANT A CROSS MOTION FOR SUMMARY JUDGMENT ON EIGHT DAYS NOTICE OVER THE NON-MOVING PARTY'S OBJECTION. (Assignment of Error 1.)

In response to Carpenter's argument that Respondents' motion for summary judgment was improperly granted for lack of sufficient notice under CR 56(c), Respondents simply point out that the trial Judge apparently felt he could grant summary judgment to either party, with or without a cross motion. There is no disputing of Carpenter's assertion that the Defendants filed on April 7, 2009 a cross motion for summary judgment. *CP 68*. Furthermore, the Order on Summary Judgment from which this appeal was taken, entered ten days later on April 17, 2009 (*CP 42*) states that the matter came before the court "on the Motion of Plaintiff and the Cross Motion of defendants..." *CP 43*.

The only Washington authorities Respondents cite to support that Judge Lawler is correct about his authority to enter judgment against a non-moving party, without proper notice, are *Rubenser v. Felice*, 58 Wn.2d 862 (1961) and *Leland v. Frogge*, 71 Wn.2d 197 (1967). The sole issue in the 1961 *Rubenser* case was whether or not the Rule in

Shelley's Case was still the law in Washington. The ultimate decision was to reverse a summary judgment granted to one party (the devisees under the Will) and enter summary judgment to another (the heirs at law,) but there is no information in the decision to allow Respondents to conclude and argue as they do (at *BR 6*) that the heirs at law were "non-movants" who had no opportunity to argue their claims at all at the trial court level.

The other case cited by Respondents as authority for the court to grant summary judgment to a non-moving party, *Leland v. Frogge*, 71 Wn.2d 197 (1967) cites *Rubenser* as authority for that proposition. As stated above, find no such authority in *Rubenser*, but more interesting is the circular reasoning put forth by Respondents as a result. Respondents cite *Leland* as also limiting judgments to non-moving parties only "if such judgment would be either one of dismissal, or **for relief sought by** or uncontestedly due that second party." (*BR 7*) There is no suggestion that this is a case where the judgment is for dismissal, or is a judgment uncontestedly due Respondents. They emphasized "**for relief sought by,**" and point to their cross motion as the basis for finding that the relief was sought. (*BR 7*) So by Respondents' reasoning, the fact that their cross motion was made on inadequate notice is immaterial because the court could grant their relief even in the absence of such a motion. But

the court can only grant that relief if the relief was sought, which in this case it was sought - by virtue of their untimely cross motion. The clear notice requirements of CR 56(c) cannot possibly be so easily evaded.

3. CARPENTER DID NOT WAIVE THE TIME REQUIREMENT OF CR 56 (Assignment of Error 1.)

Respondents' brief takes no issue with this argument.

4. CARPENTER WAS PREJUDICED BY NON-COMPLIANCE WITH RULE (Assignment of Error 1.)

When arguing that Carpenter was not prejudiced by inadequate time, Respondents characterize their argument as being related to their allegations that Green told them that he had not issued any previous deed as opposed to Green's later statement that he did not remember whether he had signed a previous deed. (*BR 7*) However, Green's assertions were that he told them (Glenn and his attorney) that he didn't recall whether he had signed a previous deed, and that he "never assured him (Glenn's Attorney) or anyone else that I had not signed any other deed on the property." (*CP 16*) This is very different from Glenn later stating "I do not recall whether I signed a previous deed." To reiterate, Glenn's declaration states that he told Glenn and his attorney **at the time** that he did not recall whether he had signed a previous deed. In that same regard, I fail to see how this is, along with his additional statement

that he “thought (he) had already deeded the property to his sister years ago<sup>1</sup>,” makes the declaration inconsistent within its four corners as argued by Respondents. *BR 11*

As argued in the opening brief, if Respondents’ cross motion was to be heard on April 17<sup>th</sup>, then for Carpenter to oppose that motion he would have had to file any opposing affidavits by April 6<sup>th</sup> – three days before the date it the cross motion was deemed served on Carpenter. Respondents’ argument totally ignores that affidavits opposing their cross motion would be due eleven days before the hearing, and argues that Carpenter had 10 days to obtain the affidavit. *BR 8*

This breach of the notice requirement is exacerbated by the fact that Glenn had never before –in answer to interrogatories or otherwise - claimed that Green told him, or his attorney, that he had signed no previous deeds.

Respondents suggest that there were several remedies available to Carpenter to the short notice, and then mentions only that Carpenter could have requested a continuance. But what is the difference between requesting a continuance versus demanding that the motion not be heard on short notice? Respondents argue that a Washington case confers a

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<sup>1</sup> In fact, in 2001 Green deeded the property to his sister, and she in turn deeded the property to Carpenter.

right to a continuance on showing of good cause. *BR 9* Presumably it would be that short notice which constitutes good cause. Carpenter argues that it is more direct to insist that the notice requirements be met (i.e. that the motion not be heard on short notice), than to request a continuance and argue it as his right due to the short notice.

Carpenter attempted to show prejudice by pointing out that when affidavit is properly made and is uncontroverted, it may be taken as true for purposes of passing upon the motion for summary judgment. *Preston v. Duncan*, 55 Wn.2d 678, 349 P.2d 605 (1960); *Henry v. St. Regis Paper Co.*, 55 Wn.2d 148, 346 P.2d 692 (1959). Respondents' response is that these citations are inapposite, in that the declarations were not introduced until well after the hearing. *BR 10* This response shows a misunderstanding of Carpenter's argument. It was Respondents' declarations of what Green said that were before the trial judge and uncontroverted. The Judge was therefore to take **those** as true, even if viewing the facts in the light most favorable to Carpenter as the non-moving (or at least not prevailing) party. The reason they were uncontroverted is because they were filed and served after the deadline to file and serve opposing affidavits to controvert them. Again, the point was that Carpenter was prejudiced by being denied the opportunity

to controvert the statements with opposing declarations due to the non-compliance with the time rule of CR 56.

5. THE COURT ERRED BY NOT VIEWING ALL FACTS AND INFERENCES IN FAVOR OF THE NON-MOVING PARTY (Assignment of Error 2.)

Respondents arguments that the court was correct in declining the make the inference urged by Carpenter ignore the fact that the trial court, if granting summary judgment to Respondents, should resolve all inferences and view all facts in the light most favorable to Carpenter.

*Vallandigham v. Clover Park Sch. Dist. No. 400, 154 Wn.2d 16, 26, 109 P.3d 805 (2005)*. Furthermore, as discussed above in the prejudice section, it is only the lack of opposing affidavits that would have allowed the trial court to accept Glenn's uncontroverted averments as facts.

While I do not think I can find a citation for this proposition, it seems patently unfair to view all facts in light most favorable to the non-moving party if the non-moving party is not afforded the opportunity to controvert facts that are asserted for the first time in the motion.

6. THE COURT ERRED IN GRANTING GLENN BFP STATUS FROM GIFT TRANSFER (Assignment of Error 3.)

Respondents cite the Declaration of David Glenn in Response to Carpenter Motion for Summary Judgment and in Support of Glenn's Cross Motion (*at CP 71*) for the proposition that Gary Green accepted an

offer by Glenn to take Green “off the hook” for the DSHS suit. *BR 13*

However, that Declaration does not support the fact alleged. That Declaration merely contains the hearsay that Green was concerned about liability, and the allegation that Glenn told Green he would be off the hook if he quit claimed the property. Nowhere does the Declaration state anything about Glenn happily accepting the offer. Furthermore, such a suggestion is contrary to the deed itself which recites that it was given as a “gift.” *CP 74* As stated in *Lopez v. Reynoso*, 129 Wn. App. 165 at 171 (2005):

Under the parol evidence rule, "prior or contemporaneous negotiations and agreements are said to merge into the final, written contract," *Emrich v. Connell* , 105 Wn.2d 551 , 556, 716 P.2d 863 (1986), and evidence is not admissible to add to, modify, or contradict the terms of the integrated agreement. *DePhillips v. Zolt Constr. Co.* , 136 Wn.2d 26 , 32, 959 P.2d 1104 (1998); *Berg v. Hudesman* , 115 Wn.2d 657 , 670, 801 P.2d 222 (1990). But the parol evidence rule is only applied to writings intended as the final expression of the terms of the agreement. *Emrich* , 105 Wn.2d at 556 ; RCW 62A.2-202

The general rule is that provisions of a real estate purchase and sale agreement merge into the deed. *Barber v. Peringer*, 75 Wn. App 248, 251-252 (1994.) Whether the terms of a purchase and sale agreement merge depends on the intent of the parties: where the intent of the parties is not clearly expressed in a deed, courts may consider parol evidence. *Failes v. Lichten*, 109 Wn. App. 550, 554 (2001.) Here the

intent of the parties is clearly expressed in both the deed. It was a gift. *CP 118*. Moreover, Respondent Glenn seems to admit that he signed an excise tax affidavit wherein he swore that deed was given him as a gift. *BR 13* Glenn should be stopped from taking a contrary position now.

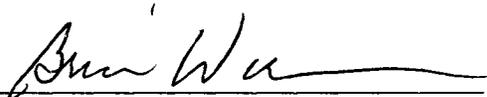
Respondent further argues that the equities favor them referencing the disputed “rent to own” agreement, work done by Glenn and the amount Glenn paid for his deed versus the amount paid for Carpenter’s deed. However (a) Carpenter disputes the existence of a rent to own agreement, (b) there is no evidence of the extent of work allegedly performed on the property by Glenn (and Carpenter disputes that Glenn did the work for which the insurance money is for – *VRP 12*) or the amount of work performed on the property by Carpenter years before Glenn ever came into the picture (*CP 86 – Carpenter repaired the property in 2001.*) Neither this court, nor the trial court is in much of a position to evaluate upon whose side the equities fall.

## **CONCLUSION**

For the reasons stated above, the trial court’s Order on Summary Judgment, quieting title in Defendants, was in error. The Defendants’ Motion was not timely and Plaintiff should have been afforded the opportunity to controvert the late-produced Declarations of Defendants, Plaintiff did not waive the time requirements, and Plaintiff was thereby

prejudiced. Furthermore, the trial court did not appear to view all inferences in favor of Plaintiff when it granted Defendants' motion. Given that a summary judgment is to be granted only when looking at all facts in light most favorable to a non-moving party, it is imperative that the non-moving party be granted the opportunity to controvert facts asserted for the first time in their motion. Finally, the court erred by effectively granting the Glenns bona fide purchaser status based upon a quit claim deed given without consideration.

Respectfully submitted this 24<sup>th</sup> day of December, 2009.

  
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Brian Wichmann, WSBA #16467  
Attorney for Appellant Carpenter

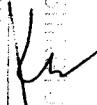
Declaration of Service

The undersigned declares under penalty of perjury under the laws of the State of Washington that on the below date I sent by regular first class mail, postage prepaid, a true copy of this document to:

Michael Mittge  
Attorney at Law  
1079 South Markey Boulevard  
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Signed at SeaTac, WA on December 24, 2009.

  
\_\_\_\_\_  
Brian Wichmann

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STATE OF WASHINGTON  
BY  PERJURY  
COURT OF APPEALS  
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