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STATEMENT OF THE CASE

Respondent accepts Appellant’s Statement of the Case, except as supplemented herein:

At the end of the second paragraph, Appellant’s Brief (AB) 2, add:
In or about 2005, Carpenter and Glenn agreed to a “rent to own” deal, but it was never committed to writing. *CP 69-70.*

At line 3 on page 3, add “Glenn was seeking the insurance money because he thought he was buying the property.” *CP 69-70*

At line 1 on page 4, after “back rents”, add “in response to a 3 day Pay or Vacate Notice.” *CP 71.*

After the end of the first paragraph on Page 8, add “Glenn’s counsel showed Ms. Griffith the Deed of Trust recorded in the matter, and asked her if this was what she was talking about, and she replied ‘Yeah, that’s it.’” *No reference to original proceedings, as this assertion came up for the first time in a Declaration issued approximately 3 months after the hearing from which this appeal is taken.*

1. STANDARD OF REVIEW.

Defendant/ Respondent Glenn accepts Plaintiff/ Appellant Carpenter's statement of the standard of review in this case.

2. GRANTING SUMMARY JUDGMENT TO THE NON-MOVING PARTY WAS WITHIN THE POWER OF THE TRIAL COURT.

Carpenter did not object to Glenn's late service of his response to summary judgment by virtue of the "mailbox rule" (*CP 36, CR 6*), but argues that the trial court improperly heard and decided Glenn's Cross Motion for Summary Judgment without proper notice. Cross motions for Summary Judgment are fairly common in Washington¹, but no authority could be found on the issue of improper or inadequate notice for such cross motions.²

Closer review of the Report of Proceedings, however, reveals that the trial judge was not necessarily recognizing Glenn's cross motion, but rather, was indicating that the Court had the power to enter judgment for the non-moving party. At the hearing, Carpenter stated that, based on the

¹ Searching WSBA "Casemaker" legal research software for the phrase "cross*motion" within 5 words of "summary judgment" yielded 977 cases. Partial analysis of those cases indicated decisions for both the original movant and the cross-movant were about equally divided.

² Adding the word "notice" to the above search yielded no cases. Adding the term "CR 56" yielded one case, but that case had no notice issue.

28 day notice requirement, he did not believe Glenn's cross motion was properly before the court. *RP 4*. The trial judge replied:

“Well, on a motion for summary judgment I can make a finding of summary judgment on behalf of either party, especially when it comes to something like this when it's an either/or thing. (*RP 4*).

In his decision, the trial judge stated:

“So the procedural status of this case where you have the competing deeds between Carpenter and Glenn, the motion for summary judgment filed by Plaintiff is to quiet title as between the two parties and Plaintiff, that allows me to make a decision, a summary judgment on this as between the two parties **and it's not fatal, I could do this whether or not the Defendants file a separate motion for summary judgment** because clearly that is the only issue that is before me.”

(*RP 18-19*) Emphasis added.

The subject of entry of judgment for the non-moving party is reviewed with favor in the American Law Reports, but no Washington cases are cited in the discussion, either for or against the practice. 48 ALR2d 1188.

In Washington, the practice of granting summary judgment to the non-moving party is supported, whether on short notice, or even no notice at all. In *Rubenser v. Felice*, 58 Wn.2d 862, 365 P.2d 320 (1961), the movant's judgment was reversed and non-movant granted summary judgment by the appeals court, so movant had no opportunity to argue non-movant's claims at all at the trial court level.

Some limitations on the practice are set forth in *Leland v. Frogge*, 71 Wn.2d 197, 427 P.2d 724 (1967), wherein the court stated that judgment for the non-moving party would be appropriate only if “such judgment would be either one of dismissal, or **for relief sought by or uncontestedly due that second party.**” *Emphasis added.* By virtue of Glenn’s cross motion, the relief sought was clearly stated, even if the matter was not actually treated as a cross motion. As indicated by the trial judge, this case was especially amenable to judgment for one party or the other, in that the court would be called upon to award legal title to one or the other of the only two contestants for it. There were no other possible outcomes, and if the facts were not in dispute, there was no need to carry the matter out any further. The purpose of summary judgment is to avoid useless trials. *Lish v. Dickey*, 1 Wash.App. 112, 459 P.2d 810 (1969).

3. CARPENTER WAS NOT PREJUDICED BY INADEQUATE TIME.

The fact which Carpenter claims he was unable to set forth within the time he had, was whether or not Gary Greene had told Glenn that he (Green) had issued a deed to the property. Glenn alleged that Green had told Glenn (*CP 71*) and Glenn’s counsel (*CP 59*) he had not executed any deeds; by a later affidavit (July 15, 2009) (*CP 16*), Green stated that he did not remember whether he had signed a previous deed. Carpenter claims

that he could not obtain this affidavit in time for the April 17th summary judgment hearing.

As a practical matter, Carpenter could certainly have obtained the Affidavit in time for the hearing. In his brief, Carpenter admits that Glenn's Response to Summary Judgment motion was emailed to him on April 6, 2009³. Admittedly, the email was not sent until after 5 P.M.⁴ However, this gave Carpenter 10 days to obtain the Affidavit from Green, who lived in Tacoma, just a few miles from Wichmann's SeaTac office.

While no specific notice cases regarding summary judgment could be found, in motions practice Washington courts have held that the requirement of CR6(d) that motions be served 5 days before the hearing thereon is not jurisdictional. Failure to comply with the time requirement will not be fatal to the motion when other parties have actual notice and sufficient time to prepare for the issues to be considered at the hearing. *Loveless v. Yantis*, 82 Wash.2d 754, 513 P.2d 1023 (1973); *CR 6(d)*; certainly, it would not be unreasonable to extend this principle to the more liberal time allowances of summary judgment hearings.

³ Glenn's counsel believed transmission by email was appropriate to provide actual notice, as he and Carpenter's counsel had communicated frequently by email in the past.

⁴ Glenn's counsel had called Mr. Wichmann at approximately 4 P.M. on the 6th, and found no one at the office, and the call was not returned before 5 P.M. Counsel thus reasoned that the email would not be viewed until the 7th, so did not strive to transmit it before 5 P.M.

Carpenter also could have availed himself of several remedies for short notice. The most obvious, of course, would have been simply asking Glenn for a continuance, which would have been granted; at the hearing itself, he could have moved the trial judge for a continuance, to which Glenn would not have objected; even if the trial judge was not inclined to grant a continuance, Carpenter he could also have moved for continuance on the basis of CR 56(f), which speaks specifically to a continuance to enable a party to obtain affidavits.

(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. (Emphasis in original) *CR 56 (f)*

A Washington decision confers a right to such a continuance, on showing of good cause. *Cofer v. County of Pierce*, 8 Wn.App. 258, 505 P.2d 476 (1973).

The missing “fact” would not have changed the outcome of the case, and thus, its materiality is in question. A material fact is one on which the outcome of the litigation depends. *Ruffer v. St. Frances Cabrini Hospital*, 56 Wn.App 625, 784 P.2d 1288 (1990), review denied 114 Wn2d 1023, 792 P.2d 535 (1990). Here, the allegation that Green had said he had not issued a deed (when it later turned out that he had) was

simply one of a number of circumstances that had led Glenn and his counsel to doubt that Carpenter possessed a deed, *CP 57-59*, and was not in and of itself dispositive of the case. An immaterial question of fact does not prevent summary judgment. *Capitol Hill Methodist Church of Seattle v. Seattle*, 52 Wn.2d 359, 324 P.2d 1113 (1958). Even without that fact, the trial court had ample reason to conclude that Glenn had acted diligently in response to inquiry notice.

The allegation by Green that he had not issued a deed was objected to by Carpenter at trial, and the objection was sustained, despite Glenn's contention that the statement was offered not for the truth of the matter asserted, but for its effect on the state of mind of the hearer. Therefore, that statement did not play a role in the decision.

In his brief, Carpenter laments that he was clearly prejudiced by not having 17 days to "get the declarations before the judge." *Appellant's Brief (AB) 12*. He did have 10 days, and Glenn asserts that 7 days more would have made no difference, as he did not obtain the declaration of Green until July 15, nearly 3 months after the hearing.

Finally, the case citations supporting the proposition that uncontradicted affidavits can be taken as true (*AB 12*) is inapposite, in that the declarations were not introduced until well after the hearing, so Glenn had no opportunity to contest them. Matters not before trial court when

considering motion for summary judgment may not be considered on appeal from trial court's ruling. *Jones v. Brandt*, 2 Wash.App. 936, 471 P.2d 696 (1970). The Declaration of Green is unreliable, in that he had obviously been shown the deeds that he and his sister had signed, and it is not surprising that he changed his mind. The Declaration is even inconsistent within its four corners: At one point he states, "I likewise told him [Glenn's attorney] that I don't recall whether or not I had signed a previous deed." Two sentences later, he states "I thought that I had already deeded the property to my sister years ago." *CP16*

In the Declaration of Yvonne Griffith, Ms Griffith did indeed state that she had signed something before. *CP 18*. Glenn's counsel showed her the Deed of Trust that was the only document of record regarding the property, and Ms. Griffith replied "Yeah, that's it."

4. THE COURT WAS CORRECT IN DECLINING TO MAKE THE INFERENCE URGED BY CARPENTER.

Carpenter believes that the fact that Glenn resumed paying rent and made no further demands that Carpenter produce a deed should have been interpreted by the trial court as acceptance by Glenn that Carpenter did indeed have a deed and that the matter was settled. *AB 13*. However, Glenn's Declaration avers facts that justify the court in declining to make

that inference. Glenn did not simply resume payments in November 2007 for no apparent reason- he did so because he had been issued a 3 day Pay or Vacate notice by Carpenter, and he didn't have the funds to enter into litigation over title at that time. *CP 71*. However, the months dragged on, the state re-filed its Medicaid foreclosure suit, and Glenn (upon inquiry) discovered that the insurance money would not be paid until the property ownership was established. "At that point, I decided that if anything was going to get done on this, I would have to do it." *CP 71*. These statements by Glenn certainly justified the court in declining to adopt the inference that the matter was settled in Glenn's mind.

5. GLENN GAVE ADEQUATE AND SUFFICIENT CONSIDERATION FOR HIS DEED.

RCW 65.08.070 recites "valuable consideration" as a requisite in establishing a bona fide purchase, but that consideration need not necessarily be money. A debtor's surrender of right to appeal was found to be sufficient consideration, even though success on appeal was not probable. *National Bank of Washington v. Myers*, 75 Wash.2d 287, 450 P.2d 477 (1969); Receipt of benefits of employees' labor constituted adequate consideration. *Adams v. University of Washington*, 106 Wash.2d 312, 722 P.2d 74 (1986).

Here, Glenn offered to take Green “off the hook” for the DSHS suit, which Green was happy to accept. *CP71*. The fact that Green did not realize his legal exposure was very small is not controlling:

“On the other hand, it is only necessary that the contracting party *believe* he is subject to a potential detriment by entering into a contract; it is not necessary that he actually suffer such a detriment.”

Calamari & Perillo, *CONTRACTS* § 4- 12 at 233 (3rd Edition 1987).

The fact that the Deed was denominated “Gift” is not conclusive—that is simply the designation that parties are directed to make on the Excise Tax Affidavit by the Treasurer’s office when no money passes in a transaction.

The equities are also on Glenn’s side in this matter. He had performed work on the property under the belief that he and Carpenter had established a “rent to own” agreement. *CP 69*. Ironically, Carpenter paid only \$250 for his deed, while Glenn paid \$1,000, but it is Glenn’s status that is called into question.

While the consideration given for the conveyance from Green to Glenn may have been less than perfect, the courts have fashioned equitable solutions where inequity would otherwise occur. See *Bernard v. Benson*, 58 Wash. 191, 108 P. 439 (1910).

CONCLUSION

Glenn had inquiry notice that Carpenter **claimed** to have a deed. Washington courts have consistently held that a circumstance that should lead a person to inquire is only notice of what a reasonable inquiry would reveal. *Miebach v. Colasurdo*, 102 Wn.2d 170, 175-176, 685 P.2d 1074 (1984); *Levian v. Fiala*, 79 Wn.App. 294, 298-299, 901 P.2d 170 (1995); *Paganelli v. Swendsen et al.*, 40 Wn.2d 304, 311 P.2d 676 (1957). Glenn diligently inquired in every way he and his counsel could think of, CP 57-59, and everything we found merely strengthened our belief that Carpenter did not hold a deed to the property. The assignments of error by Carpenter are without merit, and the Court should affirm the decision of the trial court.

Respectfully submitted,



Michael R. Mittge WSBA #17249