

No.39975-0

**COURT OF APPEALS - DIVISION II
OF THE STATE OF WASHINGTON**

Richard W. Whipple., *Respondent*

v.

Frances E. Hall., *Appellant*

**Kitsap County Superior Court
Cause No. 06-2-02697-9**

EX-101
STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
APR 11 2005
11:05 AM

BRIEF OF RESPONDENT

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Attorney for Richard Whipple.**

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ASSISGNMENTS OF ERROR

The trial court did not abuse its discretion in denying defendant's motion for attorneys fees under RCW 4.28.328.

The trial court did not abuse its discretion in denying attorneys fees pursuant to RCW 4.84.185.

The trial court did not abuse its discretion in denying defendant attorneys fees under CR 11.

STATEMENT OF THE CASE

Plaintiff Whipple owned a parcel of real property in Bremerton, Washington. At the time of his purchase, it was clear that the Whipple property shared a common driveway with the Hall property leading to the backyard of each property. RP 59. The Whipple property contained a parking area only accessible from the common driveway which clearly had been used for a significant period of time prior to Whipple's purchase. RP 63, Ex. 1, 3, 5.

After purchasing the property, Whipple's tenants enjoyed use of the common driveway between the two properties and parked their vehicles in the established parking area behind the Whipple residence. RP 47-48.

After a dispute between Whipple's tenants and Defendant Hall, Hall blocked the easement area, preventing Whipple's tenants from using the parking area behind the Whipple home. RP 45. There is no other access to the back of the Whipple home. RP 49. The only available parking is street parking.

After determining that the common driveway between the two properties and the parking area had been used for a considerable period of time, Whipple initiated an action seeking a prescriptive easement by adverse possession. CP 2-11. During the course of the litigation, Whipple discovered that his property and the Hall property had been foreclosed upon and purchased at foreclosure sale by the same party. This commonality of interest extinguished Whipple's adverse possession claim.

Whipple then amended his complaint seeking an easement by implication. CP 93-97. A title search revealed that the Whipple and Hall properties had originally been owned by a common grantor. When the Whipple property was divided by deed in the early 1900s, the original grantor failed to reserve an easement to allow access to the back of the Whipple property. CP 192-199. Despite evidence that the driveway on the Hall property had been shared by the Whipple property for many years for access to the back of the Whipple residence, the trial court granted summary judgment in favor of the Halls. CP 216, 230-232. Finding that

the lis pendens recorded on the Hall property had a sufficient basis, the trial court denied Hall's request for attorney's fees. CP 230-232

A trial was subsequently held on the remaining issue of Hall's claims for fees. At the conclusion of the trial, the court found that the claims raised by Whipple were not made in bad faith and that there was a reasonable basis for Whipple's attorney to bring forward Whipple's claims. RP 4, 18 April 10, 2009 decision. See Ex.2. Hall's request for attorney's fees was denied.

The Court entered factual findings that there was substantial justification for the recording of the lis pendens, the action was not frivolous and that the attorney had a reasonable basis upon which to bring the action. CP 813-817. A copy of the Court's findings and conclusions is attached as Ex. 1.

Various motions for reconsideration were filed, all of which were denied. This appeal follows.

ARGUMENT

All of the assignments of error and legal issues raised by Hall in this appeal challenge the factual determinations made by the court in denying Hall's claims for attorney's fees.

It is well settled that a trial courts factual findings that are supported by substantial evidence are verities on appeal. What constitutes substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise. *Miller v. City of Tacoma* 138 Wn.2d 318, P.2d (1999); see also *Reynolds Metals Company v. Electric Smith Company* 4 Wn.f 695, 698, 483 P.2d 880 (1971).

The evidence before the trial court established that when Whipple bought the property there was a common driveway which was used to access the rear of the Whipple property. This common driveway had been in existence for at least 50 years based upon aerial photographic evidence.

Ex. 1.

The previous owner of the Whipple property testified that he had used the common driveway and had parked vehicles behind the Whipple residence. RP 63, 65.

In addition, the undisputed evidence is that a common grantor had originally owned both the Whipple and the Hall properties. This common grantor had divided by deed a portion of the property now known as the Whipple property without reserving an access easement to the rear of the home. CP 192-199. Without reservation of an access easement, it is impossible to access the rear of the Whipple property with any vehicular

traffic. RP 64. In fact there is only a three to four foot separation between the houses. RP 64.

ISSUE ONE:

The trial court did not err in denying Hall's request for attorney's fees pursuant to RCW 4.28.328.

A trial court's denial of attorney's fees is based upon a factual finding requires that the appellant demonstrate that the trial courts findings were not based upon substantial evidence.

In *Schwab v. Seattle* 64 Wn.2d 742, 826 P.2d 1089 (1992), the court determined that in a dispute almost identical to the instant case, it was appropriate for a lis pendens to be recorded. This is because that litigation concerned the existence or validity of an easement between properties. Because there was substantial evidence to support the trial court's factual findings, the decision of the trial court should be upheld.

ISSUE TWO:

This action was not frivolous and the trial court did not err in denying Hall's attorneys fees pursuant to RCW 4.84.185.

Under this statutory provision, a lawsuit in its entirety must be determined to be frivolous and to have been advanced without reasonable

cause before an award of attorneys fees may be made pursuant to the frivolous lawsuit statute. *Figgs v. Vale* 119 Wn.2d 129, 42 P.2d 350 (1992). That decision made it clear that in reviewing a claim for attorneys fees based upon the frivolous action statute, the lawsuit is to be interpreted as a whole. Its purpose is to discourage frivolous lawsuits and to compensate the targets of such lawsuits for fees and expenses incurred in fighting meritless claims.

A determination as to whether a claim is frivolous is a determination left to the discretion of the trial court. *Fluke Capital and Mgt. Servs. Co. v. Richmond* 106 Wn.2d 614, 625, 724 P.2d 356 (1986).

In the instant action, the record supports the trial courts determination that Whipple's claims were not frivolous. The Whipple property had utilized a common driveway between the Whipple and Hall properties for many years. It was only because both the Whipple and Hall properties were purchased at foreclosure sales by a common owner that Whipple's adverse possession and prescriptive easement claims were extinguished. Further, the existence of a common grantor for both properties provided an appropriate claim by Whipple for an easement by implication. The trial court did not err in denying Hall's request for fees under 4.84.185.

ISSUE THREE:

The trial court did not abuse its discretion in denying Hall's claim for attorneys fees under CR 11.

The purpose behind CR 11 is to deter baseless filings and to curb abuses of the judicial system. However, the rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories. *Bryant v. Joseph Tree, Inc.* 119 Wn.2d 210, P.2d 1099 (1992).

In the instant case, the trial court determined that the pleadings filed by plaintiff Whipple had both a factual and legal basis. As a result, the trial court concluded that Hall was not entitled to CR 11 sanctions. As with Hall's earlier theories, the proper standard of review is an abuse of discretion. *Bryan v. Joseph Tree supra*.

CR 11 sanctions are to be an extraordinary remedy. The trial court properly determined that Whipple had a legal and factual basis upon which to bring his claims. It properly denied Hall's request for sanctions under CR11.

CONCLUSION

The decision of the trial court should be affirmed.

DATED this 26th day of August, 2010

BROUGHTON LAW GROUP, INC. P.S.

William H. Broughton

William H. Broughton

Attorney for Respondent Whipple

EXHIBIT 1

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KITSAP COUNTY CLERK

BROUGHTON LAW GROUP
ATTORNEYS AT LAW

APR 10 2009

DAVID W. PETERSON

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KITSAP

RICHARD WHIPPLE, a single person,
Plaintiff, Counterclaim Defendant,
and lis pendens claimant

No. 06-2-02697-9

v.

ORDER DENYING
COUNTERCLAIMANT'S
RECOVERY OF COSTS
AND ATTORNEY FEES

FRANCES E. HALL, et al.,
Defendant, Counterclaimant
and lis pendens Aggrieved Party

THIS MATTER, having come on duly and regularly before the undersigned Judge of the above entitled court, upon Defendant Frances E. Hall's motion for trial, and having heard oral argument, given consideration to exhibits, heard testimony of witnesses, and reviewed files and documents submitted by both parties, the Court hereby makes the following findings of fact and/or conclusions of law:

1. It is clear that Judge Costello, in his letter ruling of April 16, 2008, denied Ms. Hall's request for attorney fees after granting Ms. Hall's motion for summary judgment and dismissing the case.

1 Paragraph 2 of the letter ruling of April 16, 2008 reads as follows:

2 "The request for a finding that the Plaintiff did not have a sufficient
3 basis for recording the lis pendens on the Defendant's property
4 is denied and the request for reasonable attorney fees pursuant to
RCW 4.28.328 is denied."

5 This previous ruling constrains the Court at this time, since Judge Costello
6 already foreclosed the issue of attorney fees under RCW 4.28.328.
7

- 8 2. There is no other basis for this court to award attorney fees because there
9 was no concurrent tort claim for slander of title which was either pled or
10 proved and RCW 4.28.328 is the only provision under which an award
11 of damages or attorney's fees may be issued by a court in this case.
12
- 13 3. The Court abstains from making a finding about whether or not the lis
14 pendens was filed with or without substantial justification because:
- 15 a. the Statute (RCW 4.28.328) provides no definition of "substantial justification"
 - 16 b. and even if the court were to find that Mr. Whipple acted in "bad faith" when
17 he filed the lis pendens---and that would suffice to establish lack of substantial
18 justification---the Court declines to rule on this issue where Judge Costello has
19 already dismissed the counterclaim for attorney fees under this statute.
20
- 21 4. This Court chooses to uphold the previous letter ruling of Judge Costello,
22 dated April 16, 2008 which denied attorney fees to Ms. Hall pursuant to
23 RCW 4.28.328 .
24
- 25 5. This Court is constrained from making any changes to that ruling.
26
27

1 6. Based on the above,

2 Defendant /Counterclaimant Hall's claims are hereby dismissed.

3 7. The Court makes additional findings
4 of fact and conclusions of law attached
5 hereto.

6
7 DONE IN OPEN COURT this 20th day of April, 2009.

10th

8 (S) JEANETTE DALTON

9
10 The Honorable Jeanette Dalton
11 Judge of the Above-Entitled Court

12 Presented by:

13 *Frances E. Hall*

14 Frances E. Hall pro se
15 Defendant/Counterclaimant
16 lis pendens Aggrieved Party

17 Copy received

18 ~~Approved as to form; Notice of Presentation Waived~~

19
20 William H. Broughton, WSBA #8858
21 Attorney for Richard Whipple,
22 Plaintiff, Counterclaim Defendant
23 and lis pendens Claimant

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FINDINGS OF FACT

1. Plaintiff and Defendant are Kitsap County residents who own residential properties abutting each other in Bremerton, Washington.

2. Whipple's predecessors in interest particularly witness Supit utilized the property between the two residential structures as a driveway to access parking at the rear of the Whipple property.

3. After Whipple obtained ownership of his property, a dispute arose with regard to the existence of an easement on the area Supit and others had used as a driveway.

4. A title search and survey were performed both of which revealed that there was not a recorded easement on the Hall property to allow for access to the rear of the Whipple property.

5. Whipple sought to have an easement by implication granted across the Hall property by the Court. A Lis Pendens was recorded by Whipple on the Hall property to provide notice of the litigation and the potential existence of an easement by implication.

6. The evidence fails to establish that the recording of the Lis Pendens by Whipple was done in bad faith.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties and subject matter hereto.

EXHIBIT 2

1 trial. And secondary to the decision, it's really -- my
2 decision was based upon the law of the case, case law.

3 But if I were required by, say a Court of Appeals, if
4 it came back on a mandate to enter findings of fact, I
5 would have to make a finding that I don't believe that
6 the lis pendens was filed in bad faith. And that's
7 because Mr. Broughton, as the attorney for Mr. Whipple,
8 and Mr. Whipple -- well, Mr. Whipple wasn't here to
9 testify, but what appears to me to be fairly clear was
10 that Mr. Broughton honestly believed that he had a claim
11 under a prescriptive easement. I call it prescriptive
12 easement. It's an old-fashioned term for an easement,
13 which is required to be given in order not to land lock
14 somebody. And I don't think that claim was frivolous, in
15 my review of the pleadings and hearing the testimony.

16 There was testimony from the predecessor homeowner,
17 the person who owned the before you did -- no, before Mr.
18 Whipple did, who sold it to Mr. Whipple. That individual
19 had testified that it was a shared driveway, it was his
20 understanding. He wasn't sure what the derogation of
21 title was to that driveway, is my recollection of his
22 testimony, because he never frankly did a title search,
23 is my assumption. He never said that.

24 But there was no question put to him about whether or
25 not he ever knew what the title was to the driveway. But

1 THE COURT: Why don't I do that. The CR 11
2 issue is off the table, that -- because it wasn't
3 appropriately pled or approved, by the way. And I
4 wouldn't find in any event that Mr. Broughton brought
5 this action in bad faith, or signed the pleadings in bad
6 faith.

7 Because I do believe, from a real estate attorney's
8 perspective, when I look through the pleadings, I do
9 believe there was at least a colorable claim of easement
10 by implication in this case. And sometimes people can
11 bring actions and later find out that there's a
12 commonality of title.

13 I'm not going to hold that against Mr. Broughton
14 because I wouldn't -- I'm not making a finding before
15 filing this action that Mr. Broughton, given what he knew
16 at the time of filing -- now there was some evidence that
17 came out after the time of trial, there was a colloquy
18 between you and the attorney, that talked about the
19 commonality of title. But as far as at the time of
20 filing, I won't make a finding that it was done in bad
21 faith.

22 MS. HALL: Although Whipple knew he had used the
23 property permissively?

24 THE COURT: Well, Mrs. Hall, there is a -- the
25 easement -- that is, in my mind, one of those issues that

FILED
COURT OF APPEALS

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STATE OF WASHINGTON

BY _____
CLERK

COURT OF APPEALS - DIVISION II
OF THE STATE OF WASHINGTON

Richard W. Whipple.,)	
)	No. 39975-0
<i>Respondent,</i>)	
)	DECLARATION OF
)	MAILING
)	
Frances E. Hall.,)	
)	
<i>Appellant,</i>)	
)	
)	
)	

Katrina Kallio, under penalty of perjury under the laws of the State of Washington, hereby declares as follows:

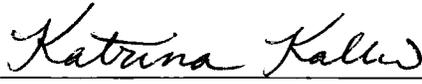
i) That I am over the age of eighteen (18) years, not a party to this action, and am competent to make this declaration;

ii) That on August 26, 2010 I caused the following document: **Brief of Respondent**, along with this Declaration of Mailing to be sent via first class mail to the following:

Clerk of the Court
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402

Frances E. Hall
332 17th Street N.W.
Puyallup, WA 98371

DATED this 26th day of August, 2010



Katrina Kallio