

No. 40219-0-II

Thurston County Superior Court No. 08-2-00476-4
Hon. Thomas McPhee

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JAMES BRETT CULPEPPER,

Plaintiff/Appellant,

vs.

FIRST AMERICAN TITLE INSURANCE COMPANY and
HOLLIS MITSUNAGA, an unmarried person,

Defendants/Respondents.

BRIEF OF RESPONDENT FIRST AMERICAN
TITLE INSURANCE COMPANY

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I. INTRODUCTION

The failure of plaintiff to prevail in his claim against First American Title Insurance Company was the result of a simple lack of evidence, as stated by Judge McPhee in his “Oral Opinion” at p. 17-18 (**RP**, 17-18)¹:

But where the claim is legal, the decision of a court must be based upon evidence that supports specific findings of fact, which, in turn, support conclusions of law. Here there is a complete absence of that evidence. (emphasis added).

Judge McPhee found that plaintiff simply did not meet his burden of coming forward with such evidence, and the record is “just simply devoid” of that evidence. **RP**, 340. The Court determined, after hearing all the evidence and even requesting additional briefing, that the lack of evidence and plaintiff’s lack of action in failing to involve First American Title in the negotiations which led to the accord and satisfaction with defendant Mitsunaga were fatal to plaintiff’s case. In other words, the burden here was on plaintiff and

¹ Judge McPhee issued two Oral Opinions; the Opinion of October 30, 2009 is pages numbered 1-21 rather than in sequence with the rest of the Verbatim Report of Proceedings.

he failed to meet it.

This entire matter is nothing more or less than a personal vendetta by plaintiff against his former paramour which, unfortunately, involved First American Title as well as Ms. Mitsunaga. As exhibits and testimony showed, plaintiff promised Ms. Mitsunaga back in December 2006 to “drag your ass thru (*sic*) extreme litigation” and make it “a long and painful process to you.” **RP**, 144-145; **Ex.** 101. He has done that, if nothing else.

II. RESPONSE TO ASSIGNMENTS OF ERROR

First American Title disputes assignments of Error which apply directly to it; namely (2), (3) and (5), as well as the other Assignments of Error relating to Ms. Mitsunaga, which presumably will be addressed by her brief.

III. COUNTERSTATEMENT OF CASE

Although plaintiff’s brief generally states the case in an accurate manner, there are some pertinent points which

should be brought forth:

First, it should be made clear that there is only Mr. Culpepper's testimony that he never saw the quit claim deed transferring title to he and Ms. Mitsunaga. It was standard practice to mail that document to the address of the premises, and there is no indication here that was not done. **RP**, 48-49. There was testimony that the mail at the house at issue came to a mailbox and was placed on a table for Mr. Culpepper to review, and that plaintiff was the one who retrieved the mail and went through it. **RP**, 161.

Secondly, the title insurance policy was issued in the names of plaintiff and Ms. Mitsunaga. It was not just the quit claim deed that included both parties as purchasers. **RP**, 51; **Ex.** 20.

Thirdly, plaintiff's statement is misleading regarding Ms. Mitsunaga's financial status and the amount of eventual proceeds from the sale of the house. Ms. Mitsunaga, in fact, was far from destitute as plaintiff painted her in his testimony. At the time of these transactions, she was

employed as a teacher's aide, then a teacher, plus received \$7,500.00 per month in maintenance/child support from her former husband. **RP**, 237.

Regarding proceeds from the sale, Ms. Mitsunaga did, in fact, receive the \$55,000.00, however, plaintiff received \$260,894.00. **RP**, 116; **Ex.** 129. The house was purchased by the couple for \$590,000.00 and was sold for \$849,000.00 **Ex.** 129.

Plaintiff's statement also mischaracterizes the negotiations which took place between he and Ms. Mitsunaga. In fact, plaintiff offered Ms. Mitsunaga \$10,000.00 to \$12,000.00 and a promise to include her children in his Will to sign off on the sale. **RP**, 101. Ms. Mitsunaga initially sought \$70,000.00 and they settled at \$55,000.00. **RP**, 147. It was a simple negotiation that ended with an agreed upon compromise that was enacted and accepted by both people involved.²

² The varied and sometimes confusing history of this relationship will, presumably, be addressed much more completely in Ms. Mitsunaga's brief. What is of importance to First American Title's position is the settlement between Mr. Culpepper and Ms. Mitsunaga as resolving their dispute over division of the proceeds of sale.

IV. ARGUMENT

a) There Was No Evidence Presented at Trial to Support Plaintiff's Claim Against First American Title

As Judge McPhee correctly noted in his Opinion, although First American Title's alleged error may have helped Ms. Mitsunaga somewhat in her negotiations with Mr. Culpepper, it is impossible to discern from this record what, if any, value could be ascribed to it. **RP**, 17. There simply was no evidence that if, in fact, an error was made what effect, if any, it had upon the negotiations between Mr. Culpepper and Ms. Mitsunaga. As indicated above, each had a starting point (\$10,000.00 - \$12,000.00 for him and \$70,000.00 for her), and they reached agreement at \$55,000.00. The agreement was dependent upon the house selling for a particular minimum amount (which it did) and apparently would have been renegotiated if it sold for less. **RP**, 104. This is not an "extortion" but a reasonable resolution of a monetary dispute which was openly negotiated and accepted. Mr. Culpepper may or may not

now feel that he made a bad deal, but the point is that he made the deal and followed through with it.

Mr. Culpepper is the plaintiff here. He had the burden of proof and he simply failed to meet it. His citation to **Clark v. Luepke**, 60 Wn. App. 848, 809 P.2d 752 (1991) does not help him at all. That was an action brought pursuant to the “Automotive Repair Act,” RCW 46.71. That statute serves to shift the burden of proving that a repair shop is entitled to retain fees by proving its conduct was reasonable, necessary and justified. **Clark v. Luepke**, 60 Wn. App. 848, 854, 809 P.2d 752 (1991); RCW 46.71.047, RCW 46.71.070. There is no such shifting of the burden of proof here. As the trial court correctly noted, the “responsibility to come forward at trial with evidence that would support specific findings” was on plaintiff and he failed to meet that burden. **RP**, 340.

This is nothing new, and this sort of conclusion is entirely within the province of the trier of fact. It is not the function of an appellate court to substitute its evaluation of the evidence for that of the trial court. **Ridgeview**

Properties v. Starbuck, 96 Wn.2d 716, 720, 638 P.2d 1231 (1982). As Judge McPhee said, his job was to weigh the testimony and make the determination as to whether the factual presentation would support conclusions of law favorable to the plaintiff. That was done here, with great care, and it is not for an appellate court to re-examine and/or re-weigh that evidence. **Wright v. City of Kennewick**, 62 Wn.2d 163, 165, 381 P.2d 620 (1963).

In order to reverse this decision, there would have to be a finding by this Court that Judge McPhee abused his discretion as the trier of fact. An abuse of discretion means that the decision made is “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” **Miller v. Campbell**, 164 Wn.2d 529, 536, 192 P.3d 352, quoting **State ex rel. Carroll v. Junker**, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). There has been no such showing here. This was a simple matter of a trial court weighing the evidence presented and properly exercising its discretion. Plaintiff has failed to direct this Court to an abuse of

discretion which would even approach this well-established standard.

The burden here was squarely upon Mr. Culpepper, and he failed to meet it. The trial court concluded there was a “lack of evidence . . . “ and a “lack of action . . .” both of which were fatal to plaintiff’s case. **RP**, 19. The “lack of action” on Mr. Culpepper’s part is important here. He negotiated only with Ms. Mitsunaga and made no attempt whatever to involve First American Title in those negotiations. The trial court found that he “was the person controlling the negotiations that resulted in the accord and satisfaction.” **RP**, 19. He chose not to even notify First American Title of what he perceived to be an error in the documents, thereby depriving First American Title of the opportunity to participate in the discussions, perhaps even to the point of taking part in a resolution, even though First American Title “did not insure” the issue of Ms. Mitsunaga’s “sweat equity,” nor did it have any liability as to the dispute between the two over that issue. **RP**, 16.

b) The Accord and Satisfaction Between Mr. Culpepper and Ms. Mitsunaga Applies to First American Title

The trial court had no difficulty finding accord and satisfaction between Mr. Culpepper and Ms. Mitsunaga as to their dispute over her monetary interest in this property. All the elements clearly existed and there were even a series of writings (e-mails) confirming the agreement.³

The issue for First American Title, of course, is whether that resolution of a dispute applied to any potential liability on its part. Although Judge McPhee did not base his decision on this issue, it should be, at least, addressed here.

It is a “general rule” that once a finding of accord and satisfaction is made, the dispute is resolved and any further arguments regarding the underlying transaction are rendered moot. ***Oregon Mutual Insurance Co. v. Barton***, 109 Wn. App. 405, 413, 36 P.3d 1065 (2001).

In ***Keane v. Fidelity Savings and Loan Assn.***, 173

³ The elements of accord and satisfaction and their application here will be discussed in much more detail in Ms. Mitsunaga’s brief and need not be repeated here.

Wn. 199, 22 P.2d 59 (1933), the Court stated at 208-209 that when a third party is either jointly liable or was a guarantor of a debt that is settled, that third party is released by settlement between the two principals. It restated the “general rule that the discharge of one joint debtor discharges his co-joint debtors” is applicable in accord and satisfaction issues. *see Oregon Mutual Ins. Co. v. Barton*, 109 Wn. App. 405, 413, 36 P.3d 1065 (2001).

This Complaint (CP, 1) sought “joint and several liability.” Simply put, if a judgment were entered against both defendants, collection efforts could, and presumably would, have been made against each defendant. If the judgment were satisfied by payment by one of them, it would have satisfied the debt as to the other.

There is no difference when the obligation is found to have been satisfied by reason of accord and satisfaction. Plaintiff chose his remedy and he is stuck with it. Once the Court found accord and satisfaction, the matter was done.

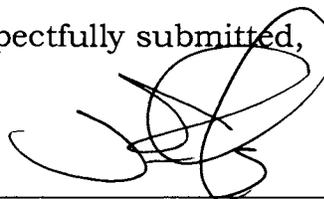
He does not get two bites at this particular apple under the state of these pleadings.

V. CONCLUSION

The trial court correctly ruled that plaintiff did not present evidence to prove his case against First American Title. This Court should not substitute its judgment for that of the trier of fact.

Judge McPhee's ruling as it relates to First American Title should be upheld.

Respectfully submitted,



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CERTIFICATE OF MAILING

I hereby certify that on this day a true copy of the foregoing BRIEF OF RESPONDENT FIRST AMERICAN TITLE INSURANCE COMPANY was deposited in the U.S. Mail first class mail, postage prepaid, addressed to:

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BY

I swear under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

DATED this 19th day of July 2010 at Silverdale, Kitsap County, Washington.


Cheryl L. Sinclair