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COURT OF APPEALS
DIVISION II
10/07/08 PM 2:59
STATE OF WASHINGTON
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No. 40667-5-II
COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON

DENNIS LANE AND ELIZABETH LANE,
husband and wife,

Respondents,

v.

LAWRENCE L'HOMMEDIEU AND
SHELANE L'HOMMEDIEU,
husband and wife,

Appellant.

RESPONDENTS' OPENING BRIEF

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I. Introduction

Appellants Lawrence and Shelane L'Hommedieu ("L'Hommedieu") appealed the trial court's decision to deny L'Hommedieu's motion to file an amended counterclaim, made three years after the conclusion of the trial, and after the mandate from the Court of Appeals was filed. L'Hommedieu's appeal is frivolous.

The amendment of pleadings is left to the sound discretion of the trial court, whose determination will be overturned on review only for an abuse of that discretion. *Trohimovich v. Labor and Industries*, 73 Wn. App. 314, 319-20, 869 P.2d 95 (1994). An abuse of discretion is discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *Id.* L'Hommedieu has not, and cannot, show that the trial court abused its discretion in denying the motion to amend the answer to assert a counterclaim following conclusion of the trial and the appeal.

L'Hommedieu's appeal raises three issues: (1) the trial court erred by holding that the CR 13(e) motion filed by L'Hommedieu was untimely; (2) the trial court erred by treating the CR 13(e) motion as a CR 13(f) motion; and (3) the trial court erred by failing to consider the actions of

the Lanes during all stages of litigation, including the appeal. There is no merit to any of these claims.

II. Background Facts¹

The underlying case involved a dispute regarding the enforceability of a deed restriction. Respondents Dennis Lane and Elizabeth Lane ("Lane") brought a complaint for injunctive relief to enforce a deed restriction. (CP 365). L'Hommedieu sought damages for wrongful injunction. *Id.*

A bench trial was held from February 26, 2007 to February 28, 2007. (CP 364). The findings of fact and conclusions of law and the final judgment were filed on May 31, 2007. (CP 364; 372).

Lane appealed and the mandate from the Court of Appeals was filed on January 13, 2010. (CP 375).

On January 21, 2010, L'Hommedieu filed a motion for leave to file an amended answer asserting a counterclaim for the wrongful filing of a *lis pendens*. (CP 384-388). The *lis pendens* was filed on June 14, 2006, eight months before the trial and three and a half years prior to the motion to amend being filed. (CP 216).

¹ L'Hommedieu's opening brief contains numerous false statements and mischaracterizations of the facts. Because the allegations are irrelevant to the determination of this appeal, in the interest of judicial efficiency and economy, Lane has elected to not respond to all of the allegations in L'Hommedieu's brief.

III. Argument

A. The Trial Court Properly Concluded that L'Hommedieu's Motion to Amend to Assert a Counterclaim was Untimely.

L'Hommedieu sought to amend the answer to assert a counterclaim for the wrongful filing of a lis pendens. The lis pendens was filed on June 14, 2006, more than eight months before trial. L'Hommedieu did not raise the issue of a wrongful filing of a lis pendens at any time before trial, during trial, or in the appeal that followed.

The only rule that provides for amending a pleading after the completion of trial is the rule that relates to amendments to conform to the evidence. *See* CR 15(b). Even in the case of amendments to conform to the evidence, which is not the case here, although the rule expressly gives the trial court the discretion to amend the pleadings at any stage of the action, even after judgment, there are limits to that discretion.

Amendments are not allowed, "if actual notice of the unpleaded issue is not given, if there is no adequate opportunity to cure surprise that might result from the change in the pleadings, or if the issues have not in fact been litigated with the consent of the parties." *Green v. Hooper*, 149 Wn. App. 627, 636, 205 P.3d 134 (2009).

In this case, L'Hommedieu does not seek to amend the pleadings to conform to the evidence, however, even if he did, none of the necessary elements are met. The issue was never raised, much less litigated, before or during trial. There is simply no basis for seeking to amend the answer to add the counterclaim following conclusion of the trial and the appeal.

B. The Amendment was Not Proper Under Either CR 13(e) or CR 13(f).

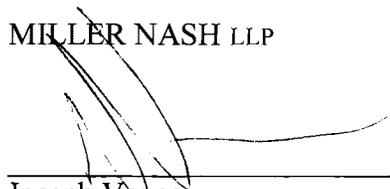
To the extent that the trial court erred at the hearing in referring to CR 13(f) rather than CR 13(e), such error was harmless. Both 13(e) and 13(f) leave it to the discretion of the court whether to grant the amendment or supplemental pleading. If anything, the standard for a supplemental pleading under 13(e) is higher than an amendment under 13(f). *See Herron v. Tribune Publishing Co.*, 108 Wn.2d 162, 168-69, 736 P.2d 249 (1987) (noting that CR 15(d) related to changes in pleadings designed to add facts occurring after the filing of the original complaint contains no injunction to the trial court that leave to supplement be "freely given," as is contained in CR 15(a) related to amended pleadings). Accordingly, whether under 13(e) or 13(f), the court properly denied L'Hommedieu's motion to amend.

C. **Nothing in Lane's Conduct During the Trial and Appeal Supports Granting the Motion to Amend.**

Finally, L'Hommedieu's claim that the trial court erred by failing to consider the actions of Lane during all stages of litigation, including the appeal, is completely without merit. L'Hommedieu's description and characterization of Lane's conduct during the trial and appeal is false. However, even if true, it would not support a conclusion that the court abused its discretion in denying the motion to amend. None of the alleged conduct, even if true, would justify amending an answer to assert a counterclaim that was not raised at any time before trial, during trial, or in the appeal that followed.

DATED this 29 day of December, 2010.

MILLER NASH LLP



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SWING - [Signature]
DEPUTY

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Respondents **Opening**
Brief on:

Lawrence L'Hommedieu
22 Cherrywood Lane
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by the following indicated method:

- by **mailing** full, true, and correct copies thereof in sealed, first-class postage-prepaid envelopes, addressed to the persons as shown above, the last-known addresses of the persons, and deposited with the United States Postal Service at Vancouver, Washington, on the date set forth below.

DATED this 27 day of December, 2010.

[Signature]

Joseph Vance