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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY _____
DEPUTY

COURT OF APPEALS

DIVISION II

NO: 43504-7-II

JOY E. FIX
Appellant

v.

MICHAEL FIX, et al

APPELLANT'S BRIEF

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pm 10/31/12

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ASSIGNMENTS OF ERROR

1. The trial court finding that the petitioner did not have standing to bring this matter in that she had no legal/record interest in the property in question when that is not a requirement.

2. The court awarded the respondent attorney fees based on **RCW 4.84.185** after specifically finding the case was not brought in bad faith nor was it frivolous.

ISSUES

1. Is there another requirement, in addition to the primary requirement for a constructive trust that the defendant is unjustly enriched at the expense of the petitioner?

2. Does the court have the authority to award attorney fees when there is no contract or statute authorizing attorney fees under its assumed power in equity after finding the case was not frivolous nor brought in bad faith?

STATEMENT OF THE CASE

This case was brought as an action in equity to declare a constructive trust and quiet title to the property in question based on the following facts:

1. The petitioner and her deceased husband sold the property in question to their son, Clifford and his wife by note and deed of trust in 1986.

(cp 15-19)

2. In June of 1987, Clifford was transferred out of state by his employer and he and his wife abandoned the property by executing what is labeled as a relinquishment of all rights to the property and delivered it to the petitioner and her husband. The relinquishment does not have a legal description nor is it notarized. They further, claimed no interest in the property.(Cp 38) Clifford's ex-wife's whereabouts was unknown for approximately 18 years and Clifford was in Wales, UK.
3. Shortly thereafter, the respondent rented the property from the petitioner and her husband by paying the property taxes and doing work on the petitioner's home (cp23) and did so under those conditions until the petitioner's husband died in September, 2008. (cp24)
4. In early 2008, the respondent wanted to buy the property from his parents. However, they discovered that petitioner and her husband did not have record title although the property taxes were in their names. Therefore, the petitioner and her husband retained attorney Craig Powers to assist with the sale and clearing of title.(Cp 56-59, 62,63, 68) There had been difficulty in locating Clifford's ex-wife

who was found remarried in New Jersey.

5. Due to age and physical condition, the petitioner does not drive and is dependent on her children, including respondent for transportation.
6. Respondent took it upon himself to get clear title from Clifford and his ex-wife, the petitioner believing that he was clearing the title so she could sell it to him.(cp71)
7. Respondent told Mr. Power's that because of his father's death, the petitioner had decided to give the property to him and for Mr. Powers to draft the necessary deeds, which he did.(Cp 62,63) The petitioner and her husband had been accompanied to Mr. Power's office by the respondent previously.(Cp 86)
8. Respondent obtained the executed deeds from Clifford and Clifford's ex-wife naming him as the grantee and filed them July 13, 2009.(cp 32, 33)
9. Despite petitioner's inquiries, respondent did not disclose that he had the deeds made out to him and had filed them until the fall of 2010 at which time petitioner contacted counsel and filed this action.(cp 36,72)
10. The only disputed fact is whether respondent had always attempted

to buy the property, his position, or it was not until 2008, petitioner's position.

11. The respondent's position was and is:
 - a. That he has the deeds to the property and the petitioner does not.
 - b. That the petitioner and her husband acquired no interest in the property in question by the 1987 relinquishment even though he and his parents had considered the property as belonging to the petitioner and her husband.
 - c. That it does not matter how he obtained the deeds, the property is his.
 - d. That the petitioner did not properly plead the case in her complaint. It was an action to declare a constructive trust and quiet title based on the respondent's trickery/deceit.
13. The court agreed with the respondent's position and dismissed the petitioner's case.
14. The property had/has a value of between \$75,000, respondent, and \$135,000, petitioner.
15. In addition, the court awarded the respondent attorney fees based on

to **RCW 4.84.185** after specifically finding the appellant did not bring this action in bad faith (cp 235) nor was it frivolous (cp234).

ARGUMENT

It is the petitioner's position that this is not a case in law but in equity.

Petitioner requested the court find a constructive trust on the property in question.

“A constructive trust arises where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it. . . . Further, Unless an equitable base is established by evidence of intent, there must be “some element of wrong doing” in order to impose a constructive trust. . . . Wrong doing, however is not confined to a particular category, such as fraud, misrepresentation or bad faith . . . “ Baker v. Leonard, 843 P.2d 1050 (1993)

The court in Kausky v Kosten, 179 P.2d 950 (1947) stated “. . . actual fraud, misrepresentations, concealments . . . taking the advantage of one's weakness . . . which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest . . . although he may never perhaps have had any legal estate therein; the court of equity has jurisdiction to reach the property either in the hands of the original wrong- doer or any subsequent

holder . . .”

And in **Brooks v. Robinson, 104 P.3d 674 (2004)** the court stated “**A constructive trust arises in equity “where a person holding title to property is subject to and equitable duty to convey it to another on the ground that he would be unjustly enriched when he or she profits or enriches himself or herself at the expense of another contrary to equity. The question is whether the enrichment is unjust, not whether the holder of the property acted with bad motive or malicious intent. Constructive trust “ arise independently of the intention of the parties, and may arise even though acquisition of the property is not wrongful.”**

The court decided the case on the basis of law, the executed and filed deeds and that the petitioner had no legal interest in the property in that the relinquishment did not transfer any interest in the property.

Equity applies when there is no monetary relief available and justice requires the title to real property be put in the name of the petitioners.

It is the petitioner’s position that Clifford and Laurie Fix abandoned the property and declared their intent by executing and delivering the June 1987 **RELINQUISHMENT** and then never making any claim to any form of ownership in the property. Laurie Fix remarried and moved to New Jersey. As is usual after a

divorce, she had no further contact with her ex-in-laws.

Abandonment of an interest in property must be proved by clear, unequivocal, and decisive evidence. **Tushcoff v. Westover, 395 P.2d 60, (1964)** The primary element to be established is an actual intent to relinquish or part with the right or rights claimed to be abandoned. **Manello v. Bornstine, 270 P.2d 1059 (1954)** as cited in **Shew v. Coon Bay Loafers, Inc. 455 P.2d 369 (1969).**

It is clear that Clifford and Laurie Fix abandoned the property in question in not paying taxes nor making any claim of any kind of ownership interest. It would have been noted in their divorce decree but there is no claim that it was.

The parties treated the property as the property of the petitioner and her husband as theirs for more than 20 years. There is no third party. There was no value paid to anyone by the respondent. The respondent obtained the deeds by deceit (trickery).

Petitioner used the word trickery in her original complaint and the respondent objected to the term trickery and the court agreed with the respondent. The petitioner was allowed to amend her pleadings. But since counsel could not come up with a better term, the court granted summary judgment for the respondent on the basis of no standing of the petitioner.

TRICKERY is defined in **The Oxford American Desk Dictionary and**

Thesaurus as “deception, use of tricks.” **TRICK** is defined in the same book as “action or scheme to fool, out wit or deceive.”

Blacks Law Dictionary defines DECEIT as “a fraudulent and cheating misrepresentation, artifice, or device, used by one or more persons to deceive and trick another, who is ignorant of the true facts, and prejudice and damage to the party imposed upon.”

“A fraudulent misrepresentation or contrivance by which one man deceives another, who has no means of detecting the fraud, to the injury of the and damage to the latter.”

In **Brown v. Underwriters at Lloyds, 332 P.2d 228 (1958)** the court cited Sir John Salmond, the noted English authority on the law of torts, who stated **“The wrong of deceit consists in the act of making a willfully false statement with the intent that the plaintiff shall not act in reliance on it, and with the result that he does so act and suffers harm in consequence (a) Salmond, Law of Torts, 9th Ed., 607, chapter 18 * 150(1).**

That is clearly the case here. The respondent lied to his mother, brother, and his mother’s attorney to obtain the title to the property without paying the petitioner.

The respondent’s position is that the June 1987 relinquishment failed to transfer any interest to the petitioner. The court held that as a result, the petitioner had

no interest and therefore no standing to bring this action.

The petitioner's position is that all parties treated the property as her and her husband's based on Clifford and Laurie Fix's abandonment of the property as evidenced by the June 1987 relinquishment and their failure to make any claim of any interest in the property.

When she, her husband and the respondent discovered that record title was still in Clifford Fix and his ex-wife's name, they attempted to clear the title to sell it to the respondent.

The 1987 Relinquishment: It is a statement against interest which is admissible under **ER 804(b)(3)**. As to the Best Evidence Rule, the original is in my file for the court's inspection. It will be filed at trial. It is also admissible under ER 802(a)(16) which is the Ancient Documents (more than 20 years and has been authenticated), the relinquishment having been signed and delivered 24 years ago.

Louis Fix's Diary Entries: They are admissible under **ER 802(a)(13)** under family records. Again, the originals are in my file to be filed at time of trial.

They have color of title by the 1990 deed to their Living Trust. Therefore, they had title by adverse possession.

As to Mr. Powers' declaration, his 2nd declaration (cp 128) makes it clear he represented the plaintiff and her husband and his contacts with Michael Fix were as

their agent.

In addition, the respondent's defense of the Statute of Limitation should be bared on the basis of Equitable Estoppel. Equitable Estoppel requires that three elements be proved:

- 1: an admission, statement, or act inconsistent with a claim afterward asserted;
- 2: action by another in reasonable reliance on that act, statement, or admission;
- 3: injury to the party who relied if the court allows the first party to contradict or repudiate the prior act, statement or admission. *Peterson v. Groves, 44 P.3d 894 (2002)*

In addition, a close family tie supports the application of Equitable Estoppel. *Peterson v. Groves*, supra.

SECOND APPEAL - ATTORNEY FEE AWARD

Subsequent to the entering the order of dismissal, the court awarded the respondent attorney fee in the amount of \$10,000 plus costs of \$700 for not amending her complaint to its satisfaction.

Court's finding of fact #5 held that the case was not frivolous nor was it brought in bad faith (cp 234 & 235). The court held that not amending her complaint

to allege standing was grounds to award attorney fees and costs.

The court in Greenbank Beach and Boat Club, Inc. v Bunney, Division I No. 66308-9-I (5/29/2012) held that “ . . . **the inherent power to assess attorney fees exists only in “narrowly defined circumstances.”** Citing Roadway Exp., Inc v. Piper, 447 U.S. 752 (1980). In its decision the court stated “**But litigants are not ordinarily required to pay attorney fees for making losing arguments . . . the court did not find . . . losing arguments were frivolous.**” The court in this matter specifically found that the action was not frivolous nor brought in bad faith (cp234 & 235). However, citing the courts (presumed) equitable power under **RCW 4.84.185**, the court awarded attorney fees. Which the petitioner believes is nothing more than loser pays without a finding of frivolous or bad faith. In Kelly v. Moessiang, Division III #29210-0, (9/18/2012). the court citing Fisher Props., Inc. v. Arden-Mayfair, Inc. 726 P.2d 8 “**Attorney fees may be awarded only when authorized by private agreement, a Statute, or a recognized ground of equity.**” The trial court did not cite a recognized ground in equity in awarding the respondent attorney fees. In the court’s Conclusions of Law it referred to **RCW 4.84.185** which is for frivolous actions requiring a finding of no possible theory resulting in no debatable issues. Kearny v. Kearny, 974 P.2d 872.

CONCLUSION

Equity demands that the trial court's decision holding that the petitioner had no standing and therefore no claim to the property and should be reversed.

The requirement for a constructive trust is that the respondent is unjustly enriched at the expense of the petitioner. The petitioner is not required to have record title to the property in question. **Brooks v. Robinson, supra.**

The parties treated the property as belonging to the petitioner for more than 20 years. The respondent son lived on the property and paid rent in the way of property taxes for his parents for approximately 20 years.

Respondent did not pay anyone for the property. He was going to buy the property from the petitioner until his father died. He lied to his mother as to what he was doing. He lied to attorney Craig Powers, his parents' attorney as to their wishes. He lied to his brother Clifford Fix and presumably his ex-sister-in-law, Laurie Fix (Shaffer).

The respondent cannot justify his actions. He stole his own mother's property. If this is not a case in equity that requires justice, there are none.

Respondents' position is, I have the deeds and it does not matter how I obtained them.

Therefore, the court should reverse the trial court and quiet title in the

property to the petitioner and reverse the award of attorney fees as not being authorized without a finding of bad faith or that the suit was frivolous.

RESPECTFULLY SUBMITTED THE 31st DAY OF OCTOBER, 2012.



John A. Rorem WSBA#4069
Attorney for the petitioner

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v.

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DECLARATION OF MAILING

I, JOHN A. ROREM, do hereby state under the laws of perjury of the State of Washington as follows:

That on the 9TH day of October, 2012, I, JOHN A. ROREM, did deposit in the United States mails, with proper postage affixed thereto and addressed to:

THOMAS L. DICKSON

1201 PACIFIC AVE, STE 1401

TACOMA, WA 98402-4322

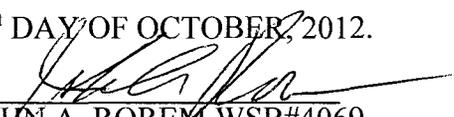
a copy of the appellant's miss-numbered brief.

On the 31st day of October, 2012, I mailed him a copy of the corrected brief.

DECLARATION OF MAILING

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SIGNED AT GIG HARBOR, WASHINGTON ON 31ST DAY OF OCTOBER, 2012.



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DECLARATION OF MAILING