

**FILED**

**JAN 18 2013**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 311490-III

Stevens County Cause No. 12-2-00067-4

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

RUSSELL H. BENSCH and CELLIE D. BENSCH,  
husband and wife,

Respondents

v.

DON C. DIXON and PATRICIA E. BRITZA,

Appellant

---

RESPONDENT'S BRIEF

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## **ASSIGNMENTS OF ERROR**

I. THE TRIAL COURT DID NOT ERR BY AWARDING SUMMARY JUDGMENT TO THE BENSCHES.

II. THE BENSCHES HAVE NOT ABANDONED THEIR PROPERTY.

## **ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

I. Is there any evidence that the Benschers are not the owners of the personal property?

II. Is there evidence that the Benschers abandoned their property?

## **STATEMENT OF THE CASE**

Russell and Cellie Bensch (hereinafter “Benschers” or “Plaintiffs”) sued Patricia Britza and Don Dixon (hereinafter “Britza-Dixon” or “Defendants”) to acquire possession of personal property (hereinafter “the personal property”) (CP 1-6). The personal property was located upon real property previously owned by

Bensch (CP16-21). The Bensches lost the property in a nonjudicial foreclosure. Dixon purchased the real property upon which the personal property was situated from the foreclosing lending institution and thereafter refused to give possession of the personal property to Bensch (CP19-21).

Exhibit B of the Russell Bensch declaration contains a detailed list containing 41 items or categories of personal property that were situated upon the real property, together with a specific explanation of how Russell Bensch acquired his ownership interest in the personal property (CP27-31).

The personal property in question consisted of semi-tractor trucks, log truck trailers, and large industrial equipment including a track excavator/loader, an industrial four wheel drive forklift, and farm tractor. There were several pickup trucks, cars, vehicles and vehicle parts. In addition, there was a substantial amount of heavy industrial building material including steel trusses, twenty tons of heavy galvanized metal sheeting, "I" beams, riggings, and other miscellaneous industrial equipment and property. The personal

property had been placed in the open upon the real property when the Bensches were the owners of the real property (CP 18).

The Bensches generally owned two adjoining 20 acre parcels; an east 20 acres and a west 20 acres each having separate tax identification numbers (CP17) . The Bensches' personal residence was located upon the east 20 acres (CP17). When the Bensches refinanced their property with Countrywide, they were advised by their lender that the lender was only interested in appraising the house and east 20 acres, and was not concerned about the adjoining unimproved west 20 acres (CP17). The Bensches suffered financial problems and defaulted in their obligation to Countrywide (CP18). A nonjudicial deed of trust foreclosure was commenced (CP18). The recorded Notice of Trustee's Sale scheduled the sale for August 27, 2010 describing the property to be sold at sale as *only* the east 20 acres which contained the principal residence (CP18). The recorded Notice of Trustee's Sale did not describe the west 20 acres upon which the personal property was sitting (CP18).

Unable to perform on the loan, and believing that the bank was foreclosing only the house and east 20 acres, the Bensches

allowed the trustee's sale to proceed, thinking that they would continue to own the west 20 acres (CP18). The Benschers moved their household contents from their residence and moved some of their personal property items to another location (CP126). However, they left a substantial amount of personal property as previously describe (CP 27-31) on the west 20 acres, which the Benschers believed they would continue to own (CP126).

After the trustee's sale on August 21, 2010, the Benschers continued to monitor the situation (CP19) to make sure that only the east 20 acres with the residence had been foreclosed. The foreclosing financial institution listed the property for sale with a realtor and only the house and east 20 acres were listed for sale in the multiple listing service(MLS) (CP19,33). The Benschers remained in title as the vested owners of the west 20 acres. The non judicial foreclosure became final on November 2, 2011 when the Trustee's Deed was recorded, however the Trustee's deed included the legal description of both the east 20 acres and the west 20 acres. (CP40, 117).

In early December, 2011 the Benschers learned that the lender had then recently sold the residence to Britza-Dixon by a deed of

conveyance recorded November 30, 2011(CP19). The Benschers investigated and learned that a Trustee's Deed divesting them of ownership of the west 20 acres was recorded on November 2, 2011 (CP117).

After they learned that the property had been sold to Britza-Dixon, on December 4, 2011 the Benschers sent a letter to the purchasers. On December 7, 2011, the Benschers had their lawyer send a letter objecting to the sale of the west 20 acres (CP19-20). In the same letter the Benschers also made an immediate claim to the ownership and possession of the personal property that the Benschers had placed upon the west 20 acres. (CP19-20). They requested access and accommodations be given them to move the equipment and personal property off the real property (CP20).

Raymond Davis, counsel for Old Republic National Title Insurance Company, responded to the Benschers' claim of ownership of the west 20 acres through letters dated December 9 and December 12, 2011 (CP56-58). Raymond Davis indicated that even if the Benschers' argument had merit (as to the faulty legal description in the Notice of Trustees Sale) and if the Benschers were successful in

quieting title to the west 20 acres, that Bensch's rights would still be foreclosed under a second deed of trust that the lender had not foreclosed (CP60). Because of the existence of the second non-foreclosed deed of trust, the Bensch's did not pursue a possible quiet title action to clear title to the west 20 acres.

Prior to purchasing the property, defendant Patricia Britza talked to Cellie Bensch and testified "In a broad general sense she claimed to still be the owner of the property with no reference to any personal property" (CP65).

Less than one month after acquired ownership of the real estate, Britza testified to obtaining a handwritten note from Cellie Bensch making claim to the personal property and asking for time to remove it. Britza testifies that the Bensch's claims to the property persisted thereafter (CP 68) but without proof of Bills of Sale or other proof of ownership (CP75).

Bensch's continued to seek possession of the personal property (CP20) and were forced to file this litigation (CP1-6). Russell Bensch testifies that he has never abandoned the personal

property and has always persisted in his claims of ownership thereof.  
(CP20-21)

## **ARGUMENT**

### I. THE TRIAL COURT DID NOT ERR BY AWARDING SUMMARY JUDGMENT TO THE BENSCHES.

At the summary judgment hearing the defendants argued that the plaintiffs were not the owners of the personal property (CP 92). However, the unequivocal evidence in the court record establishes the ownership of the Benschkes to the personal property. The declaration testified to under penalty of perjury by Russell Bensch (CP 16-47) is direct and competent evidence of ownership of the personal property. Notably, the defendants produced no evidence at the summary judgment hearing that they were the owners of the personal property or that anyone else owned the property. The only evidence before the court was that the personal property was situated upon the real property when the defendants purchased the real property. It was completely appropriate on the basis of this evidence

for the trial court to award the possession of the personal property to the unquestioned owners of the personal property, the Bensches.

The chief incidents of owning personal property are the rights to its possession, use, and enjoyment, and to sell or otherwise dispose of it according to the will of the owners. *In re Eckert's Estate*, 14 Wash.2d 497, (1942). Absent a sale or other disposition of personal property, the owner continues to own it and has a right to its continued possession, use and enjoyment.

Having legally acquired the personal property initially, the plaintiffs' ownership rights are superior to ownership claims of any other party, including the defendants, unless the defendants can establish some superior right to the property on some recognized legal theory.

In their appeal brief the defendants make no independent ownership claim and now do not question the Bensches historical ownership of the personal property. However, defendants claim that there is a question of fact as to (1) whether the Bensches had knowledge that the foreclosure pertained to all of the property financed and secured by the deeds of trust, or whether it merely

pertained to the twenty (20) acre section of land”, and (2) “...whether the Benschers intended to abandon the property they failed to remove for fourteen (14) months.”

The second issue framed relating to abandonment is the crux of this case, and is dealt with in the next section.

As to the first issue framed relating to Benschers’ subjective knowledge about the real estate foreclosure proceeding, any questions as to what the Benschers knew about the foreclosure process is only relevant, if at all, in the context of the defendant’s claim that there was an abandonment of the property. No material question of fact is created relating to the ownership of personal property simply because the defendants raise this issue.

As a matter of law, it was proper for the trial court to have awarded possession of the personal property to plaintiffs by summary judgment because the plaintiffs were the owners of that personal property.

## II. THE BENSCHES HAVE NOT ABANDONED THEIR PROPERTY.

Britza-Dixon claims that the personal property has been abandoned. However the record on review, even when viewed most favorably to the non moving party, supports the trial court's ruling that the Benschés have not abandoned their personal property as a matter of law.

Abandonment is the voluntary relinquishment by an owner or holder of a right to property with the intention of terminating his ownership. *Ferris v. Blumhardt*, 48 Wash.2d 395, 402 (1956). To successfully claim that a right to property was abandoned, the party claiming abandonment must prove the two elements of abandonment: 1) voluntariness and 2) intent. 1 *Am. Jur. 2d*. Abandoned, Lost, Etc., Property § 11. The party claiming abandonment must prove each element with "clear, unequivocal, and decisive evidence." *Shew v. Coon Bay Loafers, Inc.*, 76 Wash.2d 40, 50 (1969).

A claim of abandonment must be predicated upon an act voluntarily relinquishing property rights; abandonment must not be

under threat, coercion, pressure, or misapprehension of any kind. *Manello v. Bornstine*, 44 Wash.2d 769, 772 (1954). The doctrine of abandonment has no application unless there is a total desertion by an owner without being pressured by necessity, duty, or utility to himself. 1 *Am. Jur. 2d*. Abandoned, Lost, Etc., Property § 12.

In addition to proving the abandonment was voluntary, the party claiming abandonment must also prove that the owner intended to do so. Indeed, the owner's actual intent to relinquish or part with the right or rights claimed to be abandoned is the "primary element to be established." *Shew v. Coon Bay Loafers, Inc.*, 76 Wash.2d 40, 50 (1969). In order for one to lose rights in property by abandonment, it must be shown, among other things, that there was intent to relinquish or part with such rights. *Manello v. Bornstine*, 44 Wash.2d 769, 772 (1954).

The plaintiffs produced direct testimony that they never intended to abandon their personal property, and substantial circumstantial evidence is in the record supporting plaintiffs claim of ownership.

On the other hand, other than their argument dealing with the passage of time, the defense has produced no evidence of abandonment. Much of the evidence submitted by the defense at the summary judgment has no relevance to the issue of abandonment. Remarkably, defendant's appeals brief contains no references to any material evidence in the record to support the basic elements of abandonment. There is no direct evidence in the record of overt acts by the plaintiffs whereby they voluntarily and intentionally abandoned their rights to the personal property.

Patricia Britza produced evidence that she "presumed abandonment of all personal property". (CP 69) However, her presumptions are not relevant. The elements of abandonment turn on the voluntary and intentional acts of the owners of the property. What third parties believe or presume is not relevant as to whether an abandonment has occurred.

In the absence of any other evidence of abandonment, Britza-Dixon argue strenuously that the fourteen month passage of time from the date of the trustee's sale (August, 2010) until the sale to Britza-Dixon (November 2011) is evidence of abandonment. They

cite to four out of jurisdiction cases in their brief, all related to the passage of time in the context of abandonment, but make no attempt to apply the rulings in those cases to the facts of this case.

The passage of time alone tells nothing of the owners intent, and is not direct evidence of whether Bensch's voluntarily and intentionally acted to abandon their property. Passage of time can only be viewed in the context of all the evidence to determine whether any inferences can be drawn from the mere passage of time.

It is submitted that the following undisputed facts in the record, corroborated by evidence produced by Britza-Dixon, precludes drawing any inference of abandonment from the mere passage of time from the trustees sale in August, 2010 to the recording of the Trustee's Deed in November, 2011.

A. The Bensch's were in fact the vested owners of the real property upon which the personal property was situated from August, 2010 until November, 2011.

It is an undisputable fact that the Bensch's were the vested title owners of the real property upon which the personal property was situated until November 2, 2011, when they were unexpectedly

divested of their ownership when the Trustee's Deed was recorded. The nonjudicial foreclosure did not become final until that date. Less than one month thereafter, the bank sold the real property to Britza-Dixon. Leaving personal property sitting upon real property that one owns is not evidence of abandonment.

B. The Benschers always believed that they would continue to be the owners of the real property upon which the personal property was situated.

The declaration of Russell Bensch explains in detail the circumstances causing the Benschers to subjectively believe that the Benschers would end up owning the west 20 acres. The evidence that the recorded Notice of Trustee's sale did not describe "the west 20 acres" upon which the personal property sat, the MLS website listed only the east 20 acres with the house for sale, and the lack of recording of a Trustee's Deed divesting the Benschers of ownership of the real property upon which the personal property sat is compelling evidence to justify their expectation of continued ownership. The Benschers' contemporaneous subjective expectation that they would continue to own the west 20 acres is further

corroborated by the following evidence produced by defendant

Britza:

-Patricia Britza's declaration about a meeting with Cellie Bensch before Britza-Dixons purchase of the property on November 30, 2010 wherein Britza testified: "In a broad general sense she (Cellie Bensch) claimed to still be the owner of the property with no specific reference to any personal property" (CP 65)

-Britza produced the handwritten note from Cellie Bensch found by the contractor in December 2010 (CP67) wherein Bensch says: "We did not expect the upper ½ of the 40 to go with the sale and still not sure how that will work out..." and which continues to ask for time to move the personal property (CP 75).

-Britza produced the December 2011 responses from Raymond Davis, counsel for Old Republic National Title Insurance Company, to correspondence from Bensch's counsel (CP 58,60). Davis' responses corroborate that the Bensch's claimed continued ownership on articulated legal grounds to the real property upon which the personal property sat. Ultimately because of the fact that there was a second deed of trust upon the property that Davis

indicated would be foreclosed in the event the Bensches were successful in their quiet title action based upon the deficient recorded Notice of Trustee's sale, the Bensches did not pursue a quiet title action on the real property. Nonetheless, the Davis' letters corroborate the fact that Bensches expected to own the west 20 acres.

C. After learning that their continuous ownership of the real property had ended, the Bensches immediately and aggressively sought to retrieve their personal property.

Upon learning of the November 30, 2011 sale to Britza-Dixon, within a week the Bensches made attempts to obtain their personal property.

-They caused a letter to be sent by their lawyer on December 7, 2011 making legal claim to the real property, but also expressly stating their claim to the personal property. (CP 20). This letter and the response to it were confirmed by evidence provided by Britza by the response letters from Raymond Davis (CP 58, 60).

-Bensches attempted to contact the new purchasers, to make arrangements to pick up the personal property by letter dated December 4, 2011 (CP47).

-Britza produced as evidence the note from “Cellie” making claim to the personal property that was discovered in December, 2011 (CP 75).

-Benschel promptly filed this litigation when the defendants refused to allow them to retrieve their property.

The evidence in the record, most of which is corroborated by evidence produced by Britza, when viewed in the light most favorable to the defendants, unequivocally establishes as a matter of law that there was no intent on the part of the owners to abandon the personal property.

Britza-Dixon has submitted several cases from outside the jurisdiction dealing with the passage of time in the context of abandonment. *Deyo v. Hagen*, 41 A.D.2d 790, 341 N.Y.S.2d 328 (1973), *Greer v. Arroz*, 330 S.W.3d 763 (Ky.Ct.App.2011), *Gurgel v. Nichol*, 19 Utah 2d 200, (1967) and *Schmidt v. Stearman*, 98 Ark.App. 167, 253 S.W.3d 35 (2007). However on careful review of the legal principles upon which these cases stand, all affirm the action of the trial court in this case in granting summary judgment.

Each of the four cases affirms the basic principle that abandonment does not occur unless an owner voluntarily and with intent abandons his property. This is in accord with the previously cited Washington cases.

All four of the foreign cases also stand for the proposition that the passage of time alone is insufficient to establish abandonment. Each of the cases holds that there must be some additional evidence to support a claim of abandonment. In *Deyo* the court indicates that there must be additional evidence of an “overt act” of the owner. In *Schmidt* the court talked of the requirement of a “manifest act”. In *Gurgel* the court stated “Mere non use of property, lapse of time without claiming or using property, or the temporary absence of the owner, unaccompanied by any other evidence showing intention, have generally been held not enough to constitute an abandonment.” *Gurgel* at 202. *Gurgel* and *Deyo* hold that additional evidence or “other circumstances” must be considered in addition to the passage of time to show intent to abandon.

*Schmidt* and *Deyo* deal with fact patterns different than the current case. However, *Gurgel* and *Greer* both deal with questions

of abandonment of personal property left on real property after a judicial mortgage foreclosure. However, both cases are distinguishable from the present case on their facts.

*Greer* dealt with a judicial mortgage foreclosure. After a judgment was taken, a master commissioner sale of the property was scheduled but stayed by a bankruptcy proceeding for almost a year. Thereafter, the sale was rescheduled by court order. The sale took place and a report of sale was thereafter filed with the court and served on the debtors. The court then entered an order confirming the sale. Almost two years after the order confirming the sale, the debtor sued for possession of his personal property. The court held that under Kentucky law in the context of this mortgage foreclosure, “failure to seek relief in the foreclosure action is conclusive evidence of abandonment”. *Greer* at 765. These facts are materially distinguishable from the non-judicial foreclosure of the present case where the process was not final until less than one month before the sale to Britza-Dixon.

*Gurgel* also dealt with a judicial mortgage foreclosure where the home was sold at sheriff’s sale after a judicial proceeding.

Thereafter the debtor remained on the property during a redemption period and eventually vacated. When the purchaser at the sheriff's sale sold the property to a third party, within a month the debtor went onto the property to retrieve personal property, prompting a suit by the third party purchaser. The trial court granted summary judgment in favor of the third party purchaser. However the appeals court reversed stating that lapse of time alone is not enough to show abandonment. The court indicated that additional evidence of abandonment is required.

*Greer* and *Gurgel* involved judicial foreclosure proceedings that were finalized over two years earlier in *Greer*, and 15 months earlier in *Gurgel*. These facts are substantially different than the case at bar where the nonjudicial foreclosure process only became final when the Trustee's Deed was recorded in November, 2011, less than one month prior to the sale to Britz-Dixon..

Finally, even if the court were to consider the passage of time as an "inference" of abandonment for the purposes of a summary judgment review, as stated in the four out of jurisdiction cases, the passage of time alone is not enough without additional evidence of

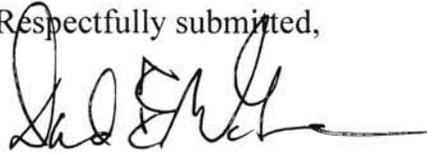
an “overt act” or circumstances that show that the owner acted voluntarily and with intent to abandon his property. In this case the record is devoid of any additional evidence of an “overt act” by the Benschers or other articulated circumstances that support the proposition that the Benschers voluntarily and with intent abandoned their personal property.

#### CONCLUSION

Not having sold, abandoned, or otherwise disposed of their ownership interest, the plaintiffs are still the rightful owners of their personal property items. The record contains no evidence that the plaintiffs have voluntarily and intentionally abandoned their personal property.

The decision of the trial court should be affirmed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'David E. McGrane', with a long horizontal flourish extending to the right.

David E. McGrane, WSBA #8064  
Attorney for the Respondent