

No. 63453-4-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

Elin Chinn, Respondents

v.

Ivy Little-Cadman, Petitioners

RESPONDENT'S BRIEF

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I. STATEMENT OF CASE

On August 21, 2008, Elin Chinn (Chinn) filed a Complaint for Ejectment and Quiet Title for her property located on Isaacson Road in Whatcom County, Washington. *CP 187-190*. She proposed to eject her son, John Cadman (Cadman) and his wife, Ivy Little-Cadman (Little) from the property. Cadman did not dispute the ownership claim of his mother, Chinn. Little (Appellant) responded by alleging that Chinn had gifted the property to Cadman and to her. *CP 183-186, 80-85, 50*.

Prior to residing on Chinn's property, Little and Cadman were essentially homeless and living in a small travel trailer on another unimproved family property owned by Little's brother-in-law. *CP 111*. In 2001, Chinn proposed to have Cadman and Little reside on her property on Isaacson Road, which was more conducive to a trailer. *CP 111*.

Chinn allowed Little and Cadman to move their small travel trailer to her unimproved lot on Isaacson Road. Since the Health Department prohibited them from remaining on the property without proper water and sewer, Chinn, at her expense purchased a modular home and had the property improved so that

Little and Cadman could live there. Chinn hired the contractors to come in and clear the property, install a septic system, a driveway (on an existing logging road), drill a well, install utilities, burn brush and put in a concrete slab. She purchased a new manufactured home, which was brought up there and completely installed and finished by Olympic Homes, all at Chinn's expense. *CP 110-112.*

Little does not dispute that all major improvements to the property were made by and at Chinn's expense. *CP 53, 54.* She does not dispute that the property is titled in Chinn's name. *CP 50.*

Little's and Cadman's occupancy was based on the agreement that they could occupy the manufactured home by paying \$200 each month for rent; in addition to doing general upkeep on the property. *CP 110-112.* Chinn installed a propane tank and paid to fill it; she installed and paid for electricity for the first four months; she installed a wood stove in the manufactured home; she installed upgraded appliances in the home (except for a washer and dryer, which Cadman and Little purchased on their own). Little and her husband never paid the agreed upon rent. *CP 110-112.*

Cadman installed wooden stairs leading to the mobile; planted grass; and did some minor clearing over an existing logging road so that the travel trailer could be moved onto the

property. Little installed what she termed a “fence” around the yard. *CP 33, 34*. The “improvements” were valued at \$10,000 or less. *CP 22, Supplemental CP 45*.

On November 5, 2008 and March 18, 2009, Little filed answers to Chinn’s Complaint. Little’s sole defense to ejectment was the allegation that Chinn had *gifted* the property to her and *intended to transfer title at a later date*. *CP 183-186, 80-85, 50*.

On March 9, 2009, Chinn filed a Motion for Summary Judgment claiming that Little could not satisfy the test for a parol gift. The Motion was supported by the Declarations of Chinn and Cadman, together with numerous attachments showing ownership and substantial improvements made to the property. *CP 180-182, 96-101, 110-179, 102-109*.

On March 30, 2009, Little filed a Response to Chinn’s Motion for Summary Judgment. Besides Declarations, Little’s Response did not contain any attachments. *CP 49-73*.

Reply Declarations were filed on March 6, 2009. *CP 33-37, 38-48*.

On April 10, 2009, the Honorable Ira Uhrig granted Chinn’s Motion for Summary Judgment. An Order granting Summary Judgment was entered the same day. *CP 21-28*.

On May 7, 2009, Little filed a Notice of Appeal to the Appellate Court. *CP 8-16*.

II. ISSUES RAISED ON APPEAL

Little claims that there are genuine issues of material fact sufficient to survive summary judgment. She raises three issues in support of her position: there is written evidence showing Little's interest in the property on Isaacson Road; credibility issues are shown by contradictions in the record; consequently, there are disputed material facts constituting a prima facie case.

III. ARGUMENT

1. **Little cannot raise new issues on appeal.**

Little raises a new issue on appeal that is inconsistent with her position at summary judgment. Further, she improperly relies on documents and a declaration that are not part of the trial court record. Said document purports to be evidence that Chinn was selling the property to Little. Chinn has a pending Motion to Strike most of Little's Brief. Because it is joined with a Motion for Judgment on the Merits, the Motion to Strike will not be decided until this case has been set for oral argument. *See: Respondent's Motion to Dismiss, Motion to Strike and For Terms, Motion for Judgment on the Merits filed on May 28, 2010*. Without waiving the Motions, Chinn replies to Little's claims.

The improperly submitted document and declaration of Little dated July 1, 2009 (CP 4-7, Amended SOA) purports to be proof of a property sale from Chinn to Little. It is a short note to an insurance agent, presumably for the purposes of obtaining insurance. It does not contain any terms of sale and there was no evidence of sale or terms of sale presented to the trial court. The document which purports to show a sale of the real estate does not meet the requirements for conveyance of an interest in real property. *RCW 64.04*.

The issue of a sale was not raised in the court below and was not the basis for Little's assertion of ownership. Rather, she argued that the property was a parol gift. *CP 183-186, 80-85, 50*. RAP 2.5(a) provides in part: "The appellate court may refuse to review any claim of error which was not raised in the trial court." In order to preserve error for consideration on appeal, the general rule is that the alleged error must be called to the trial court's attention at a time that will afford the court an opportunity to correct it.

Under most circumstances, the Court of Appeals is simply unwilling to permit a party to go before a court acceptable to (her), speculate on the outcome and after receiving an adverse result, claim error for the first time on appeal which, assuming it exists, could have been cured or otherwise ameliorated by the trial court.

In re Estate of McKiddy, 47 Wash.App. 774, 737 P.2d 317 (1987) [citing: State v. Wicke, 91 Wash.2d 638, 642, 591 P.2d 452 (1979)].

On appeal, the reviewing court is limited to the issues and materials considered by the trial court. Harris v. Kuhn, 80 Wn.2d 630, 497 P.2d 164 (1972). Little cannot demonstrate disputed material facts in the record before the trial court nor in the record properly transmitted to the Court of Appeals.

RAP 9.12 contains special record requirements for appeals from summary judgments. On review of an order granting or denying a motion for summary judgment, the appellate court will consider only evidence and issues called to the attention of the trial court. CR 56, RAP 9.12, CP 21-28. Little is impermissibly attempting to supplement materials.

Little complains that her attorney should not have withheld the document from the trial court's consideration. This is not an assignment of error. It is an issue between Little and her attorney. The document was withheld for a reason. It is completely inconsistent with the argument Little adamantly maintained – the property was *gifted* to her. Now, having lost on her claim of a parol gift, Little is attempting to show error by alleging a position she never once alleged in the court below.¹

2. Little failed to demonstrate a parol gift. Credibility was irrelevant.

Credibility was not a basis for the lower court's decision. Rather, the court found that Little failed to show by "clear, unequivocal, strong, convincing and definite" evidence that there had been a parol gift. There are four requirements necessary to sustain a parol gift of real estate:

First, it must be a gift in praesenti, that is, an absolute, present gift, not a promise, nor the expectation of some future act; second, possession must be given in furtherance of the gift; third, permanent and valuable improvements must be made which *cannot be compensated for in damages*; and, fourth, the donee must have changed his condition or circumstances or been induced to forego some benefit or assume some liability upon the strength of the gift such as would make it inequitable not to enforce the gift.

Reinhart v. Fleming, 18 Wn.2d 637 at 639 (1943). Emphasis added.

Little, except for previously permissive possession, could not show any of the elements necessary for a parol gift. Her consistent responses and position throughout the litigation was that Chinn "intended to transfer" the property to her (no present gift). *CP 183-186, 50*. By her owned admission, Little fails the first test for a parol gift. Credibility was not an issue.

Little asserted that she or the marital community made improvements to the property, but did not provide any evidence that the alleged improvements had value. Chinn's witness, Robin Ross, stated that improvements, if any, had a value of \$10,000 or less and must be considered in light of the unprofessional manner in which said "improvements" were made and the cost involved to remove hazardous conditions created by the "improvements". *CP 21-28, Supplemental CP 45*.

In summary judgment, after a moving party submits information, "the nonmoving party must set forth specific facts which sufficiently rebut the moving party's contentions and disclose the existence of a genuine issue as to a material fact." Meyer v. University of Washington, 105 Wn.2d 847, 852, 719 P.2d 98 (1986). Issues of fact cannot be raised by merely claiming contrary facts. Id. There was nothing presented to contradict Chinn's expert. Credibility was irrelevant.

3. Having failed to demonstrate any basis upon which to overturn the trial court, Little's conclusory third issue fails.

The trial court found that Little failed to show a parol gift by clear convincing evidence. *CP 21-28*. There is no competent evidence that the real property was or was intended to be conveyed

to Little. If the improvements had any value, they can be compensated and were reserved by the trial court. *CP 28*.

IV. CONCLUSION

This Court does not consider issues on appeal that are not supported by argument and citation to authority. *RAP 10.3(6); RAP 9.12; McKee v. American Home Products, Corp.*, 113 Wn.2d 701, 705, 782 P.2d 1045 (1989). Reference to the record must be included for each factual statement. *RAP 10.3(5)*. . *RAP 9.1(c)* provides that “[t]he clerk's papers include the pleadings, orders, and other papers filed with the clerk of the trial court.” A party may properly designate as clerk's papers only materials in the trial court record, and therefore available for the trial court's consideration.

Little's Brief consists almost entirely of unsubstantiated statements without reference to the record proper, and without legal authority. Little alleged that Chinn had gifted real property to her. Her Brief reflects that she did not come forward with competent evidence to support her claim. Summary judgment was appropriate and the trial court should be affirmed.

V. ATTORNEY FEES

RAP 18.9 allows for sanctions when a frivolous appeal has been filed. *RAP 18.9(a)*. Appellant has failed to identify a single authority for her position on Appeal. Appellant refers to only one case in her Brief.

That case is cited for the proposition that genuine issues of material fact should not be decided on appeal. Appellant's Brief has not identified a single issue of material fact. It does not cite any legal authority as to why this Court should reverse the court below. Little should be sanctioned for filing a frivolous appeal.

Respectfully submitted this 28th day of June 2010.



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¹ Little's request to supplement the record with the insurance note was denied by the trial court. See Respondent's Motion to Dismiss, Motion to Strike and For Terms, Motion for Judgment on the Merits filed on May 27th, 2010