

71845-2

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No. 71845-2

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JULIE ANN THOMAS, a single woman,

Appellant,

v.

J.R. LeVASSEUR and DONNA LOUISE LeVASSEUR,
husband and wife, individually and the marital
community composed thereof,

Respondents.

REPLY BRIEF OF APPELLANT

Dan S. Lossing
Washington State Bar No. 13570
Inslee Best Doezie & Ryder, P.S.
Attorneys for Appellant

10900 NE 4th Street, Suite 1500
Bellevue, Washington 98004
Telephone: (425) 450-4252
Facsimile: (425) 635-7720

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I. INTRODUCTION

The purpose of the judicial system should be to resolve disputes on their merits, not to dismiss actions in their embryonic stage because the facts alleged in an initial complaint do not fit neatly into a legal pigeonhole or under a specific cause of action. Nor does it make sense to dismiss an entire lawsuit without dedicating a single word to one of the two causes of action pleaded in the initial complaint. Nor, less than two months after the commencement of a lawsuit and a year before trial, is it appropriate to deny without explanation a timely filed motion for leave to amend.

Julie Thomas respectfully submits that a *de novo* review of the trial court's granting of the summary judgment motion demonstrates error in the dismissal of the entire litigation. Moreover, the trial court abused its discretion when it denied her request for a CR 56(f) continuance, denied her motion for leave to amend without explanation, and when it found a CR 11 violation and determined that defendants were entitled to fees under RCW 4.28.328. Accordingly, the trial court's rulings must be reversed.

As an aside, the level of personal attacks, hyperbole, unfounded assumptions and outright vitriol in the LeVasseurs' pleadings and briefs is unseemly and is not conducive to a civil discourse. Although the parties

clearly have different views of what happened and who is entitled to what, counsel can and should be capable representing their clients' interests vigorously, and should be able to disagree without being disagreeable. The fact that this is an intra-family dispute has undeniably ramped up the emotions. But, Julie Thomas respectfully submits that the apparent level of enmity between the parties need not be inflamed by counsel.

II. ARGUMENT AND AUTHORITY

A. The Trial Court Erred When It Granted the LeVasseurs' Motion for Summary Judgment.

While Julie Thomas acknowledges that she acquiesced in the decision to place her parents on title to the Seattle condominium, that fact alone does not tell the entire story, nor is it determinative of the issues related to Ms. Thomas' claims for declaratory relief and to quiet title. That decision by Ms. Thomas was part of an agreement among the parties. Opening Brief, page 1. The "mistake" and "error" in placing the LeVasseurs' on title became apparent only in retrospect – after the LeVasseurs refused to abide by the parties' agreement.

Whether that "mistake" or "error" is pleaded as part of an action to quiet title or an action for declaratory judgment or an action for breach of contract or specific performance should be immaterial unless we are to exalt

form over substance. Regardless of the name of the cause of action, the result sought by Julie Thomas is the same – title to the Seattle condo should rightfully be in her name.

Ms. Thomas and her counsel believed that the broad rubric of a declaratory judgment and quiet title action, which clearly placed the LeVasseurs on notice of the allegations and the relief requested, was sufficient to survive summary judgment. When it appeared that the trial court was considering granting summary judgment, Ms. Thomas immediately sought leave to amend her complaint to allege breach of contract and specific performance claims. (VRP page 22, lines 6 to 20; CP 293) Ms. Thomas was denied that opportunity, first by the refusal by the LeVasseurs to consent and then by the trial court's unexplained denial of Ms. Thomas' motion.

Contrary to the LeVasseurs' claims, the issue of whether the LeVasseurs were purposefully placed on title to the Seattle condominium is not the "only material fact." Brief of Respondent, page 17. As set forth in the Brief of Appellant, the issue of who paid for the condominium was clearly front and center, and it was hotly disputed. Brief of Appellant, pages 10 to 11. In addition, the question of whether the parties had an agreement regarding the Seattle condominium was in play and was disputed. Importantly,

however, the LeVasseurs have not denied Ms. Thomas' statement that she never intended to "gift" the Seattle condominium to the LeVasseurs.

According to the LeVasseurs, an action to quiet title is equitable in nature. Brief of Respondent, page 23. There is nothing "equitable" about allowing the LeVasseurs to remain in a property they did not purchase and contrary to the parties' agreement – no matter what the title says – especially in light of the fact that the Seattle condominium was never "gifted" to them.

Julie Thomas respectfully submits that the genuine dispute between the parties regarding these material facts (*i.e.*, who paid for the condominium, the terms of the parties' agreement and the lack of any intent to simply "give" the Seattle condominium to the LeVasseurs) should have prevented the entry of summary judgment on both the declaratory judgment and quiet title claims. In the exercise of its *de novo* review of the trial court's decision on summary judgment, Ms. Thomas respectfully submits the trial court's summary judgment ruling must be reversed.

B. The Trial Court Erred When It Denied Thomas' CR 56(f) Request for Continuance.

Shortly after the case was commenced, Ms. Thomas scheduled the depositions of the LeVasseurs for April 24, 2014. As it turned out, that date was less than two weeks after the April 11, 2014 scheduled date for the

summary judgment hearing. It is well to bear in mind that, in April 2014, the lawsuit was less than two months old and the trial was nearly a year away.

The March 31, 2014 Declaration of Dan Lossing (CP 224-226), filed in support of Ms. Thomas' motion for leave to amend, identified what would have been discovered if the trial court had granted a continuance to permit discovery. Among other things, counsel could have questioned the LeVasseurs regarding the few documents they produced in response to written discovery requests – none of which supported the LeVasseurs' claims that they paid for the Seattle condominium. And, counsel could have cross examined J.R. LeVasseur on the allegations in the Declaration he submitted in support of the summary judgment motion.

In addition to its potential use as substantive evidence in connection with responding to the summary judgment motion, this discovery might have been used to impeach or otherwise challenge the credibility of the LeVasseurs and the allegations made in their verified answer. These issues would have had a direct bearing on the determination of the summary judgment motion.

Ms. Thomas was also denied the opportunity to depose any of the sixteen other people identified in the LeVasseurs' discovery responses. (CP 252 to 265). Because the LeVasseurs did not disclose the information

allegedly known by these individuals, it was not possible for Ms. Thomas to specifically describe their knowledge. But, as stated in the Lossing Declaration, Ms. Thomas believes discovery would have uncovered evidence that the Seattle condominium was purchased with her money and that the parties had an agreement regarding the transfer of title.

The trial court abused its discretion by refusing to continue the hearing to permit deposition discovery. In *Tellevik v. Real Property Known as 31641 West Rutherford Street*, 120 Wn.2d 68, 91, 838 P.2d 111 (1992), cited by the LeVasseurs, the Court reversed the trial court's denial of a CR 56(f) motion. In that case, an affidavit from the Assistant Attorney General explained the evidence that the plaintiff sought to establish through further discovery.

These facts, and the reasonable inferences therefrom viewed in the light most favorable to the plaintiffs would raise genuine issues of fact regarding Mrs. Pearson's knowledge of and her acquiescence or consent to the illegal conduct. Therefore, the trial court abused its discretion in not granting the continuance.

120 Wn.2d at 91. Here, the Declaration of Dan Lossing clearly identified the evidence that would be sought through the depositions of the LeVasseurs. (CP 225). Ms. Thomas believes that she should have been entitled to that discovery and to the benefit of "the reasonable inferences therefrom."

Although the LeVasseurs' cite *Building Industry Association of Washington v. McCarthy*, 152 Wn.App. 720, 218 P.3d 196 (Div. 2 2009), that case is also inapposite. The court in *McCarthy* noted:

[T]he record shows that in the four months of litigation preceding the dismissal of its claim, BIAW never made a single discovery request, never moved under CR 56(f) for a continuance in order to conduct any discovery, and never made the showing required to delay summary judgment for purposes of discovery.

152 Wn.App. at 742. Here, Ms. Thomas submitted written discovery requests and noted depositions, moved under CR 56(f) for a continuance, and submitted a Declaration outlining the evidence it sought to obtain with that discovery.

C. The Trial Court Erred When it Found a CR 11 Violation and that the LeVasseurs Were Entitled to Attorney Fees Under RCW 4.28.328.

1. Civil Rule 11

The trial court adopted wholesale the LeVasseurs' form of Order on the summary judgment, making only one change. Without providing any opportunity for Ms. Thomas to argue the reasonableness of the fees, the trial court prematurely determined that the costs and expenses incurred by the LeVasseurs were reasonable (CP 365, line 26 to CP 366, line 2) but then reserved making an award. (CP 366, line 5).

As set forth in the Brief of Appellant, Ms. Thomas contends that the trial court's finding of a CR 11 violation constituted an abuse of discretion (Brief of Appellant, pages 15 to 19), and that argument will not be repeated here. However, the LeVasseurs cite *Biggs v. Vail*, 124 Wn.2d 193, 876 P.2d 448 (1994) for, among other things, the notion that an amended pleading may mitigate the alleged CR 11 violation. Because the trial court reserved the award of costs and expenses, the issues of the amount of the award and mitigation are not currently before this court.¹

2. RCW 4.28.328

The trial court's April 17, 2014 Order Granting Summary Judgment (CP 364 to 367) does not identify the subsection(s) of RCW 4.28.328 underpinning the award of fees and costs. As noted in the Brief of Appellant, page 19, Ms. Thomas argues that LeVasseurs are not entitled to any award of fees or costs under RCW 4.28.328(2) because the action clearly involves "title to real property."

The LeVasseurs contend that the trial court's ruling was correct

¹ On August 26, 2014, nearly three weeks after the Brief of Appellant was filed in this appeal, the trial court entered an Order to Enter Judgment and Remove Lis Pendens and a Judgment, again in the identical forms submitted by the LeVasseurs. Among other things, the Order and Judgment awarded \$26,820.00 to the LeVasseurs, pursuant to CR 11 and RCW 4.28.328, which was precisely the amount requested by the LeVasseurs. Ms. Thomas has separately appealed the August 16, 2014 Order and Judgment to this Court (Case No. 72496-7) and anticipates filing a motion to consolidate the two pending appeals.

because, they claim, “Ms. Thomas’ claim to title is based on an alleged agreement that is unenforceable under the Statute of Frauds.” Brief of Respondent, page 34. This statement is entirely conclusory, and is without basis in the record.

The trial court has not ruled on the applicability of the statute of frauds, nor has it ruled on Ms. Thomas’ position that part performance takes the agreement out of the statute of frauds. This issue might have been raised, argued and resolved if the trial court had allowed Ms. Thomas to amend her complaint to assert breach of contract and specific performance claims. Indeed, the trial court discussed this very subject with counsel for the LeVasseurs at the April 11, 2014 summary judgment hearing. (VRP page 25, line 22 through page 27, line 21).

Instead, the court denied Ms. Thomas’ motion for leave to amend, which means that the issues of the statute of frauds and part performance were never considered by the trial court. It is an unsubstantiated leap for the LeVasseurs to assert that Ms. Thomas could not have had a “reasonable, good faith basis in law or in fact for believing [she has] an interest in the property,” and the lis pendens was substantially justified. *South Kitsap Family Worship Center v. Weir*, 135 Wn.App. 900, 912, 145 P.3d 935 (2006).

D. The Trial Court Erred When, Without Explanation, It Denied Thomas' Motion for Leave to Amend.

The LeVasseurs argue that, although the trial court failed to articulate any reason for the denial of Ms. Thomas' motion for leave to amend, the appellate court may nonetheless find there was no "abuse of discretion" if there is an "apparent" reason for denial. That argument cannot hold sway here.

1. There Was No Actual or "Apparent" Futility

In support of their position, the LeVasseurs cite *Rodriguez v. Loudeye*, 144 Wn.App. 709, 730, 189 P.3d 168 (Div. 1 2008), for the proposition that futility may be "apparent" and may justify a trial court's denial of a motion for leave to amend despite a lack of explanation. But, *Rodriguez* is inapposite on this point.

In that case, the moving party failed to attach a copy of the proposed amended pleading to the motion to amend, leaving the trial court with no additional facts to support the proposed amended claim.

[T]he shareholders failed to allege any additional facts that might support such claims. They simply argue that the purported defects in their complaint actually refer to inferences that should have been drawn from the facts they have pleaded. Thus, absent any other showing that they could successfully plead these claims, an amendment would be futile.

144 Wn.App. at 730. Under some circumstances, this court may affirm a trial court's denial of a motion for leave to amend that is not accompanied by an explicit explanation. This, however, is not such a case.

The Order denying Ms. Thomas' motion for leave to amend did not mention futility. In fact, given the colloquy at the April 11, 2014 summary judgment hearing, the court and counsel for the LeVasseurs essentially acknowledged that an amended complaint might give rise to another summary judgment motion by the LeVasseurs. But, the court expressly acknowledged it was not concerned with why the LeVasseurs were on title, an issue which would clearly be implicated in breach of contract and specific performance claims. (VRP page 22, line 22 to page 26, line 5). Based on the record, it would be inappropriate and unwarranted to conclude that the issue of alleged futility was somehow "apparent," thereby obviating the need for an explanation.

2. There Was No Actual or "Apparent" Dilatory Conduct

LeVasseur argues that Ms. Thomas should have amended the complaint in the four days between April 7, 2014 and April 11, 2014 and that, if that had happened, all of this would have been avoided. Would that it were that simple.

First, pursuant to CR 15(a) Thomas would have been required to seek leave to amend, either from counsel or by court order. As the record in this case demonstrates, neither would have been a fruitful exercise. Despite multiple requests, counsel for the LeVasseurs rejected Ms. Thomas' request to stipulate to an amended complaint. (CP 310 to 313). Thereafter, the trial court denied Ms. Thomas' motion for leave to amend for reasons known only to the court.

Second, the LeVasseurs apparently claim that, to avoid an argument that Ms. Thomas was being dilatory, she was obligated to act within four days to draft an amended complaint and prepare a motion (since the LeVasseurs would not stipulate to an amendment). Simply put, such an argument is both unreasonable and unsupported by any case law.

E. The Court Should Reject the LeVasseurs' "Alternative" of Affirming the Summary Judgment Dismissal, Affirming the Finding of CR 11 Violation and Entitlement to Costs Under RCW 4.28.328, and Reversing the Denial of the Motion for Leave to Amend.

This alternative by the LeVasseurs is an apparent acknowledgment of the weakness of their argument regarding the trial court's denial of Ms. Thomas' motion for leave to amend. The only case cited for this proposition is *Tagliani v. Colwell*, 10 Wn.App. 227, 234, 517 P.2d 207 (Div. 3 1973).

The court in *Tagliani* elected to affirm the trial court's summary judgment order and reverse the denial of the motion for leave to amend. However, the issues in that case were dissimilar to those in the case at bar and included a contention by the appellant that was raised for the first time on appeal and that was contrary to the position taken before the trial court.

Moreover, reversing the trial court's order denying the motion for leave to amend while, at the same time, affirming other trial court orders would inevitably present conflicts and inconsistencies. These would have a direct bearing on: (a) the finding of a CR 11 violation; (b) the LeVasseurs' alleged *entitlement* to costs and expenses under RCW 4.28.328 (which are before this Court); and (c) the *amount* of any such award (which is before this Court but is not currently part of this appeal).

For example, if this court were to reverse the trial court's denial of the motion for leave to amend (but affirm the other orders) the trial court's finding of a CR 11 violation and its ruling that the LeVasseurs are entitled to an award of costs and fees under RCW 4.28.328 could not stand. If Ms. Thomas is permitted to amend her complaint, as she has previously sought, she will assert claims that have not been deemed to violate CR 11, and she will again assert substantially justified claims that affect title to real property,

thereby eliminating any exposure to a claim for costs and expenses under RCW 4.28.328.

Ms. Thomas respectfully submits that the LeVasseurs' proposed "alternative" would create more issues than it would solve. The trial court orders that Ms. Thomas has appealed were of a piece. They were all entered on the same day, within minutes of each other. They must all be reversed.

V. CONCLUSION

This case should be heard on its merits. The original complaint clearly placed the LeVasseurs on notice of the issues and the claims – Julie Thomas believed that she, not her parents, should rightfully be on title to the Seattle condominium. Whether the claims are prosecuted under the heading of "declaratory relief," "quiet title," "breach of contract" or "specific performance" should not matter in a notice pleading jurisdiction where, by court rule, form is not to be elevated over substance.

Julie Thomas respectfully submits that the trial court's Order granting summary judgment, dismissing her claims for declaratory judgment and to quiet title, was erroneous and must be reversed on a *de novo* review. Moreover, it was an abuse of discretion for the trial court to deny Ms. Thomas' request for a CR 56(f) continuance to permit her to conduct

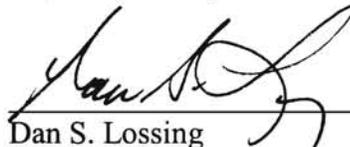
discovery pertinent to the summary judgment motion.

Given the totality of the circumstances, the trial court's finding of a CR 11 violation and its determination that the LeVasseurs are entitled to costs and expenses under RCW 4.28.328 also constitute an abuse of the trial court's discretion and must be reversed.

Finally, Ms. Thomas respectfully submits that the this Court should reverse the trial court's unexplained decision denying her timely and appropriate motion for leave to amend.

RESPECTFULLY SUBMITTED this 6th day of October, 2014.

INSLEE, BEST, DOEZIE & RYDER, P.S.



Dan S. Lossing
Washington State Bar No. 13570
Attorneys for Appellant, Julie Ann Thomas

10900 NE 4th Street, Suite 1500
Bellevue, Washington 98004

CERTIFICATE OF SERVICE

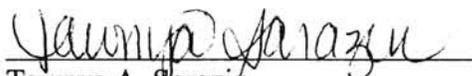
I HEREBY CERTIFY that on the 6th day of October, 2014, I caused to be served in this matter a true and correct copy of the BRIEF OF APPELLANT on the following and in the manner noted:

Mark A. Peternell	<input type="checkbox"/>	Via Facsimile
<u>mpeternell@bgwp.net</u>	<input checked="" type="checkbox"/>	Via U.S. Mail
Bean, Gentry, Wheeler & Peternell, PLLC	<input checked="" type="checkbox"/>	Via Email
910 Lakeridge Way SW	<input type="checkbox"/>	Via Legal
Olympia, Washington 98502		Messenger
Attorney for Respondents		

John A. Kesler, III	<input type="checkbox"/>	Via Facsimile
<u>jkesler@bgwp.net</u>	<input checked="" type="checkbox"/>	Via U.S. Mail
Bean, Gentry, Wheeler & Peternell, PLLC	<input checked="" type="checkbox"/>	Via Email
910 Lakeridge Way SW	<input type="checkbox"/>	Via Legal
Olympia, Washington 98502		Messenger
Attorney for Respondents		

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

DATED this 6th day of October, 2014 at Bellevue, Washington.



Tawnya A. Sarazin

OCT 6 2014
STATE OF WASHINGTON
SUPERIOR COURT
CLATSOP COUNTY