

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

RICHARD W. WHIPPLE,	)	NO. 66736-0-I
a single person,	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
FRANCES E. HALL, a single person;	)	
	)	
Appellant,	)	
	)	
LEHMAN BROTHERS, INC., a	)	
Delaware corporation, and NATIONAL	)	UNPUBLISHED OPINION
CITY MORTGAGE INC., an Ohio	)	
corporation,	)	FILED: April 25, 2011
<u>Defendants.</u>	)	

Lau, J. — Frances Hall appeals from the trial court orders denying her claim for reasonable attorney fees and costs pursuant to RCW 4.28.328(3) and reasonable expenses pursuant to RCW 4.84.185 and CR 11. We affirm.

**FACTS**

Hall purchased residential property in Bremerton, Washington in April 2000. Richard Whipple purchased an abutting residential property in July 2004. A driveway on the Hall property near the side of the Whipple property leads to the backyard area of both properties. Whipple’s property had a parking area in the backyard area that was accessible only via the driveway. The driveway was already used by both properties

when Whipple acquired his property. Whipple parked cars in the driveway, and Whipple's tenants used the driveway and parked their cars in the Whipple's backyard parking area. This pattern of use continued until August 2006.

In August 2006, Hall sent Whipple a letter denying Whipple and his tenants use of the driveway. Whipple and his tenants removed their cars from the backyard area and driveway. Hall constructed a fenced-in area in the driveway that blocked Whipple and his tenants from accessing the driveway. In September 2006, Whipple's counsel sent Hall a letter demanding that she remove the fence and requesting that she acknowledge and grant an easement for the driveway. Hall refused.

In November 2006, Whipple commenced a lawsuit against Hall, claiming an interest in the driveway under theories of adverse possession and prescriptive easement. Whipple also filed a lis pendens against the Hall property. Hall filed a counterclaim, seeking damages and attorney fees based on Whipple's recording of the lis pendens without a sufficient justification, pursuant to RCW 4.28.328(3). Hall also asserted the intent to seek expenses under RCW 4.84.185 and CR 11. Whipple amended his complaint three times, adding claims for easement by implication, trespass, and destruction of property. Whipple also filed an amended lis pendens. Hall answered each complaint and maintained her counterclaim under RCW 4.28.328.

#### Summary Judgment Motions

In March 2008, Hall moved for summary dismissal of Whipple's claims and summary judgment in her favor on the counterclaim. Following a hearing, the trial court dismissed all of Whipple's claims and released the lis pendens, but it denied Hall's

request for summary judgment on her counterclaim. In its May 9, 2008 order, the court ruled that there were genuine issues of material fact with regard to Hall's counterclaim, and denied summary judgment. The order stated, "Defendant's Motion for Summary Judgment requesting a finding that Plaintiff's recording of a Lis Pendens on Defendant's property was without substantial justification, and seeking attorney's fees and costs under 4.28.328 RCW, is denied." The court's April 16, 2008 letter explaining its ruling used identical language.

Hall brought a motion seeking clarification of the trial court's order.<sup>1</sup> The trial court's August 8, 2008 letter explained that its rulings did not dispose of Hall's counterclaims and that the claims "await trial or further motion." The court's October 17, 2008 order also states that Hall's claim for attorney fees remained for trial.

Whipple then moved for summary dismissal of Hall's claim. In its November 26, 2008 order, the court denied Whipple's motion, again concluding that there were genuine issues of material fact. In a letter attached to the order, the court explained, "[T]here is a genuine issue as to the fact of whether or not the action the Plaintiff [brought was] in bad faith and the issue of bad faith is a question of fact."

#### Trial on Hall's Claim

Trial on Hall's claim was held on March 2, 2009, before a different judge than the one who ruled on the pretrial matters.<sup>2</sup>

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<sup>1</sup> Hall also moved to amend her complaint to add claims for attorney fees based on RCW 4.84.185 and CR 11 and for damages based on trespass. Hall's motion to amend was denied, along with her subsequent motion for reconsideration.

<sup>2</sup> Although Hall was represented by counsel during the earlier stages of

Hall argued that Whipple's claim had no basis in law or fact. Hall's former attorney, Michael Uhlig, testified that his pretrial research revealed that the Whipple property had been periodically vacant during the prior six years. James Einhaus testified that he owned both the Hall property and the Whipple property for about two years in the late 1990s. He testified that he rarely visited the properties and had no tenants occupying the properties. Jeffrey Lockwood, a former neighbor, testified that there was a fire on the Whipple property in 1992 or 1993 and that the house was uninhabitable for a period.

Hans Supit, owner of the Whipple property from 1992 until 1994, testified that he used the driveway on the Hall property occasionally, with permission. He also testified that when he sold the house, he told the realtor that the driveway between the properties was "a shared driveway." Report of Proceedings (RP) (Mar. 2, 2009) at 63.

Trial Court's Findings of Fact and Conclusions of Law

The trial court concluded that Hall was not entitled to relief on her counterclaim. The court's written findings of fact and conclusions of law reveal that the court concluded it was constrained by the prior judge's earlier rulings and declined to make a finding as to whether the lis pendens was filed with substantial justification:

1. It is clear that Judge Costello, in his letter ruling of April 16, 2008, denied Ms. Hall's request for attorney fees . . . . This previous ruling constrains the Court at this time, since Judge Costello already foreclosed the issue of attorney fees under RCW 4.28.328.
- . . . .
3. The Court abstains from making a finding about whether or not the lis pendens was filed with or without substantial justification because:
  - a. The Statute (RCW 4.28.328) provides no definition of "substantial justification"

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litigation, including the summary judgment proceedings, Hall represented herself as a pro se litigant at trial and on appeal.

- b. and even if the court were to find that Mr. Whipple acted in “bad faith” when he filed the lis pendens---and that would suffice to establish the lack of substantial justification---the Court declines to rule on this issue where Judge Costello has already dismissed the counterclaim for attorney fees under this statute.

- 4. This Court chooses to uphold the previous letter ruling of Judge Costello, dated April 16, 2008 which denied attorney fees to Ms. Hall pursuant to RCW 4.28.328.

Although the trial court declined to decide whether the filing of the lis pendens was supported by substantial justification, it concluded, “The evidence fails to establish that the recording of the Lis Pendens by Whipple was done in bad faith.”<sup>3</sup> The trial court explained that its finding was based in part on Supit’s testimony that the driveway was shared and in part on the nature and use of the properties:

[Supit] testified that it was a shared driveway. . . [a]nd that he may have told the Realtor that, that it was a shared driveway. . . .

. . . I can’t make a finding at this point that the complaint itself was filed in bad faith. . . . I still believe given this particular layout of the properties, given the testimony that I heard with respect to how that driveway had been used historically, that [Whipple] had a basis upon which to seek relief from the court

RP (Apr. 10, 2009) at 4-5, 8.

The trial court made additional findings of fact concerning the basis for Whipple’s underlying suit. The court found that Whipple’s predecessors in interest used the driveway and that Whipple sought an easement by implication because there was no recorded easement. The court found that the lis pendens was recorded to

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<sup>3</sup> At the April 10 hearing for presentment of the order, the court again explained its ruling: “I would have to make a finding that I don’t believe that the lis pendens was filed in bad faith. . . . I don’t think that [Whipple’s] claim was frivolous . . . .” RP (Apr. 10, 2009) at 4.

provide notice of the litigation and the potential existence of an easement by implication.

### Posttrial Motions

Hall moved for reconsideration of the trial court's rulings and for expenses under RCW 4.84.185 and CR 11. The trial court denied both motions. In its order denying the claim for expenses, the court entered factual findings that the lawsuit was not a frivolous claim or brought in bad faith and that the claim was founded on a sound legal basis.

### ANALYSIS

#### Attorney Fees and Costs Pursuant to RCW 4.28.328

Hall first claims she was entitled to attorney fees under the lis pendens statute. RCW 4.28.328(3). We disagree.

We review a trial court's denial of a motion for attorney fees for abuse of discretion. Nakata v. Blue Bird, Inc., 146 Wn. App. 267, 276, 191 P.3d 900 (2008) (quoting Emmerson v. Weilep, 126 Wn. App. 930, 940, 110 P.3d 214 (2005)). A trial court abuses its discretion when it bases its denial on untenable grounds or reasons. Nakata, 146 Wn. App. at 276.

RCW 4.28.328(3) provides:

Unless the claimant<sup>[4]</sup> establishes a substantial justification for filing the lis pendens, a claimant is liable to an aggrieved party<sup>[5]</sup> who prevails in defense of

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<sup>4</sup> RCW 4.28.328(1)(b) defines a "claimant" as "a person who files a lis pendens . . . ."

<sup>5</sup> RCW 4.28.328(1)(c)(i) defines an "aggrieved party" as "a person against whom the claimant asserted the cause of action in which the lis pendens was filed . . . ."

the action in which the lis pendens was filed for actual damages caused by filing the lis pendens, and in the court's discretion, reasonable attorneys' fees and costs incurred in defending the action.

Hall asserts, and we agree, that that the trial court erred by determining it was constrained to follow the court's earlier rulings. Contrary to the trial court's interpretation, it was not "constrained" on the issue of attorney fees under RCW 4.28.328 by the court's summary judgment orders and letter rulings. The trial court's May 9, 2008 order denied Hall's motion for fees under RCW 4.28.328 because her claim required resolution of a factual issue. An award of fees would have been premature before that factual issue was resolved.<sup>6</sup> The trial was necessary to resolve the single factual question of whether the lis pendens was filed in bad faith, without substantial justification.

The May 9, 2008 order did not preclude the trial court from ruling on the issue of attorney fees. The trial court's subsequent order denying Whipple's motion for summary dismissal of Hall's counterclaim and November 26, 2008 letter both explained the trial court's view that that there was a genuine issue as to whether Whipple's action was brought in bad faith and that "the issue of bad faith is a question of fact."

The trial court's conclusion that it was "constrained" regarding that issue and its decision to "abstain" from "making a finding about whether or not the lis pendens was filed with or without substantial justification" were erroneous. The trial court abused its discretion to the extent that its ruling depended on its misunderstanding of the import of

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<sup>6</sup> The trial court's August 8, 2008 letter and October 17, 2008 order also expressed that the issue required resolution at trial.

the prior rulings. However, we conclude that any error was harmless, given the facts of this case.<sup>7</sup>

Here, the trial court entered factual findings that the underlying lawsuit and lis pendens were filed without bad faith. This is tantamount to a finding that the lawsuit and lis pendens were filed in good faith and with substantial justification.<sup>8</sup> Filing a lis pendens is substantially justified where the claimant has a “reasonable, good faith basis in fact or law for believing [he has] an interest in the property . . . .” S. Kitsap Family Worship Ctr. v. Weir, 135 Wn. App. 900, 912, 146 P.3d 935 (2006).

Whipple argues that the trial court’s factual findings were supported by substantial evidence and should be upheld on that basis. We agree. A party on appeal may present any ground for affirming a trial court decision as long as the record is sufficient to permit appellate consideration of the issue. Satomi Owners Ass’n v. Satomi, 167 Wn.2d 781, 808 n.21, 225 P.3d 213 (2009); LaMon v. Butler, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989); RAP 2.5. Here, the record is sufficiently developed for the court to consider this alternative ground. The trial court’s findings of fact were entered following a full trial and represent the trial court’s independent evidentiary determinations.

We review the trial court's findings of fact following a bench trial to determine

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<sup>7</sup> An error is harmless unless it materially affected the outcome below or related to an important issue of procedural fairness. Thomas v. French, 99 Wn.2d 95, 104-05, 659 P.2d 1097 (1983).

<sup>8</sup> See, e.g., In re Walt Disney Co. Derivative Litigation, 906 A.2d 27, 67 (Del. 2006) (equating the phrase “not in good faith” to “bad faith” throughout).

whether the findings are supported by substantial evidence and whether those findings support the conclusions of law. Dorsey v. King County, 51 Wn. App. 664, 668–69, 754 P.2d 1255 (1988). Substantial evidence is the quantum of evidence sufficient to persuade a rational, fair-minded person that the premise is true. Wenatchee Sportsmen Ass'n v. Chelan Cnty., 141 Wn.2d 169, 176, 4 P.3d 123 (2000). The trial court's determination of the credibility of the witnesses and what weight to give the evidence is not reviewed on appeal. Burke v. Pepsi-Cola Bottling Co., 64 Wn.2d 244, 246, 391 P.2d 194 (1964).

The trial court's factual findings are supported by the trial testimony and exhibits describing the nature of the properties and the history of their use, including Supit's testimony allowing the inference that he told the realtor who sold the property to Whipple that the driveway was "shared." Moreover, these factual findings amply support the conclusion that there was a substantial justification for filing the lis pendens. We affirm the trial court's conclusion that Hall was not entitled to attorney fees under RCW 4.28.328(3) on this basis.<sup>9</sup>

Expenses Pursuant to RCW 4.84.185 and CR 11

Hall next asserts that the trial court erred in denying her motion for expenses

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<sup>9</sup> Hall also asserts that the trial court erred by ruling that "RCW 4.28.328 is the only provision under which an award of damages or attorney's fees may be issued by a court in this case." Because Hall cites no relevant authority in support of her argument, we decline to address the argument. See RAP 10.3(a)(6); Holland v. City of Tacoma, 90 Wn. App. 533, 538, 954 P.2d 290 (1998) ("Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration."). Hall's claim of error is especially puzzling given that the trial court reached the merits of her claims for fees under CR 11 and RCW 4.84.185.

under RCW 4.84.185 and CR 11. We disagree.

This court reviews a trial court's refusal to award sanctions under either CR 11 or RCW 4.84.185 for an abuse of discretion. Hous. Auth. of Everett v. Kirby, 154 Wn. App. 842, 226 P.3d 222 (2010); Bldg. Indus. Ass'n v. McCarthy, 152 Wn. App. 720, 218 P.3d 196 (2009).

The party moving for sanctions bears the burden to justify the request. Biggs v. Vail, 124 Wn.2d 193, 202, 876 P.2d 448 (1994). In pertinent part, CR 11 requires a party's pleadings, motions, or legal memoranda to be grounded in fact, warranted by existing law, and not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

CR 11(a); See, e.g., Blair v. GIM Corp., 88 Wn. App. 475, 482-83, 945 P.2d 1149 (1997); Miller v. Badgley, 51 Wn. App. 285, 299-301, 753 P.2d 530 (1988). If an attorney signs a pleading, motion, or legal memorandum in violation of the rule, the court may impose an appropriate sanction, which may include an order to pay the other party's reasonable expenses incurred because of the filing, including a reasonable attorney fee. CR 11(a). CR 11 sanctions are not appropriate merely because an action's factual basis ultimately proves deficient or a party's view of the law proves incorrect. Roeber v. Dowty Aerospace Yakima, 116 Wn. App. 127, 142, 64 P.3d 691 (2003).

RCW 4.84.185 also provides that a party advancing a frivolous claim may be required to pay the opposing party's reasonable expenses:

In any civil action, the court having jurisdiction may, upon written findings by the judge that the action . . . was frivolous and advanced without reasonable cause,

require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action.

Unlike CR 11, the action must be frivolous in its entirety for the statute to apply. State ex rel. Quick-Ruben v. Verharen, 136 Wn.2d 888, 903-04, 969 P.2d 64 (1998). A lawsuit is frivolous if, when considering the action in its entirety, it cannot be supported by any rational argument based in fact or law. Biggs v. Vail, 119 Wn.2d 129, 136, 830 P.2d 350 (1992).

In denying expenses under RCW 4.84.185 and CR 11, the trial court concluded that Whipple's claims were neither frivolous nor brought in bad faith<sup>10</sup> and were soundly based in law and fact. The trial court's findings were based on the factual record developed before and during trial and on the law relevant to Whipple's claims. Because the record amply supports the trial court's findings and conclusions, the trial court's decisions to deny sanctions under CR 11 and RCW 4.84.185 were well within its discretion. We affirm.

#### Fees on Appeal

Hall also requests attorney fees and costs on appeal pursuant to RAP 18.1, RCW 4.28.328, RCW 4.84.185, and CR 11. We deny Hall's request for fees on appeal.

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<sup>10</sup> An action is brought in bad faith if a party engages in obstinate conduct that necessitates legal action to enforce a clearly valid claim or right, vexatious conduct during litigation, or the intentional bringing of a frivolous claim with improper motive. Rogerson Hiller Corp. v. Port of Port Angeles, 96 Wn. App. 918, 927-28, 982 P.2d 131 (1999).

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Affirmed.

WE CONCUR:

Spears, J.

Dupe, C. S.