

STATE OF IDAHO)
County of Kootenai)^{ss}

FILED _____

AT _____ O'clock _____ M
CLERK OF DISTRICT COURT

Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

Kent K. Bucher,

Plaintiff,

vs.

William H. Carney,

Defendant.

Case No. **CV 2000 1915**

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER**

This matter was tried before the Court on March 20, 2002. The parties were given until March 29, 2002 to submit additional briefing and proposed findings of fact and conclusions of law. Only counsel for William H. Carney submitted additional briefing.

FINDINGS OF FACT

1. On September 29, 1999, in Kootenai County Case Number CV 98-0136, District Judge James F. Judd ordered:

5. That Carney has a right to possession of the property until such time as he is permanently unable to reside on the property. There is no restriction on who he may have live with him. There is no right for Bucher to charge rent until such time as it is determined that Carney is unable to return to the property or permanently has

moved to another location, such as a rest home or a nursing home.

Defendant's Exhibit 2. Judge Judd was interpreting the Contract for Sale of Real Property and Mobile Home dated August 24, 1995 between the parties. Plaintiff's Exhibit A.

2. William H. Carney has not lived on the property since September 15, 2002 (the date Leanne Carney testified William H. Carney had his stroke and was admitted to Kootenai Medical Center). Jeffrey Hill testified William H. Carney on December 3, 1998, was admitted to Ivy Court (formerly known as Coeur d'Alene Homes Wellness and Rehabilitation Center), after being released from Kootenai Medical Center.

3. William H. Carney needs skilled nursing care at least some portion of each day, and needs some level of care 24 hours a day. Given William H. Carney's financial condition, it is unlikely he would be able to afford such care at home, if it were to be provided by paid providers. There was no testimony of any family member of William H. Carney that they were willing to provide such care at home.

CONCLUSIONS OF LAW

1. On September 29, 1999, in Kootenai County Case Number CV 98-0136, District Judge James F. Judd ordered:

5. That Carney has a right to possession of the property until such time as he is permanently unable to reside on the property. There is no restriction on who he may have live with him. There is no right for Bucher to charge rent until such time as it is determined that Carney is unable to return to the property or permanently has moved to another location, such as a rest home or a nursing home.

Defendant's Exhibit 2. Judge Judd was interpreting Plaintiff's Exhibit A, the Contract for Sale of Real Property and Mobile Home dated August 24, 1995 between the parties. It is clear from this language that Judge Judd held that "Carney has a right to possess the property until such time as he

is permanently unable to reside on the property.” Carney has not lived on the property since September 15, 2002 (the date LeAnn Carney testified William H. Carney had his stroke and was admitted to Kootenai Medical Center). Jeffrey Hill testified William H. Carney on December 3, 1998, was admitted to Ivy Court (formerly known as Coeur d’Alene Homes Wellness and Rehabilitation Center), after being released from Kootenai Medical Center.

2. The Court finds that William H. Carney is “permanently unable to reside on the property”. The reasons for that are as follows. **First**, is the level of care William H. Carney requires. Jeffrey Hill testified that while it is a physician’s call whether a person needs skilled nursing care, in his opinion, William H. Carney needs skilled nursing care. This Court finds that William H. Carney might not need 24 hour skilled nursing care, but he would need some skilled nursing care on a daily basis for some time, and that he would need some level of care, 24 hours a day. William H. Carney has Alzheimer’s and dementia, and it certainly would not be in his best interests if he were left unattended, even for very brief periods of time. William H. Carney testified at trial. He stated that he still lives in his residence in Post Falls and that he doesn’t live in a nursing home (he lives at Ivy Court in Coeur d’Alene), that Leanne lives in some other place other than in his home (she doesn’t, she lives in his old home), that he takes care of himself (he doesn’t). Given his testimony, the Court finds William H. Carney needs around the clock care. **Second**, is the expense such round the clock care would cost. Mr. Hill testified about William H. Carney’s financial situation. This Court finds it unlikely that William H. Carney could afford 24 hour care at home if it were to be provided by paid providers. **Third**, and most compelling to this Court, is the fact that there was no testimony from any witness as to who else (other than a paid provider), would provide that care for William H. Carney in his home. Leanne Carney testified she is William H. Carney’s daughter, and that she is the only family member around. However, Leanne Carney never testified she is willing to have her father come live with her in his old home. Her father has no

guardian or conservator, so there has been nothing keeping Leanne Carney from making this move from Ivy Court back to his old home. Yet, in over three years it has not happened, nor was there any testimony about Leanne's intent to make it happen in the future.

3. It was mentioned by counsel for Mr. Carney, that there was no appeal taken by Kent Bucher from the Judgment entered in Kootenai County Case Number CV 98-0136. Instead, Kent Bucher filed this lawsuit in this case (CV 2000 1915) on March 24, 2000. It is understandable that Kent Bucher did not file an appeal from the September 28, 1999 Judgment, as it appears it gave him the relief requested. This Judgment would have only been one year after William H. Carney's stroke, and there was no evidence adduced about William H. Carney's condition in September, 1999. Six months later, when Leanne still remained in the home, Mr. Bucher apparently felt he needed to take additional recourse to get compliance with Judge Judd's September 28, 1999 judgment. In any event, the findings of fact and conclusions of law in the present case are not prohibited by the doctrine of res judicata based on the Court's September 28, 1999 judgment in the prior case. Mr. Carney's argument that the September 28, 1999 judgment means that "Carney can have family live with him is res judicata, fully litigated and entitled to full faith and credit" (Carney's Closing Argument and Supplemental Briefing, p. 2), is completely misplaced. According to the September 28, 1999 Judgment, William H. Carney can have family live with him in his home. However, that is not the issue. The FACT is in three years, he has not had family live with him, and the only family member available (Leanne) did not indicate she was willing to take upon herself this responsibility.

4. Kent Bucher is entitled to possession of the premises within thirty days of the entry of a Judgment consistent with these findings of fact, conclusion of law and order. Counsel for Mr. Bucher will prepare such Judgment.

IT IS HEREBY ORDERED that the property in question belongs to Kent Bucher,

and he is entitled to exclusive use, possession and enjoyment of that land and the mobile home. Kent Bucher is entitled to such possession thirty days from the entry of Judgment. William H. Carney is no longer able to “independently care for himself”, and specific performance of the Contract for Sale of Real Property and Mobile Home dated August 24, 1995 between the parties, as to all terms, but in specific as to paragraph 4, is GRANTED .

DATED this 4th day of November, 2002.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of November, 2002, a true copy of the foregoing was mailed postage prepaid or was sent by facsimile to each of the following:

Fred W. Gabourie, Jr.
208.773.8097

Craig R. Wise
208.667.4930

Deputy Clerk