No. 43852-6-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

NORTHWEST CASCADE, INC.

Appellant,

v.

UNIQUE CONSTRUCTION, INC.; TEMPORAL FUNDING, LLC; WILLIAM REHE; JANE DOE REHE; WILLIAM K AND MARION L LLLP; and SAHARA ENTERPRISES, LLC,

Respondents.

REPLY BRIEF OF RESPONDENTS

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COMES NOW the Respondent/Cross-Appellants herein, and submit for the Court's consideration this Reply:

I. INTRODUCTION

Appellant Northwest Cascade's response to the cross-appeal related to the attorney's fees illustrates a fundamental problem in this case. Northwest Cascade has pursued Bill Rehe with almost the same fervor and relentlessness as Capt. Ahab pursued Moby Dick. No good came of it. In the present case, Northwest Cascades attempts to pierce corporate veil were unsuccessful and the cases against the Rehes were dismissed after much time, effort, and attorney's fees were expended. Granted, in Melville's novel the ship was sunk and most of the crew died, and everyone is still alive in this case. Still, the objective of the ultimate pursuit turned out to be a failure.

As the trial court stated in its letter ruling stated, "[m]oreover, the primary claim in this action was a breach of contract claim against Unique Construction, which claim is asserted in the original complaint. This claim is relatively straightforward." CP 1340. As will be discussed in this brief, over and over again the plaintiff has run up fees on discovery, motions, and court time that ultimately proved to be unproductive. The main body of the claim was a straight forward contract case. The rest was a relentless attempt to litigate a defendant into submission.

II. ARGUMENT

A. NWC's consistent recitation of perceived discovery violations, perjury, and sanctionable conduct was

consistently rejected by the trial court and does not excuse its excessive fees.

In looking at the response brief from pages 44 to 47, it is the same litany of perceived discovery violations, perjury, and nefarious conduct attempted to be attributed to Bill Rehe. This is at least the third time (previously in a motion for sanctions, and motion for attorney fees, and now this brief) that this litany has been brought before the court, either at the trial court level or at the appellate level. While Northwest Cascade can continue to make such assertions, each time it sought sanctions, such request was denied.

After making much the same argument in the reply brief as Northwest Cascade made before the trial court, the trial court disposed of that stating "[t]he Court does not find an appropriate basis to impose sanctions against Mr. William Rehe." CP 1340. In reviewing the Assignment of Errors and the issues pertaining to the Assignment of Errors, nowhere does it appear that Northwest Cascade is challenging the denial of fees related to the sanctions it claimed occurred. It appears that rather than appealing the trial court's clear discretion in such matters, Northwest Cascade is attempting to use the claimed basis for the denied sanctions as a basis for its inflated attorney fee request.

This is a situation where the Court of Appeals has to look at the broad picture. It is not normally appropriate for an appellate court to second-guess a trial court which had the benefit of sitting through all of the pretrial, trial, and post-trial proceedings. "We are mindful that it is the

trial judge who watches a case unfold and who is in the best position to determine the proper lodestar amount." *Morgan v. Kingen*, 141 Wash. App. 143, 163, 169 P.3d 487, 496-97 (2007) aff'd, 166 Wn.2d 526, 210 P.3d 995 (2009). Still, appellate courts have stepped in numerous times when a request is so excessive given the nature of the case and the amount in controversy.

The undersigned is in an interesting position in this argument. On one hand, we are arguing that the trial court acted appropriately in awarding the Rehes their attorney's fees. On the other hand, we are arguing that the trial court got the attorney's fees wrong related to Northwest Cascade. However, as a court reviews the various attorney fees submissions from Northwest Cascade (CP 628 – 728) and the respondents (RP 471 -515), several differences should become apparent.

First, there is an amazing amount of duplicative time with regards to the Northwest Cascade bill. Over and over, the court can see court hearings, discovery, pretrial work, trial work, and post-trial work where Northwest Cascade has two attorneys working on the same item. See, for example, the time entries for, say November 18, 2011. On such date, there are, between two lawyers, 20.3 hours of attorney time working on a motion to strike and a motion in limine. CP 709. Then we go to the next day, November 19, 2011, and there is 19.2 hours working on the same motions. CP 709. Admittedly, there is some other work going on. However, the court can review CP 707, 708, and 710, and see that there are large entries of billed time on this same motion to strike. This

happened over and over. Please look at the motion for sanctions that begins to start showing in the billing records on October 13, 2012 (CP 702). In two days. 19.7 hours are spent...and that is just getting started. There is further work on October 21, 23, 24, 27, 2012 (CP 703). Looking at such entries is illustrative of the difficulty in trying to segregate time between various portions of this case. For instance, the October 21, 2011, entry from the plaintiff's attorney reads:

> Draft Q&A for trial; identify exhibits; telephone conference with M. Murphy regarding motions for sanctions and trial preparation; revise motion for sanctions for same to M. Murphy for review; telephone message to M. Burns; discuss state of witness and exhibit list with M..Gardner; email correspondence with M. Murphy regarding alternate dispute resolution requirements;

Such entry had 7.2 hours billed. CP 703. How anyone could appropriately allocate on such an entry would seemingly be impossible. This happens over and over in Northwest Cascade's billings. At least, the Rehes were honest about the difficulty in allocating. The trial court understood this when it stated "an award of attorney's fees in this case cannot be determined with mathematical precision." CP 1339. Incidently, the earlier motion for sanctions referenced above was reserved and then it was brought up again by Northwest Cascade after the trial was completed and the request was denied.

Again, this is one illustrative example. There are far more. This court should examine how long it takes to draft a trial brief. The trial brief seems to have begun on November 20, 2011, wherein, there is 18.4 hours

of time that includes discussion between the lawyers and drafting of the trial brief. Again, there are some other ancillary matters again demonstrating difficulty in allocating this case. CP 709. On December 21, there are 19.6 hours spent between various items, which include further work on the trial brief. CP 710. In March, 2012, before as the parties approached the reset trial date, there are entries for 12.4 hours, which include updating the trial brief CP 722–23.

At trial, the multiple defendants were represented by only one attorney, the undersigned. Plaintiff Northwest Cascade was represented generally by two attorneys throughout the trial. On the first day of trial, the plaintiff's attorneys logged 16.9 hours. CP 723. On the second day of trial, they logged 15 hours. CP 724. On the third day of trial, they logged 13.2 hours. CP 724. On the fourth day of trial, they logged 15.6 hours. CP 724. On the fifth day of trial, they logged 21.5 hours. CP 724 – 25. This pattern continued further into trial.

The jury instructions are yet another example. Apparently not happy with the jury instructions previously drafted prior to the planned October start of trial, (for instance, on October 27, 2011, one of plaintiff's attorneys billed 14.8 hours on matters including revising jury instructions. CP 711). There are entries of 34.1 hours for getting the jury instructions ready during trial. CP 725. This does not include the 47.6 hours spent on March 20 and March 21, 2012, between two lawyers trying the case and working with the judge and opposing counsel on jury instructions. CP 726.

Examples can go on and on. However, the page limits for a brief do not. This was a case that involved a $139,075.74 dispute. CP 594. As previously argued, Northwest Cascade was seeking a minimum of $460,924.02 in attorney's fees and costs. Brief of Respondents, page 37. The tactics of Northwest Cascade caused this massive bill which is out of proportion with the amount in controversy.

A second distinction in the billing records is that Northwest Cascade litigated everything. Almost every motion, pleading, objection, and brief that was filed was instigated by Northwest Cascade. This court can review the records and see that not a single motion was filed by the undersigned until the attorney fee request was made. Every motion to compel, motion for sanctions, motion to strike, motion-in-limine, and motion for clarification was initiated by Northwest Cascade. This is not to say that all of such motions did not have merit. However, in dealing with Northwest Cascade, there was no such thing as a "short motion". While being thorough is important, there is also something to be said for brevity. Consistently long, arduous briefs and declarations were met with a trial court decisions to reserve ruling until after trial. After trial, the sanctions and such failed to materialize. However, extensive work resulted from such pleadings.

A third distinction between the billing records is the amount of people involved. A review of the undersigned's bills show primarily, and almost exclusively, one lawyer and one paralegal working on the file. Northwest Cascade's bills have initials for MJM, DCC, MLG, ARG, BAR, LJP, LLN

all working on the case. While no doubt, each of them has their own skill set, that many people involved in the case file will cause significant amounts of overlap, revisions, clarifications, and discussions.

B. The amount is controversy is a relevant consideration.

For understandable reasons, Northwest Cascade wants to focus on Bill Rehe's conduct. Northwest Cascade's response to the cross-appeal essentially becomes a dissertation of claimed transgressions of Bill Rehe. Its defense of the Northwest Cascade attorney fee bill regarding the amount in controversy is to say that it is "only one factor". Reply brief of appellant, page 48. Truly, it is one of the factors. It is an important factor. The previously briefed case of *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 156, 859 P.2d 1210, 1219 (1993) has an excellent discussion that appears to be relevant in the present scenario:

> Over a decade ago, the United States Supreme Court exhorted attorneys to exercise "billing judgment" in fees requests so as to avoid a costly second major litigation. *Hensley v. Eckerhart,* 461 U.S. 424, 437, 103 S.Ct. 1933, 1941, 76 L.Ed.2d 40 (1983). Unfortunately, this case demonstrates that the Court's words have not been uniformly heeded. This case began with an uncomplicated dispute over 120 vacuum cleaners worth less than $20,000. The jurisdictional problems with the Washington case were manifest. Out of these simple facts, Dwight's attorneys have fashioned a claim for over $200,000 in attorney's fees. As discussed above, a claim for over 10 times the amount in contention, in a run-of-the-mill commercial dispute, certainly gives rise to a suspicion of unreasonableness, and demonstrates little, if any, billing judgment.

The extreme amount of time that Northwest Cascade put into every aspect of this case does not demonstrate an appropriate exercise of "billing judgment." The examples in the prior section above are illustrative. A full review of Northwest Cascade's billing records extends for 101 pages, between CP 628–728. This court should read through such billing records as they speak for themselves.

The court should consider this failure to exercise appropriate "billing judgment" in light of the amount in controversy. As will be discussed in the next section, the court would then have to juxtapose these two factors (the time spent and the amount in controversy) against the results obtained. As the trial court noted, this case started out to be a relatively simple case. It was Northwest Cascade that complicated matters by attempting to pull into the litigation the Rehes' personal assets. For instance, the billings between February to April 2011, show a focus on certain Morgan Stanley accounts, seeking discovery, getting injunctions related to such accounts, all of which eventually proved to be futile. CP 684–688. These were investment accounts that had never been in Unique Construction's name. They had always been personal assets of the Rehe's, and then transferred into estate planning vehicles. But such conduct of Northwest Cascade in doggedly pursuing assets of an entity that it never contracted with helps explain the excessive fees which were run up in this case. The trial court was correct in not allowing Northwest Cascade to pierce the corporate veil to get at assets that were never contemplated in contracting – however, the trial court essentially then

rewarded Northwest Cascade with an excessive attorney fee award based on billings related, in whole or part, to reaching such assets

Judges have been dealing with attorney fee issues in this State of Washington for around a century. In an action to recover for services as an architect, and foreclose an architect's lien, the Supreme court said, "It is our opinion, however, that the allowance made for attorney's fees is excessive. The issues between the parties were not complicated or difficult of trial, and we think an attorney fee of $500 would amply compensate the respondent on this branch of the case." *Holmes v. Radford*, 143 Wash. 644, 650, 255 P. 1039, 1041 (1927). We are not suggesting that we reduce Northwest Cascade's fee award to $500.00 (though it would be appreciated). However, this case is not completely dissimilar in that the initial issue before the trial court was relatively simple. What began as a straight forward contract dispute turned into a search for a source to fund a potential judgment. A review of Northwest Cascade's billing records show that after the initial complaint was filed, the actual dispute regarding the contract largely fell off of the billings. Rather, the billings reflect a ferocious review of the Rehe's personal dealings. A sampling of the billing records show this. See CP 680–684; CP 686–687. It was the search for assets – any asset – be it potentially a company asset or personal asset that causes this litigation to spin out of control. Really, the transfer of real property related to the uniform fraudulent transfer act claim was evidenced by deeds in the public record (Exhibits 87, 88) that anyone with access to the Pierce County Auditor's

website could have found in minutes. It was the hours and hours, days upon days, of going through personal matters, enforcing discovery against the Rehes personally (against whom Northwest Cascade did not prevail before the trial court), which necessitated much of the discovery, amended complaints, motions, and briefing.... This was a relatively simple case. It should never have evolved into a case with close to a half million dollars of attorney fees spent on one side alone.

Appellate courts in the past have looked at such situations and have expressed frustration with exaggerated amounts and have remanded such situations back to trial courts for reductions. In a case where Nordstrom sued a beauty salon using the name "Nostrum, the Styling Salon" and the case went through trial and Nordstrom prevailed, the Court of Appeals was quite succinct:

> The relevant part of RCW 19.86.090 states that a successful plaintiff in a Consumer Protection Act case can "recover the actual damages sustained by him ... together with the costs of the suit, including a reasonable attorney's fee ..." Nordstrom has submitted an affidavit claiming that this fee exceeds $40,000. We believe this is a grossly exaggerated amount and remand to the trial court to determine what constitutes a reasonable award.

Nordstrom, Inc. v. Tampourlos, 107 Wn.2d 735, 743, 733 P.2d 208, 212 (1987). Similarly, this court is invited to review the hundred or so pages of billings to see the enormity of the hours that were piling up. Such review should get this court to the same reaction that other courts have had when faced with a "patently unreasonable" fee request. *Scott Fetzer Co.* at

151. The appropriate action is to either to cut the award way back or remand for redetermination.

The court should also consider how Northwest Cascade's own billing records largely contradict the argument that "Bill Rehe made me do it." Notice how nowhere in Northwest Cascade's response do its attorneys defend the billings in November 2011 of $84,665.64 and March 2012 in the amount of $89,597.39. CP 713, 728. This is on top of the $32,244.67 bill in October 2011 and $9,964.36 billed in February 2012. CP 705, 720. How much trial preparation does a party need? Spending $216,472.06 in four months on a $139,075.75 claim should strike this court is manifestly unreasonable. Bill Rehe did not make Northwest Cascade spend that sort of money. That was a choice between Northwest Cascade and their attorneys. However, it was an extreme and excessive decision which should not be passed on to the opposing side.

C. Consideration of the claims upon which Northwest Cascade actually prevailed does not support the massive attorney fees generated or awarded.

Again, this court should reflect on what Northwest Cascade actually prevailed on. It prevailed upon a relatively straightforward contract claim - as pointed out by the trial judge in her written decision. Northwest Cascade further prevailed on a fraudulent transfer act claim related to the 89th St. Property. The evidence of such transfer was largely a quit claim deed and real estate excise tax affidavit admitted into evidence showing such transfer. Bill Rehe in trial testimony quickly

conceded that in 2007, prior to the aforementioned transfer, that there was not enough money in the bank account to pay Northwest Cascade. RP 3/26/12 p. 3-9. Granted, Mr. Rehe did attempt to justify the transfer given that he had contributed personal fund to the company to buy the property in the first place and the transfer out was in repayment of that loan. The jury obviously rejected this in reaching its verdict, but the overall ability of Unique Construction to pay Northwest Cascade out of readily available funds after 2007 was not really in dispute. The point is, what Northwest Cascade actually succeeded on were fairly simple legal matters. It was the attempt to pierce the corporate veil, to get to personal assets never owned by Unique Construction, that delayed and complicated this case. The trial court realized this in its written decision and this court should recognize the simplistic nature of the case upon which Northwest Cascade prevailed as well.

Certainly, both appellant and respondent have made their various different arguments as to how a court in this matter should best handle the various claims, common defenses, time spent, prevailing parties, intertwined matters, and so forth. This truly should not be a mathematical calculation. The court needs to use some common sense in reviewing such a situation. The trial court noted, after stating that the initial, primary claim of "breach of contract claim... was relatively straightforward" and that "[i]n contrast, the claim for UFTA against Sahara Enterprises is not asserted until the third amended complaint was filed on August 8, 2011, over three years after the original complaint was filed. By that time,

plaintiff had already incurred attorney fees of $147,158.50." CP 1340. Where the trial court went wrong was not finding that such large amount of fees on a relatively straightforward claim needed to be drastically slashed. The court then compounded this error by not similarly slashing the excessive time thereafter spent on multiple trial preparations by multiple attorneys and staff wherein Northwest Cascade succeeded on only the straight-forward claims.

III. CONCLUSION

Trying to find cases that absolutely are dispositive one way or another related to excessive fee requests is likely not possible. This court needs to use precedent as guidelines and as being instructive. But ultimately, this court must exercise its own judgment and common sense as to whether or not the trial court erred in granting the amount of attorney fees to Northwest Cascade. Perhaps in looking at attorney billings for excessiveness, the best test is similar to Justice Potter Stewart description of his test for obscenity: "I know it when I see it." *Jacobellis v. Ohio,* 378 U.S. 184, 197, 84 S.Ct. 1676, 12 L.Ed.2d 793 (1964). We can have all the fancy Lodestar factors we want. Ultimately, it becomes an issue of the proper exercise of discretion.

Northwest Cascade's reply oversimplifies the respondents' position. Respondent is not merely alleging that the award was "excessive" in a vacuum. Certainly, it is the respondent's position that even in such vacuum, the award should be deemed excessive. However, the objection to such award and assignment of error is at three levels. The

first level is that the time spent was unreasonable, unproductive, and had duplicated efforts. The second level is that the award of attorney fees was manifestly unreasonable in light of the amount in controversy. The third level is that the award of attorney's fees was unreasonable given the eventual outcomes before the trial court.

It is the respondents' position that each of these three levels is independently sufficient to justify the reversal of the fee award in favor of Northwest Cascade. The fact that there are three independently sufficient reasons to reverse the trial court should make this matter all the more clear.

Getting back to the common sense, "I know it when I see it" approach: An award of $295,817.32 in costs and attorney fees in a case that had a primary judgment in the amount of $139,075.75, and when Northwest Cascade only won about half of the claims against about half of the parties at trial - the excessiveness (if not obscenity) of such situation should be apparent.

The award of fees and costs to Northwest Cascade should be reversed and reduced dramatically or remanded to the trial court.

RESPECTFULLY SUBMITTED this 6 day of May, 2013.

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CERTIFICATE OF SERVICE

I certify that on the 6th day of May, 2013, I caused a true and correct copy of this Brief to be served on the following via U.S. Mail and email to:

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