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Washington State
Supreme Court

NO. 93174-7
IN THE SUPREME COURT OF THE STATE OF WASHINGTON

TOM G. LUTZ and KAREN LUTZ, husband and wife,

Plaintiffs/Respondents,

v.

LISA BUFFINGTON,

Defendant/Appellant,

APPEAL FROM THE SUPERIOR COURT

HONORABLE RANDALL KROG

REPLY ON PETITION FOR REVIEW

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I. Identity of Replying Party.

This reply is made on behalf of Defendant and Appellant Lisa Buffington.

II. Issue Discussed in This Reply.

The answer to the Petition for Review filed on behalf of Plaintiffs and Appellants Tom Lutz and Karen Lutz (the Lutzes) requests that they be awarded attorney's fees. The Lutzes' entitlement to attorney's fees is a new issue not discussed in the Petition for Review.

III. Statement of the Case and Argument.

It is not clear whether the Lutzes are seeking review of the decision of the Court of Appeals that awarded Ms. Buffington attorney's fees or whether they simply seek attorney's fees in connection with review to the Supreme Court. In either event, the Supreme Court should not address this issue.

First of all, the Lutzes did not argue to the Court of Appeals that they were entitled to attorney's fees on appeal. They therefore cannot seek review of any claimed entitlement to attorney's fees on appeal. The Supreme Court has indicated that it will not review claims or issues not made to the Court of Appeals. See, e.g., *People's National Bank v. Peterson*, 82 Wn.2d 822, 830, 514 P.2d 159 (1973); *State v. Cunningham*, 93 Wn.2d 823, 837-38, 613 P.2d 1159 (1980); *Bender v. City of Seattle*, 99

Wn.2d 582, 598-99, 664 P.2d 492 (1983); *Fisher v. Allstate Insurance Company*, 136 Wn.2d 240, 252, 961 P.2d 350 (1998)

The Lutzes can also not claim that the issue conflicts with any decision of the Supreme Court or the Court of Appeals as might be required to secure review under RAP 13.4(b)(1), (2). Attorney's fees are available to a party only as authorized by a contractual provision, a statute, or a recognized ground of equity. *Durland v. San Juan County*, 182 Wn.2d 55, 76, 340 P.3d 191 (2014) There is no contract between the parties. The only statute addressing attorney's fees in actions to condemn a private way of necessity under RCW 8.24 is RCW 8.24.030. It requires the plaintiff to pay the condemnee's attorney's fees as is stated below in pertinent part:

. . .In any action brought under the provisions of this chapter for the condemnation of land for a private way of necessity, reasonable attorneys' fees and expert witness costs may be allowed by the court to reimburse the condemnee.

Under this statute, the condemnee is entitled to attorney's fees "without regard to whether the condemnee has prevailed in the action or on any particular issue." *Sorenson v. Czinger*, 70 Wn.App. 270, 279, 852 P.2d 1124 (1993) The condemnee's entitlement to attorney's fees applies on appeal as well. *Sorensen v. Czinger, supra; Beckman v. Wilcox*, 96 Wn.App. 355, 369, 979 P.2d 890 (1999) Conversely, no attorney's fees can be awarded against the condemnee at least when the condemnee does

not join another party. *Noble v. Safe Harbor Family Preservation Trust*, 167 Wn.2d 11, 23, 216 P.3d 1007 (2009) This rule is consistent with the notion that statutes that allow for attorney's fees to only one of the parties cannot be construed to allow an award in favor of the other. *Sato v. Century 21 Ocean Shores Real Estate*, 101 Wn.2d 599, 603, 681 P.2d 242 (1984)—interpreting a provision in RCW 19.86.090 allowing attorney's fees to a successful plaintiff making a Consumer Protection Act claim. The law is therefore clear that the Lutzes are not entitled to any award of attorney's fees pursuant to RCW 8.24.030.

It may be that the Lutzes are seeking attorney's fees under RAP 18.9(a) on the basis that Ms. Buffington has filed a frivolous appeal or perhaps a frivolous petition for review. An appeal is frivolous if, considering the entire record, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ, and that the appeal is so devoid of merit that there is no possibility of reversal. All doubts as to whether the appeal is frivolous should be resolved in favor of the appellant. Furthermore, if a party presents one debatable issue, sanctions under RAP 18.9(a) are not available because another issue was deemed to be frivolous. *Advocates for Responsible Development v. Western Washington Growth Management Hearings Board*, 170 Wn.2d 577, 580-81, 245 P.3d 764 (2010) Under that test, Ms.

Buffington's appeal in general and her petition for review cannot be considered frivolous.

Ms. Buffington has sought review of the decision of the Court of Appeals that the Lutzes action is not an unasserted compulsory counterclaim. Review of that issue is warranted if the decision of the Court of Appeals conflicts with decisions of the Supreme Court and/or the Court of Appeals. RAP 13.4(b)(1), (2) As the dissenting of opinion of Judge Lawrence-Berry states at p. 1 (Petition for Review, p. 67) states:

I disagree with the majority's determination that Tom and Karen Lutzes' easement-by-necessity claim was not a compulsory counterclaim. I also disagree with the majority's determination that the Lutzes' easement-by-necessity claim was not mature for purposes of CR 13(e). Disagreement alone does not prompt my dissent. I dissent because the new rule announced by the majority concerning CR 13(e) is inconsistent with *Lane v. Skamania County*, 164 Wn.App. 490, 265 P. 3d 156 (2011) and *Chew v. Lord*, 143 Wn.App. 807, 181 P.3d 25 (2008) and is inconsistent with the policy behind compulsory counterclaims as announced by *Schoeman v. New York Life Insurance Co.*, 106 Wn.2d 855, 726 P.2d 1 (1986).


(Emphasis added) Since the dissenting opinion states grounds for taking review on this issue, the merit of Ms. Buffington's petition for review must be considered at least debatable. The fact that this one issue is debatable precludes any award of sanctions under the teaching of *Advocates for Responsible Development v. Western Washington Growth Management Hearings Board*, *supra*. Ms. Buffington raised two other

issues for review. She claims that the Lutzes were not entitled to relief under RCW 8.24 because they were entitled to an easement by necessity over land now owned by Gene Cyrus and Judith Cyrus. She also contends that other owners in Ponderosa Park whose land the Lutzes and their tenants must traverse to get to a public thoroughfare are necessary parties who must be joined in the Lutzes' action. These arguments have been supported with authority in her petition for review and present points that are at least debatable. For all these reasons, Ms. Buffington's request for review by the Supreme Court cannot be considered frivolous and sanctionable under RAP 18.9(a).

IV. Conclusion.

The Supreme Court should grant review on the issues that Ms. Buffington has raised in the Petition for Review. It should not, however, grant review to the Lutzes on a claim for attorney's fees on appeal. It should also not award any attorney's fees to the Lutzes.

DATED this 14 day of June, 2016.



BEN SHAFTON WSB#6280
Of Attorneys for Lisa Buffington

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HONORABLE RANDALL KROG

DECLARATION OF SERVICE

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COMES NOW Ben Shafton and declares as follows:

1. My name is Ben Shafton. I am a citizen of the United States, over the age of eighteen (18) years, a resident of the State of Washington, and am not a party to this action.

2. On June 14, 2016, I served the Reply on Petition for Review together with this declaration by leaving copies of them at the offices of Ernest Nicholson, 500 E. Broadway, Suite 360, Vancouver, Washington, 98660.

I DECLARE UNDER PENALTY OF PERJURY AND THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE, INFORMATION, AND BELIEF.

DATED at Vancouver, Washington, this 14th day of June, 2016.



BEN SHAFTON WSB#6280