73869-1

73869-1

NO. 73869-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

BIRNEY DEMPCY and MARIE DEMPCY,

Petitioners/Appellants,

vs.

CHRIS AVENIUS and NELA AVENIUS, husband and wife, and their marital community; et. al,

Respondents.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY
The Honorable Theresa Doyle

APPELLANTS' OPENING BRIEF

Aric S. Bomsztyk, WSBA #38020
Shira Zucker, WSBA #48123
BAROKAS MARTIN & TOMLINSON
1422 Bellevue Avenue
Seattle, WA 98122
Telephone: (206) 621-1871
Facsimile: (206) 621-9907

TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON CASES **PAGE**

RULES, STATUTES, AND OTHER AUTHORITIES

I. INTRODUCTION

Appellants, Birney and Marie Dempcy, respectfully ask this Court to determine that the Trial Court abused its discretion in its Order Denying Attorney's Fees. Although the Appellants prevailed on the sole claim which they brought before the Trial Court under §2.6 of the "Declaration of Protective Covenants, Restrictions, Easements For Pickle Point Association" (herein after the "Pickle Point Declaration" and/or "PPD"), and the Respondents, the Aveniuses, did not present any claim under the PPD at trial, the Trial Court determined that the Appellants were not the substantially prevailing party. The Trial Court erroneously arrived at this conclusion by improperly dividing the Appellants' single claim under PPD §2.6 into three distinct claims. For that reason, this Court should reverse the Trial Court's Judgment and Order and remand the issue of attorney's fees back to the Trial Court to make an award to Appellants, the Dempcys, for their attorney's fees. This Court should also grant the Appellants their reasonable attorney's fees on appeal.

II. ASSIGNMENTS OF ERROR

1. Did the Trial Court err in finding that the Appellants were not the substantially prevailing party, when the Trial Court "split" a single claim into multiple "claims," and where the Trial Court issued a single affirmative judgment in favor of the Appellants on that single claim?

III. STATEMENT OF THE CASE

Appellants, the Dempcys, and Respondent, Avenius, have been, and currently are, next door neighbors in Bellevue, Washington in the Pickle Point Neighborhood. (CP 85). The Pickle Point Neighborhood is comprised of four (4) residential properties and a common property (Common Property). (CP 85). The four properties are owned by the following families, respectively from south to north as follows: Dempcys, Aveniuses, Zemel and Shannon. A dispute arose between the Appellants and the three (3) other neighbors of the Pickle Point Neighborhood in regards to a Common Property which resulted in a lawsuit King County Superior Cause No. 13-2-37292-4 SEA (Lawsuit). (CP 85-86). These issues (Common Property Dispute) are being decided under Appeal No. 73369-9-1, which is tracking with this instant appeal.

In addition, to the Common Property Dispute, a separate and distinct dispute arose between next door neighbors, Dempcy and Avenius, which were included in the Lawsuit. (CP 85-86). The Dempcys brought two claims solely against Aveniuses ("Dempcy-Avenius Dispute"): (1) whether there was an actual or preservative easement over the Avenius Property allowing the Dempcys access to their west yard; and (2) whether certain plantings violated PPD §2.6 of a

recorded document entitled "Declaration of Protective Covenants, Restrictions, Easements For Pickle Point Association" (herein after the "Pickle Point Declaration" and/or "PPD"). (CP 85-86). Relevant here, the PPD contains the following language:

> Except for those existing on the date hereof, no fences, wall, hedge, or mass planting other than a foundation shall be permitted between Parcel 1 and Parcel 2 unless approved by the owners of both parcels....With respect to all parcels, no fence, wall, hedge or mass planting shall at any time extend higher than six feet above the ground.[1]

PPD §2.6. (CP 86, 121-22).

Appellants alleged in the lawsuit that a massive hedge/fence (Hedge/Fence) between the Dempcy Property and the Avenius Property violated PPD § 2.6 and sought specific enforcement of this provision's breach by Avenius. (CP 12). In addition, the Appellants argued that scattered plantings between their property and the Avenius property also violated PPD § 2.6 as "mass plantings" and as a "wall". (CP 12).

The Trial Court agreed with the Appellants in relation to the massive Hedge/Fence between the Dempcy Property and Avenius Property. (CP 26). The Court ordered the Aveniuses to take down the Hedge/Fence. (CP 26). Accordingly, the Court only issued one

[1]Parcel 1 is the Dempcy Property and Parcel 2 is the Avenius Property.

affirmative judgment, and that on affirmative judgment was in Appellants' favor as follows:

> Based on the decision above, it is ORDERED that:
>
> 1. The Aveniuses must remove the Fence and Hedge by July 31, 2015.
>
> 2. All other relief requested in the trial before Judge Allred is denied with prejudice.
>
> 3. Any motion related to (a) the claims and issues litigated before Judge Allred, or (b) the enforcement of Judge Allred's ruling in this matter, shall be brought before Judge Allred.

Memorandum Decision, dated June 15, 2015. (CP 26-27).

After the Court's ruling, the Appellants sought to avail themselves of the attorney's fees provision at PPD § 6.1, which provides, in pertinent part:

> Enforcement. Any owner of property within the property subject to this Declaration shall have the right to enforce the Covenants contained in this Declaration through an action at law or in equity. The Architectural Control Committee shall also have the right to bring such action in its name. The prevailing party in any action brought to enforce the Covenants contained in this Declaration shall have the right to collect attorney's fees, court costs, and other expenses of litigation, in addition to any damages which may be awarded.

PPD §6.1.

The Appellants filed their petition for attorney's fees for prevailing on this issue.[2] (CP 74-83). The Aveniues, likewise, filed their own motion for attorney's fees. (CP 63-69). The Trial Court disagreed with the Appellants and denied their petition for attorney fees in entirety in the "Order Denying Motions For Attorney Fees." (CP 259-260). The Trial Court's rationale was as follows:

> The parties base their motion on the following provision, ¶6.1, in a restrictive covenant: 'The prevailing party in any action brought to enforce the Covenants contained in this Declaration shall have the right to collect attorney's fees, courts [sic] costs, and other expenses of litigation....' A trial on the restrictive covenant claim, each side won in part and lost in part. The Dempcys won on the issue of removing a fence and hedge. The Aveniuses won on the issue of removing a trellis and 11 trees.
>
> The undersigned judge presided over the trial, which included personally listening to and observing all witnesses-including the parties—as well as reading the parties' trial and post-trial submissions. On this basis, the Court finds that each side prevailed on a major issue and, therefore, neither side is [the prevailing party.
>
> Neither side disputes that removing the fence and hedge was a major issue. But the Dempcys argue that their request to remove the trellis and 11 trees was not significant (thus, the Aveniuses did not prevail on a major issue). This is inconsistent with the Dempcy's argument at trial, where they vigorously urged removing the trellis and trees based on the restrictive covenant. The Court finds that the request to remove the trellis and trees was a major issue.

---

[2] The Dempcys' segregated the first issue which did not have an attorney's fees provision.

> Each side prevailed on a major issue, there is no 'prevailing party,' and, therefore the restrictive covenant does not provide an award of attorney fees or costs (nor does RCW 4.84).

Order Denying Attorney's Fees. (CP 259-260).

The Dempcys appealed this Order denying their attorney fees, and Judgment, on September 3, 2016. (CP 262-271).

IV. SUMMARY OF THE ARGUMENT

The granting of attorney's fees and costs is governed by RCW 4.84.330, which explicitly provides:

> As used in this section "prevailing party" means the party in whose favor final judgment is rendered.

RCW 4.84.330.

At trial, Appellants claimed that the Hedge/Fence and other obstacles maintained or installed by Respondent Avenius violated PPD §2.6 and asked for a judgment that Respondent Avenius was in breach of the section and that such obstacles be removed. (CP 12). The Trial Court enforced PPD §2.6 against Respondent Avenius and ordered that the Hedge/Fence be removed. (CP 24-27). Based upon the concept that Appellants did not prevail as to one hundred percent of their claim even though they caused the covenant to be enforced, the Trial Court held that

there was no prevailing party either under RCW 4.84.330 or PPD §6.1.[3] (CP 259-261).

The Trial Court erred for the following basic reason: The Trial Court looked at one claim which was to enforce PPD §2.6 but, for erroneous reasons, divided it into three distinct parts: (1) the Hedge/Fence; (2) the trellis; and (3) the eleven trees. (CP 27, 259-261). However, in the Dempcy-Avenius dispute there was only *one* claim for violation of PPD §2.6 and *one* affirmative judgment that the Aveniuses had violated PPD §2.6 which favored the Appellants. (CP 8-16, 27-28). Thus, there can only be *one* prevailing party—the Appellants.[4] The Aveniuses made no claim under the PPD that was before the court. The Trial Court first erred when they "split" the Appellants' single claim for violation of PPD §2.6 in to three "separate" parts. They erred again when they determined that since the Appellants did not obtain everything they wanted in the enforcement of PPD §2.6—they could not be the prevailing party.

However, as set forth below, because the Appellants brought their enforcement action of PPD §2.6 as a "single claim," the Appellants

---

[3] The Court relied on *Am. Nursery Products, Inc. v. Indian Wells Orchards,* 115 Wn.2d 217, 797 P.2d 477 (1990); *Mellon v. Reg'l Tr. Servs. Corp.,* 182 Wn. App. 476, 334 P.3d 1120 (2014). (CP 259-260). These cases are distinguished below.

[4] The easement issue did not provide for prevailing party attorney fees. The Appellants segregated the petition for attorney fees to only include fees and costs directly related to the violation of PPD §2.6. (CP 76).

caused the covenant to be enforced, and were the only prevailing party. Accordingly, they should have been awarded one hundred percent of their attorney's fees and costs related to this issue, and they are now entitled to attorney's fees for the appeal pursuant to RAP 18.1(b).

In short, the Appellants bring this appeal because the Trial Court applied the wrong legal standard. A single unsegregated claim should not be "split" into multiple "claims" to conclude that there was no prevailing party. There was one affirmative judgment in favor of the Appellants, which means that there was one prevailing party.

V. ARGUMENT

A. The Appellants were entitled to their attorney's fees at trial.

The trial court's decision on attorney's fees can only be reversed if there is "abuse of discretion". *Washington State Physicians Insurance Exchange & Ass'n v. Fisons Corp.,* 122 Wn.2d 299, 335, 858 P.2d 1054 (1993). A trial court would necessarily abuse its discretion if it based its ruling on an improper legal standard. See *Fisons,* 122 Wn.2d at 339 (1993). The meaning of an attorney's fee statute is a question of law that is reviewed *de novo*. *Guillen v. Contreras,* 169 Wn.2d 769, 774, 238 P.3d 1168, 1171 (2010), *as amended* (Dec. 21, 2010). "Discretion can be abused if it is exercised on untenable grounds or for untenable

reasons, such as a misunderstanding of the meaning of a statute." *Guillen,* 169 Wn.2d at 774, (2010).

The Trial Court erred because they took the Appellants' single claim and determined that since Appellants did not obtain all relief that they sought under this single claim—there was no prevailing party. Essentially, the Trial Court artificially divided a single claim in to three separate factual "claims" without justification or supported facts. However, in the Dempcy-Avenius dispute there was only *one* claim for violation of PPD §2.6 and *one* affirmative judgment both of which favored the Appellants. Thus, can only be *one* prevailing party—the Appellants. The Memorandum Decision could not be any clearer that there was only one affirmative judgment:

> Based on the decision above, it is ORDERED that:
>
> 1. The Aveniuses must remove the Fence and Hedge by July 31, 2015…

Memorandum Decision. (CP 26-27).

Since there was one affirmative judgment, on one claim, only one party prevailed, notwithstanding that the Appellants did not obtain the entirety of the relief that they asked for under this one claim. Several cases illustrate this principle clearly.

In *Stott,* Plaintiffs, the Stotts, sued for $10,000 in damages. *Stott v. Cervantes,* 23 Wn. App. 346, 347, 595 P.2d 563, 564 (1979). However, the trial court only awarded damages in the amount of $3,746. *Id.* The trial court then applied an offset of $327, so the net recovery for the Plaintiffs was $3,419. *Id.* "The [trial] court allowed the plaintiffs $132.75 costs but refused to allow them any attorney's fees, in effect, holding they had not recovered all that they had sought and also that the defendant had recovered at least some damages." *Id.* The appellate court reversed the trial court and found that the Stotts' argument "presents a prima facie case for error, and under the circumstances, reversal is required." *Stott v. Cervantes,* 23 Wn. App. 346, 348, 595 P.2d 563, 564 (1979).

The principle of *Stott* was explicitly reaffirmed in the *Silverdale* case. *Silverdale Hotel Associates v. Lomas & Nettleton Co.,* 36 Wn. App. 762, 774, 677 P.2d 773 (1984)(*citing Stott* at 774). Here, the contract between Silverdale Hotel Associates (Silverdale) and National Homes Acceptance Corporation contained an attorney's fee provision. *Id.* at 774. The court rendered final judgment to the benefit of Silverdale for over $600,000, including costs. *Id.* This amount was far less than what Silverdale prayed for in damages. *Id.* at 764-65. The defendants claimed that Silverdale was not the prevailing party. *Id.* at 774. The

Appellate Court rejected the defendant's argument that Silverdale was not entitled to attorney fees—stating clearly "[a] party need not recover its entire claim in order to be considered the prevailing party." *Id.* In doing so, the Silverdale court cited *Stott*. *Id.*[5]

In the Dempcy-Avenius dispute, the Appellants extracted their attorney's fees which were spent on the easement claim, and brought a petition solely to recompense for attorney's fees which were incurred for enforcing PPD §2.6. The Trial Court ruled that the Aveniuses violated PPD §2.6, but not to the full extent the Appellants had claimed. The Aveniuses brought no counterclaim under PPD §2.6 whatsoever.

The error was clear. When the Trial Court attempted to identify the prevailing party, the Court, for unjustified reasons, split the single claim into three separate parts (i.e. the fence/hedge, the trellis and the 11 trees). However, the Appellants did not bring three separate claims under PPD §2.6—they brought a single claim to enforce this covenant, ultimately prevailed and a single judgment was entered in their favor on §2.6.

This is a contractual case with direct analogues seen in *Stott* and *Silverdale*. In those two cases, the Plaintiffs were denied the full amount of the damages sought under their claims—yet the Appellate Courts in

[5] A similar principle appears in *Guillen.* See *Guillen,* 169 Wn.2d at 774 (2010).

each case affirmed each of the respective plaintiffs, as the respective prevailing party, and rendered an affirmative judgment in the plaintiffs' favor. *See Stott,* 23 Wn. App. at 348. (1979). ("Determination of which party is the prevailing party, whether for the purpose of awarding costs or attorney fees, is made on the basis of which party has an affirmative judgment rendered in his favor at the conclusion of the *entire case*."); see also *Moritzky v. Heberlein,* 40 Wn. App. 181, 183, 697 P.2d 1023 (1985) citing *Ennis v. Ring,* 56 Wn.2d 465, 353 P.2d 950 (1959).

In its order denying the Appellants' claim for attorney's fees, the Trial Court cited two cases for its rationale: *Am. Nursery Products, Inc. v. Indian Wells Orchards,* 115 Wn.2d 217, 797 P.2d 477 (1990), and *Mellon v. Reg'l Tr. Servs. Corp.,* 182 Wn. App. 476, 334 P.3d 1120 (2014). (CP 259-260). However, both cases are inapposite to the facts here.

In *Am. Nursery*, Mount Arbor Nurseries (Mt. Arbor) brought an action to recover sums due under a nursery contract with Indian Wells Orchard. *Am. Nursery Products, Inc.,* 115 Wn.2d at 221 (1990). The crux of the contract was that Indian Wells Orchard would provide Mt. Arbor 700,000 trees for growing on Mt. Arbor's property. *Id.* at 220-21. In turn, Mt. Arbor would grow these apple trees for Indian Wells. *Id.*

Ultimately, Mt. Arbor only delivered about sixty percent of all the trees promised it would deliver. *Id.* at 221.

Indian Wells Orchard alleged that Mt. Arbor dipped the delivered tree roots in a substance called Ridomil which damaged the trees and caused Mt. Arbor to fall short of its contractual obligations. *Id.* Mt. Arbor sued under the contract to collect fees owed under the contract. *Id.* Indian Wells Orchard counterclaimed alleging breach of contract and negligence. *Id.* The trial court found:

> [T]he dipping of the rootstocks in Ridomil proximately caused over $2.3 million in direct and consequential damages and constituted negligence per se and a breach of contract. Over $1.7 million of these damages resulted from production losses. The damages, plus attorney fees and costs of $147,198.01, were reduced by the $383,528.44 still due under the contract, and a judgment of $2,081,854.10 was awarded to Indian Wells. In awarding these damages, the trial court held the provision in the agreement which excluded incidental and consequential damages was unconscionable, unenforceable and against public policy.

Am. Nursery Products, Inc. v. Indian Wells Orchards, 115 Wn.2d 217, 221-22, 797 P.2d 477 (1990).

Am. Nursery provides limited elucidation regarding the issue at stake here. *Am. Nursery* primarily centered around an exclusionary clause which the Appellate Court upheld—reversing the trial court. See, *Am. Nursery Products, Inc.,* 115 Wn.2d at 222-226 (1990). However, what distinguishes *Am. Nursery* from this case is that in *Am. Nursery*

both parties brought a claim for breach of contract. From the opinion, it appears that both parties prevailed on their respective contract claims. Again, in this case, the Appellants brought the single claim to enforce PPD §2.6. There was no counterclaim from Avenius in this regard. Thus, there is only one prevailing party. The rules in multiple claim cases are different than single claim cases. See *International Raceways v JDFG,* 97 Wn. App. 1, 7-10, 970 P.2d 343 (1999)(determining that the proportionality approach is applicable in all contract cases "where multiple distinct and severable claims are at issue.").

In *Mellon,* the Mellons, residential consumers, entered into a mortgage forbearance agreement with their bank and its parent organization (collectively, "IndyMac"). *Mellon v. Reg'l Tr. Servs. Corp.,* 182 Wn. App. 476, 484, 334 P.3d 1120 (2014). The Mellons defaulted under this forbearance agreement. *Id.* at 483. In response, IndyMac terminated the forbearance agreement and instituted foreclosure proceedings. *Id.* At 484. In turn, and in response to this, the Mellons sued IndyMac under multiple legal theories: the deeds of trust act, chapter 61.24 RCW; the Foreclosure Fairness Act (FFA), Laws of 2011, chapter 58; the mortgage loan servicing act, chapter 19.148 RCW;

and the Consumer Protection Act (CPA), chapter 19.86 RCW. *Mellon*, 182 Wn. App. at 484 (2014).[6]

After the Mellons' complaint was filed, the trial court temporarily enjoined the trustee sale on the condition that the Mellons pay $1,523 monthly to the court registry as an injunction bond. *Id.* at 485. After this ruling, IndyMac moved to dismiss the Mellons' complaint with prejudice under CR 12(b)(6). *Id.* The trial court granted IndyMac's motion, and the Mellons moved for reconsideration. *Id.* The trial court denied reconsideration and released the injunction bond to IndyMac. *Id.*

The Appellate Court affirmed the CR 12(b)(6) dismissal except for the CPA claim. *Id.* At 483. They rejected the Mellons' argument that the Trial Court erred in releasing the injunction bond to IndyMac and/or failing to order IndyMac to apply the injunction bond a certain way. *Id.* at 497-98. Both parties sought appellate attorney's fees under the

---

[6] In doing so, the Mellons sought six forms of relief: "First, the Melions sought to either reinstate the defaulted note and deed of trust or fix an equitable payment of $1,582.89 monthly while requiring IndyMac to deal with them in good faith. Second, they sought to specifically compel IndyMac to deal with them in good faith by either removing their loan from default status or reducing their payments to $1,582.89 monthly. Third, the Melions sought a ruling that they timely made the first and second payments under the forbearance agreement and may tender the third payment to the court clerk. Fourth, they sought to temporarily and permanently enjoin IndyMac from foreclosing the deed of trust. Fifth, the Melions sought treble damages and attorney fees for IndyMac's unfair or deceptive act or practice. Finally, they sought attorney fees for IndyMac's nondisclosure regarding the loan transfer." *Mellon v. Reg'l Tr. Servs. Corp.*, 182 Wn. App. 476, 484-85, 334 P.3d 1120, 1124 (2014).

Mellons' deed of trust. *Id.* However, the Court of Appeals ruled that each party "prevailed on a major issue and loses on others. Thus, no party stands as the clear victor meriting such award." *Id.* 484.

Again, the issues here are very different. Whereas *Mellon* was a classic case of "multiple claims" brought by the Mellons, here, the Appellants alone brought a single contract claim against the Aveniuses at trial. Whereas the Mellons lost every, save one, of their multiple legal claims and prayer for relief; the Appellants won a portion of their sole legal claim – and the sole contractual claim brought forward in the case. Whereas IndyMac prevailed on all but one claim and, additionally, was allowed to apply the injunction bond as they sought fit; the Aveniuses brought no contract claims upon which they prevailed. *Mellons* was obviously a case of multiple claims and is not applicable to the instant litigation.

Also important, in *Mellon*, there was no affirmative judgment entered. This distinguishes the case at bar where the trial court entered one affirmative judgment solely against the Aveniuses.

Finally, *Mellon* is of marginal utility because, as the court noted in *Mellon*, both parties sought "appellate attorney fees and costs as the prevailing party under the deed of trust." *Id.* at 498. It is unclear what the deed of trust actually stated—so it is difficult to transpose this

rationale to this case without improper assumptions. However, it is clear that *Mellon* involved multiple claims alleged, all of which, save one, were excluded. *Mellon* is inapplicable to the case at bar.

B. The Appellants are entitled to their attorney fees on appeal RAP 18.1(b).

The Appellants hereby make their request pursuant to RAP 18.1(b) for attorney fees for bringing this appeal. In Washington, a prevailing party may recover attorney fees authorized by statute, equitable principles, or agreement between the parties. *Landberg v. Carlson,* 108 Wn. App. 749, 758, 33 P.3d 406 (2001), *review denied,* 146 Wn.2d 1008, 51 P.3d 86 (2002). Generally, if such fees are allowable at trial, the prevailing party may recover fees on appeal as well. *Landberg,* 108 Wn. App. at 758, 33 P.3d 406 (citing RAP 18.1); see also *Marine Enters. v. Security Trading,* 50 Wn. App. 768, 750 P.2d 1290, *rev. denied,* 111 Wn.2d 1013 (1988).

Appellants incorporate by reference those portions of this Brief which address why attorney's fees were warranted and at the Trial Court level. For the same reasons, attorney's fees are warranted on this appeal.

VI. CONCLUSION

Based on the foregoing, the decision of the Trial Court denying attorney's fees to the Appellants should be reversed. This Court should

remand the case back to the Trial Court for a determination of the amount of attorney's fees to which the Appellants are entitled. Additionally, the Appellants are entitled to their reasonable attorney's fees on appeal.

DATED this 1st day of April, 2016

Respectfully Submitted,

BAROKAS MARTIN & TOMLINSON

By: Aric S. Bomsztyk, WSBA #38020
Shira Zucker, WSBA 48123
Attorneys for Appellants

PROOF OF SERVICE

On April 4, 2016, I caused the foregoing Appellants' Opening Brief to be served on the parties to this action, by email and legal messenger to:

Counsel for Redek Zemel
Christina Mehling
Mehling Law Firm, PLLC
10900 NE 4th Street, Suite 2300
Bellevue, WA 98004
Email: cm@mehlinglawfirm.com
& Legal Messenger

Counsel for Chris and Nela Avenius
Allen R. Sakai
Jeppesen Gray Sakai, P.S.
10655 NE 4th Street, Suite 801
Bellevue, WA 98004
Email: asakai@jgslaw.com
& Legal Messenger

Counsel for Defendant, Jack Shannon
J.Richard Aramburu
Aramburu & Eustis, LLP
720 3rd Avenue, Suite 2000
Seattle, WA 98104
Email: rick@aramburu-eustis.com
& Legal Messenger

I declare that the statements above are true to the best of my information, knowledge and belief.

DATED this 4th day of April, 2016.

Patti J. Cagle