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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' REPLY BRIEF

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I. INTRODUCTION AND OVERVIEW ON REPLY

This Appellate Court has a very clear issue to determine. Was Birney and Marie Dempcys' (Appellants) claim that certain plantings of Christopher and Nela Avenius (Respondents) were in violation of §2.6 of the "Declaration of Protective Covenants, Restrictions, Easements For Pickle Point Association" (PPD): (i) a single claim because it involved enforcement of a single contractual provision and under a single cause of action; or (ii) multiple claims because it involved attempts to enforce this single contractual provision against different groups of plantings?

Respondents' position that this is, somehow, a "multiple issue" claim in which each group of plantings, or possibly, each single tree, is a separate cause of action and that the Appellants' cause of action[1] should be artificially divided into as many separate claims as trees.

The Appellants received the *only* affirmative judgment in the case. This affirmative judgment was brought under a *single cause of action.* Therefore, they are the only prevailing party and are entitled to attorney fees.

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[1]Relevant to this Appeal is Appellants' plea for relief "For an order finding that the fence and mass plantings violate the Declaration at Paragraph 2.6 and also interfere with, and denigrate, Dempcy's prescriptive easement across the Dempcy-Avenius Property and must be removed." CP 14.

The Respondents' entire brief rests on the proposition that this was a multiple claim case and that the Court properly applied the law of multiple claims. Appellants argue that, for the purposes of awarding attorney fees, this was a single claim case in which the Appellants brought an action to enforce a covenant which the Court determined the Respondents were violating. The Respondents brought no claim against Appellants which was subject to attorney's fees.

The Court entered only one affirmative judgment: Respondents were in violation of PPD §2.6 and certain fences, shrubs and trees had to be removed in order to cure this violation. Therefore, Appellants could be the only "prevailing" party under PPD §6.1, which allowed attorney's fees and costs for the party who prevailed in "enforcing" any covenant in the PPD.

The only way for Appellants not to be the "prevailing party" would be pursuant to a Court Order finding that Respondents were not in violation of PPD §2.6. Appellants do not dispute that Respondents could prevail in successfully defending a claim, even without filing a claim, if Respondents had prevailed in a determination by the Trial Court that Respondents did not violate PPD §2.6. However, that is not the case here.

How do Respondents try to convert this single claim case into a multiple claim case to try to escape attorney fees? They do so by

artificially "splitting" a single claim to enforce a covenant into multiple claims based on different types of violations of PPD §2.6 that were described in the Complaint—regardless of whether the enforcement was brought under a single claim of action. Thus, the Respondents create a strange fiction whereby a single claim to enforce a covenant is actually multiple claims—one lodged in each specific location of vegetation, as follows: First, it is one claim against the large western fences/hedges. Second it is one claim against a small trellis with plantings. Third, it is one claim against eleven trees. Appellants are not clear why Respondents did not divide the eleven (11) trees into eleven (11) causes of action as that seems to be where their logic ultimately takes them, otherwise they have now created an artificial resting point for the "splitting" of claims.

Again, this case questioned whether certain plantings and structures along the property line between the Dempcy-Avenius property line violated of PPD §2.6 which prohibited "fences, walls, hedges and mass plantings." This misses the whole point of Appellants' allegations. Appellants did not have to prove that all single pieces of vegetation were in violation of Section 2.6 in order to qualify for attorney's fees under PPD §6.1 which only requires that the covenant be "enforced"- which it was.

II. ARGUMENT

A. This case involved a single claim.

The critical issue Respondents' brief lists "multiple claim" cases. See, i.e., *American Nursery Products, Inc. v. Indian Wells Orchards,* 115 Wn.2d 217, 797 P.2d 477 (1990) (in which both parties brought claims); *Mellon v. Regional Trustee Services Corp.,* 182 Wn. App. 476, 334 P.3d 1120 (2014) (in which the plaintiffs brought claims against multiple parties under multiple theories); *Marassi v. Lau,* 71 Wn. App. 912, 859 P.2d 605 (1993), overruled on other grounds by *Wachovia SBA Lending, Inc. v. Kraft,* 165 Wn.2d 481, 200 P.3d 683 (2009) (involving claims under multiple legal theories). By contrast, Appellants' brief lists "single claim" cases where all relief claimed under a single claim was not granted but the claiming party still prevailed. *See, Stott v. Cervantes,* 23 Wn. App. 346, 595 P.2d 563 (1979); *Silverdale Hotel Associates v. Lomas & Nettleton Co.,* 36 Wn. App. 762, 677 P.2d 773 (1984); *Moritzky v. Heberlein,* 40 Wn. App. 181, 697 P.2d 1023 (1985). Further, none of these cases involves a contractual provision comparable to PPD §6.1, which provides the sole measure for attorney's fees in this case. Therefore, it serves no purpose to analyze the cases since the only true issue is whether or not this is a "single claim" case or a "multiple claim" case. To

that end, Respondents' cases are only discussed where they elucidate the law, even though they are not applicable.

PPD §2.6 provides:

> 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.

PPD §2.6; (CP 86, 121-22).

Successful enforcement of this clause invokes PPD §6.1. PPD §6.1 is a clause that only allows attorney's fees to a party who prevails by enforcing the provisions of a covenant—which the Appellants did.

> 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.

PPD §6.1 says nothing about adding up the distinct items of vegetation and determining who won the most of them. The case law comports with this being a "single claim" contractual issue. That being said, in most of the cases it is clear that "issues" *means* "claims," and

"issues" *does not mean* "issues <u>within</u> claims." For example, in *International Raceways v. JDVG,* 97 Wn. App. 1, 970 P.2d 343 (1999), the Court determined that it is a claim which is important, but apparently utilizes the term "issues" to refer to "claims." *Id.* at 7-10. The Court is talking about "issues" interchangeably with "claims" and not "issues within claims." *Id.* Indeed, the Court in *International Raceways* abandoned the term "issues" and uses only "claims" in the balance of its ruling. *Id.*

In other cases, in which the Appellate Court is tasked only with deciding whether certain conclusions of law by the lower court are correct, the Appellate Court is not being asked to decide between claims, but only to rule on issues of law. In these cases, the Appellate Court makes a decision on the law only and remands the case to the lower court to make the final judgment using the legal decisions of the Appellate Court. By way of example, the Trial Court decision cites *Marine Enter., Inc. v. Security Pacific Trading Corp.,* 50 Wn. App 768, 750 P.2d 1290 (1998). However, this case actually supports Appellants' argument, wherein, because of the unusual wording of the fees' clause, the usual rule that the prevailing party is the one who receives an affirmative ruling prevails did not apply. *Id.* at 775-76. *Marine Enterprises* cites three other cases which support the usual rule which favors Appellants and is discussed below.

Reading the trial court's Memorandum Decision on the Restrictive Covenant issues in this case reveals the peril of discussing issues of fact or law rather than claims. Indeed, the amount of discussion on each issue in the decision is very informative. The trial court uses very little verbiage (approximately 42 words) discussing the trellis and eleven (11) trees. In a ten (10) page Memorandum Decision only the following three lines discussed the trellis and eleven (11) trees:

> In addition to the Fence and Hedge, the Dempcys seek removal of the trellis and 11 trees. But the trellis and trees are not a "fence, wall, hedge, or mass planting". Therefore, the trellis and trees did not violate paragraph 2.6.

Memorandum Decision, pg. 10

That was it. There is no legal significance between tree one (1) and tree eleven (11) other than identifying their location. There is no law on "mass plantings." Whether the trees were "mass planting" is a subjective question of fact made by the judge "who knew it when he saw it."

In contrast, the trial court devoted more than 260 words to the Fence and Hedge which it ordered removed and granted the Appellants an affirmative judgment. There it answered the two main questions of the claim:

I. Did any of the structures and plantings violate PPD §2.6 to the extent that it could be "enforced"?

II. Did the Respondents have an affirmative defense of laches?

Appellants prevailed on both of these issues and the only claim subject to attorney's fees, and Appellants received the only affirmative judgment in the case. The dismissal with prejudice of some elements of Appellants' claim was not an affirmative ruling for Respondents on any claim by them, but only a minor reduction of Appellants' affirmative ruling on a single claim.[2] A reduction of a claim by a defendant is *not* an affirmative ruling in favor of a defendant and does not negate an award of attorney's fees for the prevailing party. *Stott v. Cervantes,* 23 Wn. App. 346, 347, 595 P.2d 563, 564 (1979); *Silverdale Hotel Associates v. Lomas & Nettleton Co.,* 36 Wn. App. 762, 774, 677 P.2d 773, 781 (1984). See also *Hawthorne v. Diel,* 166 Wn. App. 1, 269 P.3d 1049 (2011).

Respondents also attempt distinguish *Stott* on the basis that it was "only about a single money claim." This is not clear from the case. The claim was for damages for "misrepresentation*s*," which is unmistakably plural.[3] And, regardless, the case at bar is about a single contractual provision. In *Stott*, the appellant did not prevail on all the relief he sought and his claim was reduced. In addition, there was a $327 offset in favor of respondent. So Respondents' statement that "Plaintiff did not lose

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[2]Appellants take issue with Respondents' contention that Appellants' partial citation to J. Allred's Memorandum Decision is "disingenuous." Resps' Brief p. 4. Appellants note that their Opening Brief cites the entire text of the Order which was part of the Memorandum Decision dated June 15, 2015. *See,* App's Brief p.4.

[3] Since Respondents' brief was not allowed on procedural grounds, it is difficult to know what Respondent was claiming.

anything in the [*Stott*] case" is incorrect. *See,* Resps' Brief p.17. Whether it is classified as a "loss" or a "win," the *Stott* plaintiff did not receive all the relief he sought—yet he received his attorney's fees. Here, while the Appellants' classify the enforcement of PDD §2.6 to remove the Fence and Hedge as a "win," given the enormity of what had to be removed and the concordant benefit to the Appellants, they did not receive all the relief that they asked for because a trellis and eleven (11) trees were allowed to remain. Thus, the *Stott* case is directly in point since the plaintiffs prevailed in their claims but did not receive all the relief they sought. The same is true of the *Sillverdale* case which cites *Stott.*

Respondents further attempt to distinguish *Stott* and *Silverdale* – unconvincingly – by citing cases involving multiple claims, which simply do not apply. For example, in *Marassi v. Lau,* 71 Wash. App. 912, the plaintiff, who was a lot purchaser, sued the developer for seven (7) different causes of action, including breach of contract, negligence, fraudulent conveyance and misrepresentation. The plaintiff prevailed on two (2) of the seven claims and the defendant was awarded a small amount on his claim. The court held that since these were multiple claims and defendant succeeded in defending against five (5) of the claims, attorney's fees should be awarded proportionately depending on the value of each claim. The court clearly distinguished *Stott and Silverdale*

because they are single claim cases. The *Marassi* court held that "when the alleged contract breaches at issue consist of several distinct and severable claims, a proportionality approach is more appropriate." *Marassi*, 71 Wn. App. At 917. *Marassi* distinguishes *Stott* and *Silverdale,* for the exact same reasons that the Appellants believe that the case at bar is a "single claim" case. Again, Appellants' position is that each tree along the property line was not a "distinct and severable claim," analogous to the difference between a breach of contract claim and a fraudulent conveyance claim, for instance. Each structure and planting was subject to the same test as to whether it violated the provisions of PPD §2.6—and the vast majority, by any definition possibly imaginable, did violate PPD §2.6. If this Court determines that each tree was a "distinct and severable claim," it would in effect be overruling *Stott* and *Silverdale* since those cases had multiple items of damages, under a single claim, which were ultimately held to be only one claim.

B. Only Appellants were entitled to attorney's fees under RCW 4.84.330.

Respondents cite *Walji v. Candyco. Inc.*, and *Wachovia SBA Lending, Inc. v. Kraft* for the proposition that RCW 4.84.330 only applies where the attorney's fee provision is unilateral and not where it is bilateral as in this case. *See,* Resps' Brief at pp. 20-22 (citing *Walil v. Candyco.*

Inc., 57 Wn. App. 284, 787 P.2d 946 (1990) and *Wachovia SBA Lending, Inc. v. Kraft,* 165 Wn.2d 481, 200 P.3d 683 (2009). Neither case has held as such. Both *Walji* and *Wachovia* discuss whether there can be a "prevailing party" under the statute when there is a voluntary withdrawal by one party without prejudice. These cases are simply inapposite.

Indeed, a simple reading of RCW 4.84.330 shows that it applies to all cases which have attorney fee provisions but adds that if the provision is unilateral, it will be considered bilateral. The significance of applying RCW 4.84.330 in this case is that the statute requires that the prevailing party is the one in whose favor final judgment is entered. In this case, the final judgment was that Respondents' actions were sufficient to allow Appellants to enforce PPD §2.6 pursuant to PPD §6.1. The fact that Respondents were able prevent the Appellants from receiving all the relief that he sought is not a final judgment in Respondents favor.

There can be no debate that case law has made it clear that what is meant in the statute is an affirmative judgment. See e.g. *Stott, Silverdale, Moritsky,* and *Marassi.* Here, there was only one affirmative judgment entered in this case and that was the determination by the court that Respondents were in violation of PPD § 2.6. So only Appellants were entitled to attorney's fees for enforcing a covenant under PPD §6.1.

C. The trial court did not follow the correct procedure for "Multiple Claims" cases.

If this Court were to adopt the Respondents' position that this was a "multiple claim," case, then, respectfully this matter should be remanded back to the Trial Court because it did not follow the appropriate procedure for allocating and awarding attorney fees—specifically, it did not issue proper findings of fact and conclusions of law. See, *International Raceways v JDFG,* 97 Wn. App 1, 970 P.2d 343 (1999).

In *International Raceways v JDFG,* the Washington State Court of Appeals Division I adopted the proportionality rule of *Marassi* which requires a trial court to provide findings of fact and conclusion of law to support the allocation of fees among the claims. Here, the trial court's finding of "major issues" is not supported by any record that can be reviewed. The case would have to be remanded to the trial court to make these findings and to make an allocation between the parties based upon those finding. As the Washington Supreme Court ruled:

> JDFJ also contends that the award must be remanded so that fees and costs attributable to the claims upon which IRI prevailed can be segregated from those upon which JDFJ prevailed. We agree. In *Mahler v. Szucs* the Washington Supreme Court held that findings of fact and conclusions of law are required to support a fee award. Accordingly, we vacate the award and remand so that the trial court may establish an adequate record for review.

JDFJ Corp. v. Int'l Raceway, Inc., 97 Wn. App. 1, 9, 970 P.2d 343, 348 (1999), *as amended on reconsideration in part* (Aug. 25, 1999).

Thus, if this Appellate Court finds that this is a multiple claim case, it should be remanded to the trial court to make findings about how many feet of plantings and structures violated PPD §2.6 and how many feet of vegetation did not violate PPD §2.6. How high was each structure removed and how high was each structure that remained? How do we account for the vegetation that was removed which blocked the Appellants' valuable view of Lake Washington and the ones that remained which blocked no view of anything appreciable of value? How much time was spent by the attorneys on each issue? How much of the Memorandum Decision addressed each issue?

Appellants' offer that the various exhibits in the record would show that more than eighty percent (80%) of the trees and structures were in violation of Section 2.6 and their removal, benefited the Appellants the most both aesthetically (because their view of Lake Washington was opened) and monetarily (because their newfound view add certain value to their property). The remaining twenty (20) percent of which was held not to be in violation was in a side yard where no views were involved. It is Appellants' opinion that the trial transcript would clearly reveal very little trial time was devoted to whether the trellis and eleven (11) trees did or did not violate PPD §2.6. However, admittedly, these are all things more

properly before the trial court—if this Court should rule that this is a multiple claim case, which the Plaintiffs, of course, allege that it is not.

D. Appellants Should be Awarded their Attorney's Fees on Appeal

Pursuant to RAP 18.1(b), the Appellants seek their attorney fees in this matter. Respectfully, the Appellants are entitled to attorney fees if either (i) the Appellate Court finds that this is a single issue claim and remands the matter to the trial court to award attorney fees or (ii) the Appellate Court remands this Court to make a finding pursuant to the procedure set forth in *International Raceways.*

III. CONCLUSION

Based on the foregoing, the decision of the Trial Court denying attorney's fees to the Appellants should be reversed. This is a single claim case in which no allocation of fees is necessary because the Appellants did not receive all of the relief they sought under their single claim. The only issue on remand should be the amount of attorney's fees to be awarded Appellants.

DATED this 30 day of June, 2016

Respectfully Submitted,

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PROOF OF SERVICE

On June 20, 2016, I caused the foregoing Appellants' Reply Brief to be served on the parties to this action, by email and legal messenger to:

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

DATED this 20th day of June, 2016.

Patti J. Cagle