No. 46895-6-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II

THURSTON COUNTY, a political subdivision of Washington State,

Appellant/Cross-Respondent,

v.

MAYTOWN SAND AND GRAVEL, LLC, a Washington limited liability company, and THE PORT OF TACOMA, a Washington special purpose district,

Respondents/Cross-Appellants.

RESPONDENTS/CROSS-APPELLANTS' JOINT REPLY IN SUPPORT OF CROSS-APPEAL

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I. ARGUMENT

Plaintiffs seek an award of damages arising out of the County's tortious conduct. Those damages take the form of attorneys' fees expended as a direct and proximate result of County actions that not only damaged the Special Use Permit (SUP) for mining, but threatened to cause additional damage. As Plaintiffs argued in their opening brief, the logic behind the American Rule, which prohibits recovery of attorneys' fees incurred prosecuting an action for damages, does not apply to attorneys' fees incurred as damages, and, contrary to the County's responsive argument, no Washington case holds otherwise. In fact, the only reported decision in Washington involving a similar fact pattern affirmed the award of such damages, albeit without analysis of the American Rule. This Court, which appears to be the first in Washington to address the question, should rule that the American Rule does not bar awards of damages.

Assuming for the sake of argument that the American Rule applies as the County argues, the County then incorrectly characterizes Plaintiffs' request for fees under the "bad faith" exception to the American Rule as a request for litigation sanctions raised for the first time on appeal. In fact, as Plaintiffs argued to the trial court, the County's bad faith actions taken *before* the damages action commenced merits a remand for a new trial to determine the amount of damages. Plaintiffs do not seek sanctions for any

County misconduct during litigation. Finally, the County argues that equitable exceptions should be read narrowly, but the equitable consideration central to existing equitable exceptions – whether the defendant's actions forced the Plaintiffs into unnecessary litigation – is no less present here than it is in the cases addressing established exceptions. The Court should rule that the equities here merit an award of attorneys' fees as damages.

A. The American Rule does not apply to attorneys' fees expended in a prior legal action necessitated by a defendant's tort

As asserted in Plaintiffs' opening brief on their cross appeal, the logic behind the American Rule extends only to attorneys' fees incurred as costs of a damages action, not as damages incurred prior to the damages action. This proposition is supported by *Pleas v. City of Seattle,* a case where city officials "intentionally prevented, blocked, and delayed construction" of a project because "they 'thought it politically expedient for them to cater to those opposing'" the development. 112 Wn.2d 794, 799, 774 P.2d 1158 (1989). The City's misconduct forced the developer to pursue "legal remedies to reverse the arbitrary and capricious downzoning of its properties and to compel the City to issue the necessary permits." *Id.* at 809. Concluding that the City's conduct, like the County's conduct in this case, constituted "flagrant abuse of power by officials who

intentionally interfere with the development rights of property owners," the Court upheld an award of damages, including attorneys' fees. *Id.* at 799.[1]

While the County correctly points out that *Pleas* did not directly address the application of the American Rule to those circumstances, there is no reason for this Court to depart from *Pleas* because the American rule governs fees incurred as costs in a damages action. It does not apply where, as here, the holder of a valid property right is forced through governmental misconduct to resort to legal action to exercise its established rights, and fees are incurred as a consequence of the governmental misconduct.

Citing dicta in *City of Seattle v. McCready*, 131 Wn.2d 266, 931 P.2d 156 (1997), the County urges that Washington's version of the American Rule applies to attorneys' fees as both costs and damages. The distinction between fees-as-costs and fees-as-damages was not at issue in that case. The *McCready* plaintiffs sought only the fees incurred in an earlier stage of ongoing litigation. *See id.* at 270–71. Such fees are costs of litigation, subject to the American Rule, and any suggestion in the case

[1] While the Supreme Court opinion notes that the damage award included "attorney fees," *Pleas*, 112 Wn.2d at 799, the Court of Appeals opinion clarifies that the award included "attorney fees and costs incurred in *Parkridge v. Seattle*, supra," which was the prior action that challenged the City's permitting actions. *Pleas v. City of Seattle*, 49 Wn. App. 825, 832, 746 P.2d 823 (1987), *rev'd on other grounds*, 112 Wn.2d 794.

that the American Rule precludes an award of damages was dictum. Here, by contrast, Plaintiffs request as damages the attorneys' fees expended in *prior actions* which were forced on Plaintiffs by the County's continual misconduct, and *McCready* provides no guidance on that question.

The more common formulation of the American Rule is that attorneys' fees are not recoverable as costs of litigation unless the recovery of such fees is permitted by contract, statute, or some recognized ground in equity. *See, e.g.*, *Durland v. San Juan County*, 182 Wn.2d 55, 76, 340 P.3d 191 (2014) ("[A]ttorney fees will not be awarded for *costs of litigation* unless authorized by contract, statute, or recognized ground of equity.") (emphasis added); *City of Sequim v. Malkasian*, 157 Wn.2d 251, 284, 138 P.3d 943 (2006) ("[A]ttorney fees are not recoverable by the prevailing party as *costs of litigation* unless the recovery of such fees is permitted by contract, statute, or some recognized ground in equity.") (emphasis added). The Supreme Court's frequent and continued use of the fees-as-costs formulation of the rule makes clear that the *McCready* dicta cited by the County is without force.

The logic behind the American Rule applies only to attorneys' fees as costs of litigation, not to attorneys' fees as damages incurred prior to litigation as a proximate result of a defendant's culpable conduct. As a

matter of first impression, the Court should rule that the American Rule does not apply to such damages and remand for a new trial on the additional damages the County owes for its tortious conduct.

B. Plaintiffs request fees for the County's bad-faith actions prior to litigation, not as a sanction for the County's conduct in this litigation

Assuming, as the County argues, that the American Rule does apply to awards of attorneys' fees as damages, Plaintiffs nonetheless are entitled to an award of attorneys' fees because of the County's bad faith prelitigation misconduct. Contrary to the County's assertion, Reply Br. at 41, Plaintiffs do not seek to recover their attorneys' fees as a sanction for the County's conduct in this litigation.[2] Rather, as they did in the trial court,[3] and assuming *arguendo* that the American Rule applies to damages, Plaintiffs request an award of their attorneys' fees as damages under the recognized "bad faith" exception to the American Rule. *See Rogerson Hiller Corp. v. Port of Port Angeles*, 96 Wn. App. 918, 927–28, 982 P.2d 131 (1999) (citing *In re Recall of Pearsall-Stipek*, 136 Wn.2d 255, 267 & n.6, 961 P.2d 343 (1998)). "Bad faith" is a recognized equitable exception

[2] As stated in the Cross-Appeal, the relief the Port and Maytown seek is not sanctions, but rather a remand for a trial to determine the amount of Plaintiffs' attorneys' fees the County should pay as damages. *See* Joint Response Br. at 92, 98.

[3] The County's assertion that Plaintiffs did not request fees on this ground in the trial court is mistaken. *See* CP 7496-7509, Joint Suppl. Br. Regarding Recovery of Attorneys' Fees as Damages, at 11 (June 10, 2014) (arguing that the trial court should allow recovery of attorneys' fees for County's prelitigation misconduct).

for the award of attorneys' fees, and "prelitigation misconduct" is a recognized type of such bad faith conduct. *See Dave Johnson Ins., Inc. v. Wright*, 167 Wn. App. 758, 784, 275 P.3d 339 (2012). By definition, "prelitigation misconduct" does not include actions taken *during* litigation, and Plaintiffs do not ask the Court to sanction the County's attorneys for their conduct during this litigation.

This Court has explained that "prelitigation misconduct" refers to "obdurate or obstinate conduct that necessitates legal action to enforce a clearly valid claim or right." *Id.* (citing *Rogerson Hiller Corp.*, 96 Wn. App. at 927). Here, Plaintiffs held a valid permit to mine gravel, that the County *itself* had confirmed remained valid, yet County staff and elected officials refused to allow Plaintiffs to *use* the permit, and would not change their position even after Plaintiffs' repeated requests, made over the course of years. The unchallenged jury findings, verities in this appeal, establish that County staff and elected officials intentionally interfered to prevent mining, knowingly violating the foundational principles of Washington land use law. The County's bad-faith, intentional actions forced Plaintiffs to defend their permit from unfounded attack at considerable expense. This is exactly the type of "prelitigation misconduct" to which the equitable exception should apply.

In *Rogerson Hiller Corp.*, this Court cited *Bell v. Sch. Bd.*, 321 F.2d 494 (4th Cir. 1963) to illustrate the prelitigation conduct prong of "bad faith." 96 Wn. App. at 927–28. The County attempts to distinguish *Bell* because it involved an action to compel compliance with the U.S. Supreme Court's *Brown v. Board of Education* decision. Reply Br. At 42. In fact, *Bell* supports Plaintiffs' claim for attorneys' fees. The Fourth Circuit there based its award of fees on the school board's "long continued pattern of evasion and obstruction," which included the imposition of administrative obstacles designed to thwart plaintiffs' valid wishes. *Id.* at 500. Similarly here, the County itself first issued the SUP after a thorough quasi-judicial process, then later spent years erecting a variety of administrative obstacles designed and imposed to obstruct Plaintiffs' right to operate under the SUP. The County's long pattern of obstinate conduct, repeatedly interfering with Plaintiffs' exercise of their rights under a valid permit that the County itself issued, necessitated legal action where there should have been none. *Bell* provides an example of prelitigation misconduct; it does not limit the facts that can establish such conduct.

Perhaps apart from the natural sympathy inspired by schoolchildren seeking equal access to education, this action is no different from that in *Bell*. After receiving proper instructions on the meaning of the terms, the jury found that the County acted intentionally,

that the County's actions were arbitrary and capricious, and that the County's actions shocked the conscience.[4] The law does not contain a stronger way to describe the offensiveness of the County's culpable actions.

The County misses the point when it argues that the current suit for damages is not a suit to vindicate a clear legal right. The County, through a "reprehensible misuse of governmental power" similar to the one at issue in *Alger v. City of Mukilteo*,[5] forced the Plaintiffs into legal action to vindicate the clear validity of the County's own SUP. Fees expended in that effort are recoverable in this action under the "bad faith" exception to the American Rule.

C. Even if the American Rule applies, Plaintiffs are entitled to recover their fees on recognized equitable grounds

Assuming that the American Rule applies here, Plaintiffs are, in addition to recovering under the bad faith exception, also entitled to recover their fees on equitable grounds. The County argues that "exceptions to the American Rule against awarding fees are narrowly construed." Reply Br. At 41. But exceptions cannot be so narrowly construed that they cease to exist. The unifying theme of the equitable

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[4] *See* Instructions to Jury Nos. 10-12 (regarding "intentional") , CP 3365-3367; 24 ("shocks the conscience") , CP 3379; & 25 ("arbitrary and capricious") , CP 3380. *See also* Special Verdict Form, CP 3388-3391 (finding liability on all theories presented).

[5] 107 Wn.2d 541, 548-52, 730 P.2d 1333 (1987).

exceptions is that the defendant's wrongful action gave the plaintiff no choice but to litigate. Although the factual setting of this case may differ from prior cases, the relevant equitable consideration is no less present.

In *Rorvig v. Douglas*, the Washington Supreme Court reversed an 85-year-old rule to allow recovery of attorneys' fees expended in clearing a property title in a slander of title case. 123 Wn.2d 854, 873 P.2d 492 (1994). The *Rorvig* Court explained that slander of title, malicious prosecution, and wrongful garnishment or attachment shared a common theme: each supported awards of attorneys' fees expended as a result of the defendant's "intentional and calculated action" that left the plaintiff with litigation as her only course of action. *Id.* at 862.

Here, the County actually knew that its wrongful conduct left Plaintiffs with no choice but to litigate to preserve the tremendous value in the SUP. When a defendant's tortious act damages intangible property that can only be repaired through legal processes, a person must hire an attorney to mitigate and repair that damage. Equity demands that such attorneys' fees be recoverable.[6] This consideration supported an award of

[6] The *Rorvig* Court noted that the Second Restatement of Torts treated "[a]ttorney fees incurred in removing the cloud from the title and restoring vendibility" as necessary expenses in a slander of title case. *Rorvig*, 123 Wn.2d at 863. Other sections of the Restatement echo this sentiment. Section 681(c) provides for the recovery of attorneys' fees as damages expended defending against a wrongful civil proceeding. *See* Restatement (Second) of Torts § 681 cmt. c (Am. Law Inst. 1977). Wrongful use of civil proceedings may arise where the proceedings are used to interfere with the other's use and enjoyment of his land, chattels or intangible things. See *id.* § 677 cmt. c.

fees in *Rorvig* and supports an award of Plaintiffs' requested fees here, just as it supported the Washington Supreme Court affirmation of such an award in *Pleas v. City of Seattle*, 112 Wn.2d 794, 774 P.2d 1158 (1989).

Here, as in *Pleas*, the defendant County *forced* Plaintiffs into legal action to enforce their right to mine under the SUP. Other jurisdictions have even justified awarding attorneys' fees as *costs* based on similar determinations. *See, e.g.*, *Heslop v. Bank of Utah*, 838 P.2d 828, 841–42 (Utah 1992) (holding that consequential damages in wrongful termination suit may include attorneys' fees because "[e]mployers can reasonably foresee that wrongfully terminated employees will be forced to file suit to enforce their employment contracts and will foreseeably incur attorney fees.").

Thus, even if the County is correct that the American Rule applies to attorneys' fees as damages, Plaintiffs nonetheless are entitled to recover their fees on recognized grounds in equity. Because the County's tortious actions forced Plaintiffs to preserve the SUP through litigation, this case falls squarely within the equitable ground identified in *Rorvig* and is consistent with the award of fees in *Pleas*.

II. CONCLUSION

Plaintiffs incurred attorneys' fees repairing damage to valuable intangible property caused by the County's tortious conduct. That

Plaintiffs would incur such fees was reasonably foreseeable at the time of the County's interference and should be recoverable as tort damages. The logic of the American Rule, a policy choice to compel litigants to bear their own attorney fees incurred prosecuting an action for damages, does not apply to such fees-as-damages. Yet, even if the American Rule does apply, an award of fees here is consistent with both accepted equitable grounds and with the fee award approved by the Washington Supreme Court in *Pleas*. There, as here, Plaintiffs were forced into ligation to reverse politically-motivated, plainly unlawful land use decisions and to compel regulators to comply with land use law. By its intentional, negligent, and otherwise culpable actions the County forced Plaintiffs to defend a SUP that County staff conceded was valid, from County attacks that never should have occurred. Fees incurred in such an action are recoverable as damages, and the trial court erred when it concluded otherwise. Plaintiffs respectfully request that the Court remand this case for a trial to determine the amount of attorneys' fees the County must pay in damages arising out of its culpable conduct.

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