

Case # 71156-3-1

WASHINGTON COURT OF APPEAL

DIVISION ONE

PAUL N. AND DEBORAH R HAGMAN, HUSBAND AND WIFE,
AND RYAN P. HAGMAN, AS HIS SEPARATE ESTATE,

RESPONDENTS

V.

HMC CAPITAL INVESTMENTS, INC. D/B/A JOHN L. SCOTT
SNOHOMISH, BARBARA A. SHELTON, CHRISTOPHER GOUGH,
JOHN OR JANE DOE, DESIGNATED BROKER OF JOHN L. SCOTT
SNOHOMISH,

APPELLANTS

Appeal from Washington Superior Court
For the County of Skagit
Court File 12-2-00807-1

APPELLANT'S OPENING BRIEF

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ASSIGNMENTS OF ERROR

The trial court erred when it failed to award attorney's fees to the appellants, pursuant to the contract between the parties granting fees to the prevailing party. The trial court should also have awarded fees to the plaintiffs under Rule 11, CR.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

The parties had a contract whereby the prevailing party in any lawsuit would be awarded their attorney's fees. The plaintiffs voluntarily dismissed their case so the defendants became the prevailing parties. In Washington State, when parties to litigation have a contract that calls for the payment of attorney's fees to the prevailing party the trial court is obligated to adhere to that contract. In this case, the trial court ignored the contract and refused to award attorneys fees to the prevailing party.

The plaintiff's case was meritless from the start. This is a classic case where a dissatisfied land purchaser sues everyone in sight, including the seller, the realtors, and the title company. There are specific statutes that limit the liability of realtors and, in this case, there is also a contract limiting the duties of the realtors. The plaintiffs ignored the statutes and the contract until just before trial when they dismissed their case. Rule 11 sanctions are appropriate against the plaintiffs and their counsel and also

to return the defendants the position they were in before this meritless case was commenced.

STATEMENT OF THE CASE

Facts

Warren Williams and his former wife, Katrina E. Williams, owned property in Skagit County on Starbird Road (CP 97) that they short-platted into three parcels, numbers 1, 2, and 3. Sometime in early 2010 the Williams decided to sell the land and offered the parcels for sale, with Barbara Shelton acting as the selling agent (CP 101). Paul N. and Deborah R. Hagman, husband and wife, and Ryan P. Hagman, as his separate estate, (collectively, "Hagman") became aware of the property and made an offer to purchase the property, which offer was accepted by Williams on March 19, 2010. The Hagmans were assisted by Christopher Gough, (CP 99) a realtor in the same office with Barbara Shelton. There was no well on the property. (CP 112) (Appellants will hereinafter be called, collectively, "Shelton")

The closing occurred on April 29, 2010. (CP 97) No contingency of any kind was exercised between the time of the signing of the PSA and the closing date. (CP 114) The Hagmans also signed a document called a "Buyer's Agency Agreement," also known as NW MLS Form 41A. (CP

99) That document calls for the payment of attorney's fees to the prevailing party in any lawsuit commenced to enforce the contract:

11. ATTORNEY'S FEES. In the event of suit concerning this Agreement, including claims pursuant to the Washington Consumer Protection Act, the prevailing party is entitled to court costs and a reasonable attorney's fee. The venue of any suit shall be the County in which the property is located.

At the time of the closing it appears that the buyer could have drilled a well or he could connect to the well on the neighboring property if he made an application. Hagman has made no showing of any effort to obtain a well or to connect to the neighboring well.

CARPENTER-FISHER SUB-BASIN CLOSURE

On June 27, 2011, fourteen months after the closing, and without any significant public notice in advance, the Washington Department of Ecology closed the Carpenter-Fisher sub-basin to any new extractions of water. The Hagman property is within the sub-basin and therefore is unable to obtain water to the site. The closure continues today and there is no indication as to when the closure might end. The Hagman property became unbuildable when the closure was instituted. Although the sub-basin is unavailable for new unrestricted wells, new water extraction can be made if the property owner provides an offset. No efforts at offsets have been shown by the Hagmans.

LAW SUIT BY HAGMAN

Hagman claimed that he began inquiring about building a home on the subject property (believed to have been in the spring of 2012) but soon found out that there was no water to the property. (CP 90) Hagman brought this action against the seller and also against the realtors and other parties, claiming that they misrepresented the property regarding the access to water. In the complaint Hagman claimed:

- A. Fraud and Negligent Misrepresentation;
- B. Rescission;
- C. Constructive Fraud;
- D. Breach of Contract/Warranty; and
- E. Violation of Consumer Protection Act. (CP 91 - 96)

Significant discovery followed the commencement of the lawsuit. Depositions were taken and interrogatories were issued. Both parties also requested production of documents.

In December, 2012, Shelton brought a motion for summary judgment against Hagman, showing that the only problem with the property, the lack of water access, did not occur until 14 months after the closing and was the act of the Washington Department of Ecology and was in no way the fault of any actions of Shelton. (CP 11-83) This motion was contested by the plaintiff and was eventually denied. (CP 123 - 126)

Significant further actions occurred in the case, including further discovery.

In August, 2013, and approximately a year and a half after the case was filed, Hagman moved for a voluntary dismissal of their case. (CP 127 – 171) Hagman also asked that the court refuse to award any attorney's fees. Shelton consented to the voluntary dismissal but demanded payment of attorney's fees under Rule 11, since Shelton could not possibly have known that the subbasin would be closed 14 months later, and under the Buyers Agency Agreement (CP 172 - 179). Shelton presented the amount of attorney's fees. (CP 294 - 299) The fees were uncontested by Hagman in amount. The matter was eventually heard on the merits by the trial court. The final attorney fee demand was for \$26,104.40. The trial court granted the voluntary dismissal of the case but refused attorneys fees to Shelton (CP 395 - 396). This appeal is brought to obtain the attorneys fees that are due Shelton from Hagman. (CP 397-404)

SUMMARY OF ARGUMENT

This is a rare single-issue appeal. The trial court erred by failing to award Shelton for attorneys fees, either under the contract or as a Rule 11 sanction.

Hagman brought a case that never had any merit. All representations that were made to Hagman were true at the time they were

made. The property became unbuildable fourteen months after the sale due to activities outside the control of Shelton, namely the closure of the Carpenter Fisher subbasin. If Hagman had moved promptly after purchasing the property he would have a house on the property today, with adequate water supply.

Shelton was put to a significant, and costly, effort to oppose the meritless case. A year and a half after the case was initiated Hagman apparently "saw the light" and moved to dismiss the meritless case. Shelton agreed to the dismissal but demanded her attorneys fees, as she was entitled under the contract with Hagman and Rule 11, CR. The trial court failed to award Shelton her attorneys fees in violation of Washington statute and case law.

Standard of Review

The standard of review in this case is a review de novo, as no evidence or testimony was taken by the trial court except for documentary evidence and argument. "We review questions of statutory interpretation de novo." *Sound Infiniti, Inc. v. Snyder*, 237 P.3d 241, 169 Wn.2d 199 (Wash. 2010). There is no question of fact, only an interpretation of the law.

Issue

Can the trial court ignore Rule 11, CR, and the attorneys fee clause between the parties in a contract?

Rule

The court is obligated to award attorney's fees under Rule 11, CR, and when the parties have a contract that calls for such fees.

Rule 11 states:

If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.

When the attorney's fees are based on a contract, the courts have stated:

We hold that the trial court has discretion regarding the amount of attorney's fees which are reasonable, but that where a contract provides for an award of reasonable attorney's fees to the prevailing party, such an award must be made.

Singleton v. Frost, 742 P.2d 1224, 108 Wn.2d 723 (Wash. 1987);

and

Pursuant to the Harting/Barton contract, we affirm the trial court's award of attorney fees to the Hartings. And we must award the Hartings attorney fees and costs on appeal. RAP 18.1; RCW 4.84.330; *Singleton v. Frost*, 108 Wash.2d 723, 727, 742 P.2d 1224 (1987); *Kofmehl v. Steelman*, 80 Wash.App. 279, 286, 908 P.2d 391 (1996).

Harting v. Barton, 6 P.3d 91, 101 Wn.App. 954 (Wash.App. Div. 3 2000). See also *Boyd v. Davis*, 897 P.2d 1239, 127 Wn.2d 256 (Wash. 1995), *Progressive Animal Welfare Soc. v. University of Washington*, 790 P.2d 604, 114 Wn.2d 677 (Wash. 1990).

Argument

There were no factual questions for the trial court in this case. There was a contract between Hagman and Shelton, a copy of which was affixed to Hagman's original complaint. That contract called for the payment of attorney's fees to the prevailing party in the event that a lawsuit was commenced by either party for the enforcement of the contract. Since Hagman voluntarily moved to dismiss this case Shelton is the prevailing party, by operation of law. The amount of attorney's fees presented to the trial court were reasonable and were uncontested by Hagman. Based on the statutory and case law of this state, the trial court had no discretion and was required to award Shelton for attorneys fees.

RULE 11 SANCTIONS

If an attorney signs pleadings that had no basis in law or fact then the court may issue sanctions against the attorney, his client, or both parties. This case on appeal is a negligence case, suggesting that Shelton had a duty to Hagman, that that duty was breached by Shelton, causing damages. Specifically, Hagman complained that the property did not have a well or other permanent water source and that, somehow, the realtors

should have known this fact and disclosed it to him. This argument ignores the "Well Disclosure Statement" that was part of the purchase and sale agreement, as well as the other indicators that Hagman should inquire as to water sources.

Washington statutes limit the duty of the realtor to a buyer. “(2) Unless otherwise agreed, a broker owes no duty to conduct an independent inspection of the property or to conduct an independent investigation of either party's financial condition, and owes no duty to independently verify the accuracy or completeness of any statement made by either party or by any source reasonably believed by the broker to be reliable.” RCW 18.86.030. See also *Douglas v. Visser*, 295 P.3d 800 (Wash.App. Div. 1 2013)

In addition to the statute, the contract between the parties limited to duty of the realtors to the buyer Hagman. The contract stated:

6. NO WARRANTIES OR REPRESENTATIONS. Broker makes no warranties or representations regarding the value of whether the suitability of any property for Buyers purposes. Buyer agrees to be responsible for making all inspections and investigations necessary to satisfy Buyer as to the property's suitability and value.
7. INSPECTIONS RECOMMENDED. Broker recommends that any offer to purchase a property be conditioned on Buyer's inspection of the property and its improvements. Broker and Agent had no expertise on these matters and Buyer is solely responsible for interviewing and selecting all inspectors.

By this documentation, the parties agreed that the defendant realtors would not be responsible for the condition of the property. By bringing this lawsuit Hagman has violated the specific terms of the contract. Such an action is a violation of Rule 11. The case is clearly not well grounded in fact, is not warranted by existing law and is otherwise an open violation of the statute and the contract between the parties. Shelton is entitled to her attorneys fees under this argument alone.

THE CONTRACT BETWEEN THE PARTIES

From Hagman's own documentation, and the exhibits that were made part of Hagman's complaint, a contract existed between the parties. That contract, which is labeled "Buyers Agency Agreement," and is also known as Form 41A. It calls for the payment of attorney's fees to the prevailing party. There is no dispute that the contract was entered into by both parties and is therefore effective in all its terms, particularly the attorneys fee clause.

PREVAILING PARTY

The contract between the parties calls for the payment of attorney's fees to the "prevailing party." Again, there is no dispute that Shelton is the prevailing party. For their part, Hagman claims that a voluntary dismissal, pursuant to Rule 41, CR, deprives either party of obtaining a judgment in their favor. Hagman then cites RCW 4.84.330 for the proposition that a

litigant must first have a final judgment to be the prevailing party in order to get attorney's fees. In support of this claim Hagman cites *Wachovia SBA Lending, Inc. v. Kraft*, 200 P.3d 683, 165 Wn.2d 481 (Wash. 2009). However, neither the statute nor this case has any effect on these parties. The *Wachovia* case only involves a reference to RCW 4.84.330, which is the statute that turns a one-sided Attorney's fee clause into a two-sided Attorney's fee clause, allowing both parties, not just the claiming party, to receive Attorney's fees. In those cases the legislature decided that a "final judgment" would be necessary for either party to be the "prevailing party."

The *Wachovia* case involved a one-sided attorney's fee clause. "Here, the attorney fees provisions at issue are unilateral. Clerk's Papers at 32, 39. Therefore, RCW 4.84.330 applies." *Wachovia*, supra, at 489. The case at bar does not have a one-sided Attorney's fee clause. All Attorney's fee clauses are already equal so RCW 4.84.330 and the *Wachovia* case have no implication in this case.

Additionally, the court in *Wachovia* acknowledged this difference between cases that involve RCW 4.84.330 and those that do not. In that case the court held:

Marassi appears to have crafted its erroneous rule from language in *Andersen v. Gold Seal Vineyards, Inc.*, 81 Wash.2d 863, 505 P.2d 790 (1973). *Andersen* suggests that a defendant may prevail when a plaintiff voluntarily dismisses a claim by virtue of the fact that the plaintiffs "failed to prove his claim." *Id.* at 868, 505 P.2d 790. *Andersen* also states that the general rule regarding nonsuits is that the defendant is regarded as having

prevailed. Id. **But *Andersen* did not deal with an award under RCW 4.84.330 and did not involve a statutory definition of "prevailing party"** as a party who receives a final judgment. Thus, Andersen did not answer the question before us. RCW 4.84.330 requires a final judgment to operate.

(Bold Added)

The *Andersen* case did not deal with RCW 4.84.330 and neither do we. As such, we do not have a statutory definition of "prevailing party" as a party who receives a final judgment. Instead, we have the definition used in *Andersen* which calls for the defendant to be the prevailing party when the plaintiff voluntarily dismisses its claim. Based on this definition, Shelton is the prevailing party and is entitled to her Attorney's fees and costs.

Hagman goes on to cite another case that, oddly, can only assist Shelton. The case is *Walji v. Candyco, Inc.*, 787 P.2d 946, 57 Wn.App. 284 (Wash.App. Div. 1 1990), and states that:

No authority is cited, nor is any compelling legal reason urged, for adopting the statutory definition of "prevailing party" quoted above in interpreting the lease provision. At the time of a voluntary dismissal, the defendant has "prevailed" in the common sense meaning of the word.

At 288.

In this case, at the time of voluntary dismissal, Hagman had failed to prove his case so Shelton becomes the prevailing party. Shelton, who is the prevailing party, is entitled to her costs and Attorney's fees.

REASONABLE ATTORNEY'S FEE

A reasonable Attorney's fee is a reasonable rate multiplied by a reasonable number of hours applied to the case. Without some compelling

reason to deviate therefrom, a normal attorney's billing would be considered a reasonable Attorney's fee. Hagman would have the burden of justifying a departure from Shelton's attorney's billing records.

A determination of reasonable attorney fees begins with a calculation of the " lodestar," which is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.

Morgan v. Kingen, 166 Wash.2d 526, 539, 210 P.3d 995 (2009); *Mahler v. Szucs*, 135 Wash.2d 398, 433-34, 957 P.2d 632, 966 P.2d 305 (1998).

To establish the reasonableness of the fee award, the Attorney's documentation of the work performed must satisfy at least a minimum level of detail. " The court must limit the lodestar to hours reasonably expended, and should therefore discount hours spent on unsuccessful claims, duplicated effort, or otherwise unproductive time.

Bowers v. Transamerica Title Ins. Co., 675 P.2d 193, 100 Wn.2d 581, 597 (Wash. 1983).

The trial judge " who has watched the case unfold ... is in the best position to determine which hours should be included in the lodestar calculation."

Chuong Van Pham v. City of Seattle, 159 Wash.2d 527, 540, 151 P.3d 976 (2007).

After the lodestar figure is calculated, the court may consider an adjustment based on additional factors under two broad categories: "the contingent nature of success, and the quality of work performed." *Bowers*, 100 Wash.2d at 598, 675 P.2d 193. The party proposing the deviation from the lodestar bears the burden of justifying it. *Bowers*, supra. 224 *Westlake, LLC v. Engstrom Properties, LLC*, 281 P.3d 693 (Wash.App. Div. 1 2012).

For his part, Shelton's counsel has been practicing real estate law since first being admitted to the bar in Minnesota in May, 1985, and since

being admitted in Washington in October, 2008. Counsel charged his regular rate of \$280 per hour, a reasonable rate for an attorney of his experience, for a reasonable number of hours on a case where damages, although never stated clearly by the plaintiff, were believed to be the amount of the contract, \$265,000, plus interest, costs and fees and any additional Consumer Protection Act fees or costs..

In this case, Hagman brought a very extensive complaint against several defendants and alleged many different theories of recovery, including the consumer protection act, requiring significant response. The complaint also required Shelton to do extensive research into the novel laws regarding water rights, subbasin closure, the Department of Ecology and its connection to the county, in addition to research into real estate broker liability, in both statutes and case law. Shelton also had to engage in discovery, both issuing and responding to interrogatories, production of documents, and attending two depositions.

It wasn't until the trial on this matter was barely weeks away, with the plaintiff, faced with answering the defendant's Requests for Admissions, which focused the plaintiff's attention to the fact that he has no case, that the case was finally dismissed.

Shelton made an effort to shorten the case by bringing a motion for summary judgment. Hagman responded with several inches of pleadings, many of which were voluminous, containing copies of many documents,

most of which were already in the file, but all of which had to be reviewed by Shelton prior to the hearing.

Shelton would also ask that the court take note of the open and friendly approach taken by Shelton toward Hagman's counsel. Shelton's counsel made contact with plaintiff's counsel, both by telephone and by email, endeavoring to provide as much information to Hagman's counsel as possible in the hopes that Hagman would come to this voluntary decision to dismiss the case before any Attorney's fees of significance were billed. Unfortunately, the actions of Shelton's counsel were unavailing.

The court will find that Shelton's Attorney's fees match the lodestar approach, include a reasonable rate and a reasonable number of hours in response to this case. The court will also find that Shelton made a good effort to keep Attorney's fees to a minimum and that Hagman has provided no reason to deviate from the lodestar approach.

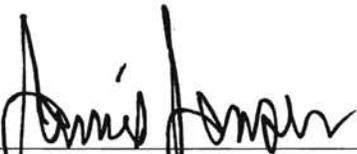
ATTORNEY'S FEES ON APPEAL

It is necessary to request attorney's fees in the opening brief of an appeal if the party believes they are entitled to such fees. Appellant is entitled to such fees by rule and by contract. The right to attorney's fees at the trial level should be found in appellant's favor, due to the clarity of law on the matter. Any opposition at the appellate court level would be frivolous.

CONCLUSION

Hagman brought an action against Shelton that had no merit and Hagman was informed that their actions had no merit and that Attorney's fees plus Rule 11 sanctions would be sought. Hagman continued to press on with the case to a point just short of trial before realizing their action was meritless. Shelton agreed that the matter should be dismissed and that Shelton is entitled to receive the Attorney's fees and costs generated by Hagman's frivolous action.

DATED this 21st day of January, 2014



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