

No. 72919-5-I

**COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON**

SONJA O. BEAL and ROBERT E. BEAL,

Respondents/Cross-Appellants,

v.

RICHARD D. CAMPBELL and
REBECCA LEE MARCY,

Appellants/Cross-Respondents.

Reply Brief of Respondents/Cross-Appellants

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I. REPLY BRIEF SUMMARY

Beals respectfully request that the Court of Appeals award interest on Beals' damages for the value of the lost property from November 28, 2011 to November 24, 2014. Beals' damages were sufficiently liquid to award interest in a manner consistent with case law governing damages for breach of a warranty deed's covenants and prejudgment interest.

Furthermore, Beals respectfully request the Court of Appeals award Beals their attorney fees from March 26, 2014 through August 29, 2014 as damages proximately caused by Campbell's breach of the covenant to defend and award Beals their attorney fees incurred responding to Campbell's frivolous appeal of the trial court's orders.

II. ARGUMENT

A. Beals Should Have Been Awarded Interest On The Lost Property's Value From The Date of Conveyance Since Beals' Damages Were Liquidated.

Since Campbell breached the covenants under the warranty deed, Beals, as the injured grantees, were rightfully awarded both damages for the value of the lost property and attorney's fees incurred defending title. *See Edmonson v. Popchoi*, 172 Wn.2d 272, 278, 256 P.3d 1223 (2011) (citing *Mastro v. Kumakichi Corp.*, 90 Wn. App. 157, 163, 951 P.2d 817 (1998)). Beals' damages, however, should have also included interest on the amount awarded for lost property. *See id.* at 277. The Court of

Appeals for Division One has itself confirmed that interest is an allowable item of damage for breach of a warranty deed's covenants. Foley v. Smith, 14 Wn. App. 285, 295-296, 539 P.2d 874 (1975).

In addition, prejudgment interest is awardable when a claim can be categorized as liquidated, or readily determinable. Hansen v. Rothaus, 107 Wn.2d 468, 472, 730 P.2d 662 (1986) (citing Prier v. Refrigeration Eng'g Co., 74 Wn.2d 25, 442 P.2d 621 (1968)). A claim is liquidated when the evidence furnishes data that, if believed, makes it possible to compute damages with exactness. *Id.* A dispute over the claim, in whole or in part, does not change the character from liquidated to unliquidated. *Id.* at 472-473.

An award of prejudgment interest is based on the principle that a defendant who retains money that ought to be paid to a plaintiff should be charged interest, *id.* at 473, with the plaintiff compensated the "use value" of the money from the time of loss to judgment. *Id.* (citing Mall Tool Co. v. Far West Equip. Co., 45 Wn.2d 158, 273 P.2d 652 (1954)). Awarding Beals interest on monies paid to Campbell for land for which title failed would simply reimburse Beals for the years the Beals were deprived of the use of their money and that Campbell enjoyed use of Beals' money. Since Beals' damages were sufficiently liquid, an award of interest would be

consistent with case law regarding damages for breach of a warranty deed's covenants and prejudgment interest.

The evidence before the trial court provided sufficient information from which Beals' damages could be computed with exactness. On November 28, 2011, Beals purchased the property, including the portion to which title ultimately failed (the "Property"), for \$274,000.00. EX 4. As King County public records show, the Property's improvements constituted 49 percent of the entire Property's 2011 value. EX 19. The land constituted the remaining 51 percent of the Property's 2011 value. *Id.* Accordingly, the Property's land value was \$139,740.00, or 51 percent of the \$274,000.00 Beals paid Campbell on November 28, 2011.

Per the survey Beals conducted after their purchase, the Property was 61,990 square feet. EX 5. Therefore, Beals' payment of \$139,740.00 to Campbell for the 61,990 square feet of land amounted to payment of \$2.25 per square foot to Campbell. At \$2.25 per square foot, Beals paid Campbell \$20,583.00 for 9,148 square feet of lost property. This readily determinable damages calculation is even greater than the valuation of the expert, Ms Sestrap.

That Beals and the trial court also relied upon the testimony of Ms Sestrap, a licensed appraiser, to support other evidence of value before the court does not mean Beals' damages were unliquidated. Ms Sestrap's

testimony regarding other ways of valuing the property simply provided additional evidence that discredited Campbell's unsupported valuation. The additional evidence of value before the trial court confirms that Beals' damages were readily determinable and, therefore, sufficiently liquid to award interest.

Beals should have been awarded interest of \$6,616.49 on Beal's damages for lost property of \$18,446.52, the most conservative legitimate valuation of the lost property and the valuation ultimately adopted by the trial court. Such an interest award would represent interest accrued on the lost property's value at 12 percent per annum, pursuant to RCW 19.52.020, from the date Beals purchased the Property, November 28, 2011 to trial on November 24, 2014. Such an award would be consistent with case law regarding damages for breach of a warranty deed's covenants and prejudgment interest and should, therefore, have been awarded by the trial court.

B. Beals Should Have Been Awarded Attorney Fees Through August 29, 2014 As Fees Proximately Caused By Campbell's Breach Of The Covenant To Defend.

As the Supreme Court has stated, when the covenant to defend is breached the grantor must pay the grantee's attorney fees incurred in defending title. Edmonson at 284. Such attorney fees include "in the context of the warranty to defend, attorney fees proximately caused by the

breach.” Buck Mountain Owners’ Association v. Prestwich, 174 Wn. App. 702, 731, 308 P.3d 644 (2013) (citing Edmonson v. Popchoi, 155 Wn. App. 376, 384, 228 P. 3d 780 (2010)). Although the trial court rightfully awarded Beals their attorney fees through March 25, 2014 as fees incurred defending title, Beals should have also been awarded their attorney fees through August 29, 2014, when summary judgment as to liability was entered, since those fees were proximately caused by Campbell’s breach of the covenant to defend.

The question for this court is whether the facts of this unusual case warrant awarding Beals attorney fees incurred after entry of the Agreed Judgment on March 25, 2014 which effectively settled the Lopez Francis’ adverse possession claim and Beals’ quit title claim. CP 345. Beals contend that their fees through August 29, 2014, should have been awarded as fees proximately caused by Campbell’s breach of the covenant to defend since Beals would have been prejudiced had they not contested Campbell’s motion for summary judgment – a motion that plainly operated as Campbell’s attempt to evade the duty to defend.

Campbell’s motion for summary judgment asserted that Campbell had defended title, even though Campbell had not defended title, and that Campbell could condition acceptance of the tender of defense on being allowed to represent Beals *pro se*, on not paying any damages to Beals for

the lost property, and on not reimbursing any of Beals' attorney fees incurred defending title. CP 357-359. Furthermore, although Beals and Lopez Francis had settled the adverse possession and quit title claims on March 25, 2014, Campbell argued that Beals must prove the Lopez Francis' adverse possession claim at the August 29, 2014 hearing on Campbell's motion for summary judgment. CP 360.

At the August 29, 2014 hearing on Campbell's motion for summary judgment, the trial court denied Campbell's motion and granted Beals' motion for partial summary judgment. CP 557. The court found Campbell liable for breaching the covenant to defend since Campbell inappropriately conditioned acceptance of the tender of defense on being allowed to act as Beals' *pro se* counsel and on not paying Beals any damages for breaching the covenants of the warranty deed. CP 379. Similarly, at the damages trial on November 24, 2014, the trial court held that all of Beals' attorney fees through the Agreed Judgment of March 25, 2014, were incurred defending title and arose from "Mr. Campbell's conditional and essentially ineffective responses to the tender." RP 258.

Despite two separate judges finding that Campbell's conditional responses to the tender breached the covenant to defend, Beals were not awarded attorney fees through the August 29, 2014 hearing on Campbell's motion for summary judgment at which Campbell argued that the very

things the trial court held were a breach of the covenant to defend were legitimate. However, attorney fees incurred by Beals defending against Campbell's claims that Campbell had defended title, could condition acceptance of the tender on acting as Beals' *pro se* counsel, and could condition acceptance of the tender on not paying Beals any damages should have been awarded to Beals since they were proximately caused by the very acts the trial court concluded constituted a breach of the covenant to defend.

Beals should have been awarded the attorney fees they incurred responding to Campbell's attempt to evade the duty to defend through the hearing on Campbell's August 29, 2014, motion for summary judgment. But for Campbell's repeated conditional responses to the tender of defense and repeated breach of the covenant to defend, Beals never would have needed to incur the substantial attorney fees they incurred defending against Campbell's motion. Had Campbell simply declined to defend title at the outset, almost none of Beals' attorney fees would have been incurred. Instead, Campbell promulgated a lengthy and expensive charade which caused Beals to incur otherwise unnecessary fees and should result in an award to Beals of \$31,802.00 in attorney fees incurred from March 25, 2014 to August 29, 2014, EX 42, since those fees were proximately caused by Campbell's breach of the covenant to defend.

C. Beals Should Be Awarded Attorney Fees On Appeal Because Campbell's Appeal Is Frivolous.

For purposes of awarding attorney fees on appeal under either RAP 18.1 or 18.9(a), an appeal is frivolous and a recovery of fees is warranted if no debatable issues upon which reasonable minds might differ are presented and issues are so devoid of merit that no reasonable possibility of reversal exists. Harrington v. Pailthorp, 67 Wn. App. 901, 913, 841 P.2d 1258 (1992), *review denied*, 121 Wn.2d 148 (citing Marriage of Greenlee, 65 Wn. App. 703, 710, 829 P.2d 1120 (1992)). An appeal of summary judgment is frivolous, and supports an award of appellate attorney fees, where appellants' arguments could not have resulted in reversal because they either lack merit, rely on a misunderstanding of the record, require consideration of evidence outside the record, or were not adequately briefed. Stiles v. Kearney, 168 Wn. App. 250, 268, 277 P.3d 9 (2012).

1. Campbell's appeal of the trial court's order granting Beals' motion for partial summary judgment is frivolous because it is meritless.

Campbell's appeal of summary judgment is premised on the meritless argument that the evidence at summary judgment did not establish that Campbell had breached the covenants of the warranty deed. Contrary to Campbell's contention, all the evidence before the trial court

established Campbell had breached the covenant of seisin, covenant of quiet possession and covenant to defend. Campbell presented no contrary evidence at summary judgment. The trial court's order granting plaintiff's motion for partial summary judgment should be affirmed and Beals should be awarded attorney fees incurred responding to Campbell's frivolous appeal.

First, with regards to the covenant of seisin, in Mastro v. Kumakichi Corp., the Court of Appeals for Division One held that a grantor breaches that covenant when the grantor delivers a deed to a grantee while a third-party encroachment exists on the described property. Mastro v. Kumakichi Corp., 90 Wn. App. 157, 163, 951 P.2d 817 (1998). At summary judgment, Beals presented the trial court with the warranty deed in which the disputed property was legally described. CP 419, 421, EX 4. Beals also presented Jamie Lopez's declaration in which Mr. Lopez testified that he and Ms Francis' possessed the disputed property at the time Campbell conveyed the Beal Property to Beals. CP 395. Campbell presented no evidence to contradict evidence that Campbell had breached the covenant of seisin by delivering a deed to Property that Lopez and Francis possessed. RP 5-6.

Second, the covenant of quiet possession is breached where premises are possessed by third-persons claiming under superior title at

the time the deed is delivered, and the grantee cannot be put into possession. Whatcom Timber Co. v. Wright, 102 Wash. 566, 568, 173 P. 724 (1918). Evidence of adverse possession is sufficient to support a claim to title so long as such possession is adverse and hostile for the statutory period. Hoyt v. Rothe, 95 Wash. 369, 374, 163 P. 925 (1917). Jamie Lopez's declaration, along with the declarations of Lopez and Francis' predecessors, George and Ellen Welch, evidenced actual, hostile, open, notorious, continuous and exclusive possession of the disputed property that began in 1998. CP 385, 390, 395. Campbell provided no contradictory evidence even though Campbell, as the former property owner, could have asserted possession of the Property during Campbell's ownership. CP 402, RP 21.

Lastly, Washington's Supreme Court has held that a grantor breaches the covenant to defend title when conditioning acceptance of the tender since conditional acceptance effectively operates as a refusal of the tender. Edmonson at 280 (citing Mastro at 166). Evidence that Beals repeatedly tendered defense of the Lopez Francis' adverse possession claim to Campbell, CP 428-430, RP 217, and that Campbell improperly conditioned acceptance of the tender on several occasions and ultimately failed to defend title was presented to the trial court. CP 428-430, RP 218. Campbell provided no evidence that Campbell defended Beals' title or

provided anything but ineffective conditional responses to Beals' tenders of defense. RP 20-21.

Campbell's appeal of the trial court's order granting plaintiff's motion for partial summary judgment on the issue of liability is totally devoid of merit since Campbell presented no evidence to contradict the evidence that Campbell had breached the covenant of seisin, covenant of quiet possession and covenant to defend. Furthermore, Campbell misunderstands the record, procedure, and law in arguing that because Lopez and Francis' earlier summary judgment motion on their adverse possession claim was denied without prejudice that Beals' partial summary judgment motion regarding liability for breach of the covenants should have also been denied. Beals should be awarded attorney fees incurred responding to Campbell's meritless, frivolous appeal of the trial court's order granting Beal's motion for partial summary judgment.

2. Campbell's appeal of damages is frivolous because it presents no debatable issues upon which reasonable minds might differ and is so devoid of merit that no reasonable possibility of reversal exists.

Campbell's appeal is also frivolous because the appeal of the damages award presents no debatable issues upon which reasonable minds might differ and is completely devoid of merit that no reasonable possibility of reversal exists. Campbell's arguments for reversal of the

trial court's damages award rely on misstatements and misunderstanding of the record and law. Had Campbell bothered to read and cite Edmonson, the leading and most recent Washington Supreme Court case regarding breach of the statutory covenants and the duty to defend, at all in his appeal briefs, Campbell may have realized the frivolous nature of this appeal.

First, Campbell wrongfully claims that Beals were awarded attorney fees incurred pursuing Campbell for breach of the statutory covenants. That is simply wrong. Beals were not awarded one penny in attorney fees after March 25, 2014, when the adverse possession and quiet title actions were settled with Lopez and Francis. CP 710. The trial court awarded Beals only attorney fees through the Agreed Judgment on March 25, 2014 concluding that all of those attorney fees were awardable because they were fees incurred defending title because they arose from Campbell's ineffective conditional responses to Beals' tender of defense. CP 712, RP 259. No legitimate basis for reversing the attorney fees awarded to Beals has been asserted by Campbell.

Second, the trial court did not use the improper legal standard when awarding Beals' damages for the value of the property they lost due to the Lopez Francis adverse possession claim. Despite Edmonson going uncited by Campbell, that case makes clear that "where covenants under

the warranty deed are breached, an injured grantee is entitled to recover both damages for lost property, or diminution in property value, and attorney's fees incurred in defending title." Edmonson at 278 (citing Mastro at 163). The trial court properly awarded Beals' damages for the value of the lost property, and properly relied on the testimony of a licensed appraiser as evidence of value before the trial court. RP 257. There is no basis for reversing the trial court's order regarding damages for lost property.

In Harrington, the Court of Appeals for Division One awarded a respondent attorney fees on appeal because the appellant persisted in an action despite a lack of any facts or law to support that appeal. See Harrington, 67 Wn. App. 901, 841 P.2d 1258 (1992), *review denied*, 121 Wn.2d 148. Campbell requests that this Court reverse the trial court's order holding that Campbell breached the covenant of seisin, covenant of quiet possession, and covenant to defend without providing or citing any evidence to support a reversal. Similarly, Campbell request to reverse the trial court's order regarding damages relies on a complete misrepresentation or misunderstanding of the law and facts. Campbell's appeal is entirely meritless and Beals should be awarded the attorney fees they incurred responding to this frivolous appeal.

III. CONCLUSION

Beals respectfully request the following relief:

1. Affirm the trial court's order granting Beals' motion for partial summary judgment as to Campbell's liability for breaching the covenant of seisin, covenant of quiet possession and covenant to defend.
2. Affirm the trial court's order awarding Beals' damages of \$18,446.52 for the value of lost property and \$21,310.00 in attorney fees incurred defending title through March 25, 2014.
3. Reverse the trial court's order finding that Beals were not entitled to interest on the value of the lost property and award Beals \$6,616.49 for interest on the \$18,446.52 value of the lost property from November 28, 2011 to November 24, 2014 at the rate of 12 percent per annum.
4. Reverse the trial court's order limiting Beals' attorney fees to fees incurred defending title through March 25, 2014, and award Beals an additional \$31,802.00 in attorney fees incurred from March 25, 2014 through August 29, 2014 since those fees were proximately caused by Campbell's breach of the covenant to defend.
5. Award Beals their costs pursuant to RAP 14.1.
6. Award Beals their attorney fees on appeal pursuant to RAP 18.1 and RAP 18.9.

Respectfully submitted this 11th day of June, 2015.

Winslow Law Group, PLLC

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

By: J.B. Ransom, WSBA #11941
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IV. APPENDIX

Findings of Fact Challenged on Cross-Appeal

13. Beals defended title to their property and incurred reasonable attorney fees defending title from March 27, 2013 through March 25, 2014 in the amount of \$21,310.00. All Beals' attorney fees incurred from March 25, 2014 were incurred defending title and constitute damages for Campbell's breach of the covenant to defend.

14. Beals should be awarded interest at the statutory rate of twelve percent (12%) from the date the damages became liquidated; that is, the date of trial, November 24, 2014, on the value of the land lost and effectively rendered useless to the Beals due to Campbell's breaches of the covenant of seisin and covenant of quiet enjoyment (\$18,446.52) and the attorneys' fees incurred by Beals due to Campbell's breach of the covenant to defend (\$21,310.00).

Conclusions of Law Challenged on Cross-Appeal

9. Beals should not be awarded interest on the monies paid to Campbell for the lost and effectively lost land (i.e. \$18,446.52) from November 28, 2011, the date of purchase, to the date of entry of judgment.

10. Beals should be awarded judgment of \$21,310.00 as damages for the attorneys' fees they incurred defending title due to Campbell's breach of the duty to defend.

CERTIFICATE OF SERVICE

On June 11, 2015, I caused to be served upon the below named pro se defendants, at the address stated below, via the method of service indicated, a true and correct copy of the foregoing document and attachments thereto.

Richard D. Campbell, Pro Se Via Email to rdcampbell@frontier.com
Rebecca Lee Marcy, Pro Se
21421 NE 92nd Place
Redmond WA 98053

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED at Seattle, Washington on June 11, 2015.



JULIE C. KEATON

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