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No. ~~4~~557-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

HAL MOORE and MELANIE MOORE; and LESTER KRUEGER and
BETTY KRUEGER,

Appellants,

v.

STEVE'S OUTBOARD SERVICE, and
STEVEN LOVE, and MARY LOU LOVE,

Respondents.

SUPPLEMENTAL BRIEF OF RESPONDENTS

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I. Issue.

The Court of Appeals should affirm the trial court's award of attorneys fees to Steve and Mary Lou Love and Steve's Outboard Service because it is clear from the record that the trial court carefully considered the fees requested in the manner required by applicable law, and there was no abuse of discretion.

II. Statement of Facts.

The trial court ruled as follows: "A segment of the case did involve the Shorelines Management Act. And under RCW 90.58.230, there is a provision for award of attorneys fees to the prevailing party, attorneys fees and costs. There was some disagreement about whether that included a prevailing defendant. And in the case of Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801 (1992), the Court made clear that this does apply to a prevailing defendant." (RP 6-7, trial court's oral ruling on attorneys fees).

"The Court did hear both of the plaintiffs, Ms. Melanie Moore and Ms. Betty Krueger testify that they were not asking for damages. Yet in reviewing the plaintiffs' closing argument at page 2, beginning at line 12, it states quote, while the plaintiffs are not necessarily seeking damages, damages are allowed both under the Nuisance Statute and State Shoreline Management Act, and should be considered by the Court." (RP 7).

“And then for the concluding paragraph in plaintiffs’ closing argument, beginning on line 11 on page 19, quote, plaintiffs also seek damages for the significant loss and enjoyment of their properties from 2004 to the present, end quote.” (RP 7).

“So while there was testimony that specifically those two plaintiffs were not asking for damages, there was request for the Court to first consider the fact that damages could be awarded and secondly, to consider damages for the significant loss and enjoyment of their properties from 2004 to the present.” (RP 7).

“So the Court will find that the Shoreline Management RCW is applicable in this case. The Court will find that defendants, Steve’s Outboard Service and Steven Love and Mary Lou Love were the prevailing parties. And we’ll need to go through the billings that have been submitted essentially line-by-line to look and compare under the requirements of the lodestar method to make sure that the Court can find that the services that were performed were at a reasonable rate; that they were reasonably related to the claim. And then once the Court makes an initial determination of time and rate, is able to put in place a multiplying factor, if the Court believes that is appropriate. So for that part of the Court’s decision I will need to spend some time going line-by-line on the billing records.” (RP 8).

The court reconvened on September 12, 2010, and ruled as follows:

“Yes, and that was my recollection as well, although some time has gone by. My recollection was that the Court had made a decision to award attorneys fees and costs, and then the next step was to look through the documentation and apply the lodestar method, as is required. And so I’ll go ahead at this point with my recitation of my decision as to the attorneys fees and costs in use of the lodestar method.” (RP 11-12).

“Washington has adopted the lodestar method for determining the amount of an award of attorneys and costs. And the lodestar approach involves two steps. First, the award is determined by multiplying a reasonable hourly rate by the number of hours reasonably expended on the matter. Second, the award is adjusted, or may be adjusted, either upward or downward to reflect factors not already taken into consideration.” (RP 12).

“So under the lodestar methodology, a court must first determine that counsel expended a reasonable number of hours in securing a successful recovery for the client. Counsel must provide reasonable documentation of the work performed, as the Court said in Bowers v. Transamerica Title Insurance Company, 100 Wn.2d 581 at 597(1983), quote, to this end, the attorneys must provide reasonable documentation of

the work performed. This documentation need not be exhaustive or in minute detail, but must inform the court, in addition to the number of hours worked, the type of work performed and the category of attorney who performed the work (i.e., senior partner, associate, etc.). The court must limit the lodestar hours reasonably expended, and should therefore discount hours spent on unsuccessful claims, duplicated effort, or otherwise unproductive time, end quote. (RP 12-13).

“Normally the prevailing party will submit an attorney’s declaration or affidavit detailing the hours worked, the type of work performed, the category of the attorney who performed the work if there is more than one attorney or person working on the file – sometimes even a paralegal works on a file and that’s billed at a different hourly amount. And this information then allows the Court to make the assessments required in the first set, or part of the lodestar assessment.” (RP 13).

“In this particular case, Moore v. Steve’s Outboard Service, two defense attorneys were engaged, one after the other. First the firm of Eisenhower and Carlson. And unless I missed it in the file, no attorneys fees declaration or affidavit was filed by anyone from Eisenhower and Carlson, but instead copies of billing statements were attached to Mr. Finlay’s motion for attorneys fees and costs filed October 15, 2010, coupled with defendant, Mr. Love’s declaration that he hired the firm of

Eisenhower and Carlson to defend. And that they billed at \$250 per hour, and that Mr. Love spent a total of \$20,213 before then hiring Mr. Finlay to take over the defense in the case.” (RP 13).

The trial court concluded that the billing documents from Eisenhower and Carlson were insufficient for her to make the required determinations. (RP 14).

The trial court then ruled on fees requested by Mr. Finlay, as follows:

“Secondly Mr. Finlay took over the case at a late stage. And there are two declarations from Mr. Finlay. The first, which was filed on October 15, 2010, is insufficient to allow the required analysis regarding the time spent. This declaration indicates that the client was billed a \$5,000 flat fee. And that does not permit the Court to do the type of assessment that is needed in the first part of the lodestar methodology.” (RP 14-15).

“However secondly, there was filed a supplemental declaration by Mr. Finlay on October 22, 2010 which set out dates. Some were approximate, which is okay. And we know that this documentation of attorneys time and effort need not be exhaustive or in minute detail. But it must inform the Court of the number of hours worked, the type of work performed, and the category of the attorney performing the work. We

know from the declaration that only Mr. Finlay provided this work and this his billing rate was \$250 per hour for this type of work, even though he did charge a flat fee in this particular case.” (RP 15).

“The Court has reviewed those entries. And I realize that there had been argument earlier on about excluding some of the work that did not specifically pertain to the Shorelines Management Act allegations. But in hearing the case, the Court found the Shoreline Management issues so intertwined with the other nuisance theories, and other theories of the case, that it was not possible to separately assess those portions of the attorneys fees. And will use the total of 67.25 hours as a reasonable amount of hourly work to get to the result that was obtained.” (RP 15-16).

“The court will further find that the \$250 per hour amount for billing is appropriate and reasonable in this particular case. And will set the attorneys fees for payment by the defendants in the amount of \$16,812.50.” (RP 16).

“And I did skip the second part of the lodestar, and maybe I did that because I had already considered whether or not going upward or downward from that hourly rate was appropriate. And I saw no other factors that had not already been taken into consideration that would require under the second part of the lodestar analysis to go either upward or downward in the end award.” (RP 16).

“I know that you will probably be listening and thinking that I am fairly picky about attorneys fees awards, and that’s true. I am fairly picky about attorneys fees awards. And I do that not just because I myself feel that that’s an important part of my job, but I am aware of our Supreme Court saying that in the past we have expressed more than modest concern regarding the need of litigants and courts to rigorously adhere to the lodestar methodology. Courts must take an active role in assessing the reasonableness of the awards, rather than treating cost decisions as a litigation after thought. Courts should not simply accept unquestioningly fee affidavits from counsel. And consistent with such an admonition is the need for an adequate record to be made on fee award decisions.” (RP 16-17).

“And the Court has seen that cases will come down from the appellate court back to the lower court for an actual review on a fee award, if there is not an adequate record made as to why things were either awarded or not awarded. So those are the reasons that the Court is fairly picky with regard to fee awards.” (RP 17).

“So the total awarded then is the amount of \$16,812.50. I am hopeful that you have some paperwork that we could just fill the blank in with that amount.” (RP 17).

The Court asked Mr. Mann, counsel for the Moores and Kruegers, whether he had any objection to the Court using the form provided by counsel for the Loves. Mr. Mann for the Moores and Kruegers stated that he had no objection. (RP 18).

The Loves moved the Court to reconsider whether to award the fees billed by Eisenhower and Carlson, supported by appropriate billing records and declarations. The Court made its ruling on December 6th and granted the award, as follows:

“The Court will grant essentially the motion for reconsideration with respect to the fees from the Eisenhower Law Firm and allow certain of those fees. The Court will allow the fees beginning with the service on July 6, 2006 with a telephone call from Steve and Mary Lou Love regarding lawsuit; review complaint, telephone call to attorney for county and review file. Anything prior to that the Court does not find is appropriate to be awarded under the circumstances, especially those fees that went back more than two years prior to that.” (RP 24).

“So beginning July 6, 2006, the complaint in this case having been filed June 23, 2006, the Court will find that these fees are reasonable and will award the same, with one other exception. And that is to remove the fees that were charged regarding the discovery sanction issue. And that

may take you to do a little bit of math. Shall I put it on again for presentation in one or two weeks?" (RP 24).

III. Argument.

It is clear from the record that the trial court carefully considered the request for attorneys fees, applied the correct analysis and came to a decision that was within its discretion.

There are two principal steps in computing an attorney's fee award under the lodestar method. First, a lodestar fee is determined by multiplying a reasonable hourly rate by the number of hours reasonably expended on the lawsuit. Second, the lodestar is adjusted up or down to reflect factors, such as the contingent nature of success in the lawsuit or the quality of legal representation, which have not already been taken into account in computing the lodestar and which are shown to warrant the adjustment by the party proposing it. Bowers v. Transamerica Title Ins. Co., 100 Wn.2d 581, 593-94, 675 P.2d 193, 593-94 (1983).

The trial court must determine the number of hours reasonably spent on the litigation. To this end, the attorneys must provide reasonable documentation of the work performed. The documentation need not be exhaustive or in minute detail, but must inform the court, in addition to the number of hours worked, of the type of work performed and the category of attorney who performed the work. 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, at 597.

Here, the trial court obviously considered the declarations of both Eisenhower and Carlson and Bruce Finlay for the Loves, and discounted certain hours that it felt did not directly pertain to the litigation. The hours it awarded are reasonably related to the litigation and based on a reasonable hourly rate. The award was within the trial court's discretion. Thus, this Court should affirm the award. In the alternative, the Court should remand this issue to the trial court for entry of formal findings of fact and conclusions of law to support the attorneys fee award. However, the trial court's oral ruling is detailed and thorough and should suffice for review. As argued in the Loves' brief, there was no objection to the form of the attorneys fee award in the trial court and there was no request for entry of formal findings and conclusions; thus, the Moores and Kruegers have waived that issue. RAP 2.5; Dyer v. Dyer, 65 Wash. 535, 538, 118 P. 634 (1911); Ach v. Carter, 21 Wash. 140, 142, 57 P. 344 (1899).

IV. Conclusion.

The Court of Appeals should affirm the award of attorneys fees to the Loves. Although formal findings of fact and conclusions of law were not entered, the trial court's oral ruling was extensive, detailed, and

correctly applied applicable law; the record is fully sufficient for the appellate court to review the basis for the trial court's decision.

Should the Court disagree, the matter should be remanded to the trial court for entry of written findings and conclusions.

Respectfully submitted October 4, 2011.

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I hereby certify that on this 4th day of October, 2011, I caused the original and one copy of the document to which this certificate is attached to be delivered for filing via U.S. Mail to:

Clerk of Court
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402
(253) 593-2970, tel

I further certify that on this 4th day of October, 2011, I caused a copy of the document to which this certificate is attached to be delivered to the following via U.S. mail:

Dennis D. Reynolds, Attorney at Law
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Declared under penalty of perjury under the laws of the State of Washington at Shelton, Washington this 4th day of October, 2011.

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