

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

DALE R. HARKINS and ELIZABETH H. HARKINS, a married couple

Plaintiff's/Appellants

vs.

CARRIE L. MERRILL, a single woman

Defendant/Respondent

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Roger Bennett, Judge
Clark County Case No. 05-2-02006-1

CORRECTED BRIEF OF DEFENDANT/RESPONDENT
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INTRODUCTION

This matter comes before the Court of Appeals on plaintiff's Notice of Appeal from the award of attorney fees to defendant after a court trial. Plaintiffs originally brought claims for a total of \$91,000.00. Plaintiffs brought their claims under various theories, but had two basic claims. One for loss of personal property totaling \$41,000.00 and the other for emotional distress and personal injury damages for \$50,000.00. Plaintiffs prevailed on their loss of personal property claim, though, for a much smaller sum than they claimed (\$5,200.00). Plaintiff's claim for intentional infliction of emotional distress was dismissed after trial and plaintiffs received nothing on that claim. Defendant did not bring any counterclaims. Plaintiffs have appealed the award of attorney fees to defendant and the denial of their motion for attorney fees.

ANSWER TO ASSIGNMENTS OF ERROR

1. The Court did not err in awarding attorney fees to defendant. Defendant prevailed on the plaintiffs' breach of contract claim and their claim for personal injuries for intentional infliction of emotional distress. Defendants were a prevailing party.
2. The Court did not err in denying plaintiffs attorney fees for failing to file their motion for attorney fees within the time required by CR 54(d)(2). Plaintiffs failure to file their motion for attorney fees within the time required by CR 54(d)(2) was not the result of excusable neglect and plaintiffs were, thus, not entitled to an extension of time to file their motion under CR6(b)(2).

STATEMENT OF THE CASE

Plaintiffs were the sellers of real property pursuant to a purchase and sale agreement. Findings of Fact, Conclusions of Law, pg. 2, lines 4-8. After the closing date of the sale and the date whereby the parties agreed to transfer possession, plaintiffs left personal property on the

premises without the permission of defendant. Id. The following day, defendants had a scrap metal dealer remove some of plaintiffs' personal property. Id. at lines 23-25. Plaintiffs retrieved much of their personal property, but brought this action for damages for the personal property and emotional distress allegedly due to defendant's disposal of their personal property. Id. at pg. 3, lines 3-15. Ruling on Bench Trial, pg. 1, line 18.

After a bench trial the trial court awarded plaintiff's \$5,200.00. Ruling on Bench Trial, pg. 9, line 10. Defendant prepared the form of Judgment. Findings of Fact and Conclusions of Law, pg. 4. On September 2, 2011, defendant presented the form of Judgment for the court's consideration. Id. At that time and contrary to plaintiff's representation in their brief, the court entered judgment but did not award either party attorney fees. Id. RP, lines 11-19. Attorney fees were reserved for subsequent motion. Id. A motion for attorney fees is required to be made under CR 54(d)(2).

On September 12, 2011, defendant filed her motion for attorney fees. Plaintiffs failed to file any motion for attorney fees by September 12, 2011. Ruling on Cross Motions for Attorney's Fees, pg. 3. Instead, on September 13, 2011, after the deadline for filing a motion for attorney fees, plaintiffs filed a motion to allow the late filing of a motion for attorney fees. Id. Designation of Clerk's Papers, pg. 3, item #53. Plaintiff's motion for attorney fees was not filed until October 12, 2011. Designation of Clerk's Papers, pg. 3, item #57. After a hearing, the court found that both parties were prevailing parties and awarded defendant 50% of her attorney fees. Id. Pg 4. Plaintiffs' motion for attorney fees was denied as untimely under CR 54(d)(2). Id. Pg. 3. The Court's Ruling on the Cross-Motions for Attorney fees was entered on October 20, 2011. Id. pg. 1. Plaintiffs filed a motion for reconsideration on November 4, 2011, more

than 10 days after the Court's Ruling was filed. Designation of Clerk's Papers, pg. 4, item #60. A Supplemental Judgment to enforce the court's previous ruling on attorney fees was entered without hearing on November 21, 2011. Designation of Clerk's Papers, pg. 4, item #64. In addition on the same date, the court ruled on plaintiff's untimely motion for reconsideration, denying the motion to strike the untimely filed motion for reconsideration and denying plaintiffs' motion for reconsideration. Designation of Clerk's Paper's, item #63. Plaintiffs filed their notice of appeal on December 20, 2011. Designation of Clerk's Paper's, item #73.

ARGUMENT

1. Defendant is entitled to her attorney fees because she prevailed on plaintiff's claims for personal injury damages which resulted in a final judgment being entered dismissing plaintiff's claims for personal injuries.

Plaintiffs sole argument related to this assignment is that defendant is not a prevailing party under RCW 4.84.330. Defendant is wrong. First of all, RCW 4.84.330 only applies to contracts that allow attorney fees to only one party such as a contract that only allows the lessor attorney fees. Under RCW 4.84.330, such a clause is converted so that even if the party not named in the contract as entitled to attorney fees prevails, they will be entitled to attorney fees as well. Wachovia SBA Lending, Inc. v. Kraft, 165 Wash.2d 481, 200 P.3d 683 (2009). (Purpose of statute is so that no party will be deterred from bringing an action on a contract or lease for fear of triggering a one-sided fee provision). The contract at issue in this matter does not provide for an award of attorney fees to only one of the parties. It awards attorney fees to "any prevailing party." Real Estate Purchase and Sale Agreement, Section 17 (attached to appellant's brief). Because the agreement is not covered by RCW 4.84.330, appellant's use of the statutes definition

of prevailing party is not legally supported. Further, as outlined in the Judgment, two of plaintiffs' three claims including the claim for personal injuries resulted in a final judgment dismissing those claims. Defendant had no counterclaims. Defendant prevailed as it relates to those two claims and had final judgment entered in her favor in relation to those claims. This type of analysis has been made applicable even in cases under RCW 4.84.330. Crest Inc. V. Costco Wholesale Corp., 128 Wash. App. 760, 115 P.3d 349 (2005).

Because the attorney fee provision at issue here is not unilateral, the definition of prevailing party under RCW 4.84.330 likely does apply. However, the court has essentially used the same method for determining prevailing parties under other contractual attorney fee clauses. Marassi v. Lau, 71 Wash. App. 912 (1993). In Marassi (like Crest), the plaintiffs brought multiple claims for relief and defendant did not bring any counterclaims. Here, like the Marassi, the plaintiffs prevailed on some but not all of their claims and received a judgment. Id. at 913. The Marassi plaintiffs litigated a total of \$88,450.00 of damage claims and the court awarded them \$15,000.00 of damages and dismissed the remainder of the claims. Id. at 914. Marassi adopted a substantially prevailing party approach where several distinct claims are made and the parties split the results. Id. The plaintiff is entitled to attorney fees on the claims they prevail upon and the defendant is entitled to attorney fees that she prevailed upon and the fee awards are then offset. Id. If the court finds both parties prevailed on major issues, then each party bears its own attorney fees. American Nursery Products, Inc. V. Indian Wells Orchards, 115 Wash. 2d 217 (1990) (holding that "because both parties have prevailed on major issues, neither qualifies as the prevailing party under the contract").

2. **Absent a finding of excusable neglect, plaintiffs' failure to file its Motion for**

Attorney Fees is fatal.

Motions for attorney fees are governed by CR 54(d)(2). CR 54(d)(2) provides that the motion must be filed no later than 10 days after judgment. In this case, plaintiffs were required to file their motion for attorney fees by September 12, 2011. However, CR 54(d)(2) also provides that the court may order a different time. The trial court did not order a different time to file the motions for attorney fees in this matter and thus, the 10 day deadline applies subject to enlargement under CR 6(b). CR6(b) allows enlargement of the time to do an act for cause at the trial court's discretion, but the limit of that discretion depends on when the motion for enlargement is made. If made before expiration of the time by which the party is supposed to act, the court may enlarge the request upon a simply showing of cause. CR6(b)(1). However, there was no court order to enlarge the time allowed prior to expiration of the ten day limit nor a motion for such an enlargement prior to the expiration of the ten day period under CR 54(d)(2). Thus, plaintiffs are only entitled to file their motion for attorney fees late if plaintiffs can show excusable neglect. CR6(b)(2) and Corey v. Pierce County, 154 Wash. App. 752 (2010).

CR 6(b)(2) does not define specifically what constitutes excusable neglect. However, excusable neglect is a common reference in motions to set aside or overturn default judgment. In the context of setting aside a default, excusable neglect may generally be found if the tardy party acted diligently despite the circumstances constituting excusable neglect. Puget Sound Medical Supply v. Washington State Department of Social and Health Services, 156 Wash. App. 364 (2010). For instance, in Puget Sound the court refused to find excusable neglect when the defendant failed to show diligence and failed to attempt to seek additional time when it had the opportunity to do so. Id at 376. Other Washington Courts have found no excusable neglect in

the following circumstances (as detailed in Puget Sound):

1. An insurer failed to answer a complaint because the insurer misplaced a copy of the legal process sent by the commissioner when the person designated to receive process was reassigned to other duties. Prest v. Am. Bankers Life Assurance Co., 79 Wash. App. 93 (1995).
2. An employee at an attorney general's office failed to timely route documents to the responsible attorney because of inadequate office procedures to catch administrative errors. Beckman v. Dept. of Soc. & Health Services, 102 Wash. App. 687 (2000).
3. Someone other than general counsel accepted service and then did not forward the compliant. Johnson v. Cash Store, 116 Wash. App. 833 (2003).
4. A legal assistant responsible for entering the deadline into a calendaring system left on an extended vacation, but failed to ensure that employees hired to replace her were properly trained. TMT Bear Creek Shopping Ctr. v. Petco Animal Supplies, Inc., 140 Wash. App. 191 (2007).

As pointed out to the trial court, plaintiff's counsel's reasons for failing to file the motion for attorney fees falls well below the standard of case to demonstrate excusable neglect.

Plaintiffs' counsel stated that he could not find billing records. The failure to find records explains neither the failure to file a motion (with records demonstrating the amount of fees that are reasonable to follow) or the failure to file for an extension before expiration of the 54(d)(2) limit. Plaintiff's Appellate Brief does not even try to explain the delay in filing their motion for attorney fees. Without such an explanation plaintiffs/appellants cannot show how the court abused its discretion in finding that there was no "excusable neglect." Appellant attempts to couch the denial of attorney fees as the court's failure to use its discretion. Appellant however does not cite to anywhere in the record where the court failed to use its discretion. The court, in

both its ruling, and the Judgment entered to enforce the ruling found that the delay in filing was not the result of excusable neglect. Ruling on Cross Motions for Attorney Fees, page 3, lines 22-25, Judgment Re: Attorney Fees and Order, page 2, lines 6-9. A trial court's finding of inexcusable neglect is reviewed for abuse of discretion. Davies v. Holy Family Hospital, 144 Wash. App. 483, 183 P.3d 283 (2008). Appellants present no substantial argument that the trial court abused its discretion in denying their untimely motion for attorney fees and their motion for enlargement of time to file their motion for attorney fees made after the expiration of the deadline for filing the motion for attorney fees. Appellants' mistakenly and without citation refers to the trial court ruling as believing that the trial court could not allow the late filing. This is a misreading of the Ruling which was later confirmed in the Judgment Re: Attorney Fees. In both, the trial court made clear that the untimely filing of the motion for attorney fees was not the result of excusable neglect.

To the extent that appellant argues that the court had already awarded them attorney fees, appellants are again wrong. The trial court reserved any ruling on attorney fees in the Judgment. Judgment, page 4. During argument, the trial court did express some views about who may have been prevailing, but that was not ever reduced to a ruling or Order granting plaintiffs/appellants attorney fees. The court expressly (orally and as part of the judgment) reserved all issues related to attorney fees. Plaintiffs/appellants cite to no legal support for their argument that they had already been awarded attorney fees. Oral statements of the court are not Orders or Judgments. Even if the discussion could be called a "decision," it is not a judgment or ruling and the court can freely change its mind until a formal judgment is rendered. Fosbre v. State 70 Wash. 2d 57, 424 P.2d 901 (1967).

3. Plaintiffs' Notice of Appeal is not timely filed.

The trial court's ruling on attorney fees was entered on October 20, 2011. A motion for reconsideration of that ruling was filed on November 4, 2011, after the time limit set forth in CR 59(d). The failure to file the motion for reconsideration by the deadline set in CR 59(d) is fatal. While the trial court accepted the motion, the trial court did not have discretion to accept the late filing under CR6(b). Trial courts have no discretion to allow late filings of motions for reconsideration or a new trial. While the trial court did accept the motion for reconsideration and denied reconsideration, the issue here is whether the motion tolled the time for the plaintiffs to file their notice of appeal. In order for the 30 days to file an appeal to be tolled based on a motion for reconsideration, the motion for reconsideration must be filed timely. RAP 5.2(a), Schaefco, Inc. V. Columbia River Gorge Comm'n, 121 Wn. 2d 366, 849 P.2d 1225 (1993).

If an untimely motion for reconsideration cannot be used to toll the time for filing the notice of appeal, the issue of the timeliness of the appeal rests on whether the 30 days runs from the Trial Court's Ruling on Attorney Fees (filed October 20, 2011) or the Judgment filed to enforce the attorney fees and offset the sums awarded thereunder from the underlying Judgment. Here the Ruling on Attorney Fees was an appealable order. Wlasiuk v. Whirlpool Corp., 76 Wash. App. 250, 884 P.2d 13 (1994). While a judgment offsetting the attorney fees against the underlying judgment was entered on November 21, 2011, it was entered without a hearing and was merely enforcement of the Order awarding defendant attorney fees (including the amount) in the October 20, 2011 Ruling. Because the award of attorney fees was appealable, the deadline for filing the notice of appeal (without a timely motion for reconsideration) was November 20, 2011. This notice of appeal was filed December 20, 2011 and is therefore untimely.

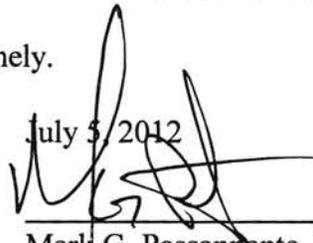
ATTORNEY FEES ON APPEAL

The contract between the parties permits attorney fees to any prevailing party. The contractual right to attorney fees to a prevailing party includes appeals. Real Estate Purchase and Sale Agreement, Section 17 (attached to appellant's opening brief). Pursuant to RAP 18.1(a) and (b), defendant respondent requests that the appellate court award her reasonable attorney fees for this appeal.

CONCLUSION

As the trial court correctly found, defendant was a prevailing party for purposes of an award of attorney fees. Plaintiffs/appellants do not contest the amount of attorney fees awarded. The trial court did not abuse its discretion in finding that the failure to file a motion for attorney fees within the time required by CR 54(d)(2) was not the result of excusable neglect and plaintiffs are not entitled to attorney fees. The notice of appeal is not timely because the Ruling on the Cross Motions for Attorney Fees is an appealable order despite the later confirming and offsetting judgment and the untimely filing of a motion for reconsideration did not toll the time for filing the notice of appeal and thus the notice is not timely.

July 5, 2012



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