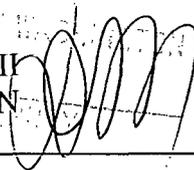


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COURT OF APPEALS
DIVISION II

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No. 45462-9

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON



ROBERT EMERICK

Appellant/Cross-Respondent,

v.

CARDIAC STUDY CENTER, INC., P.S.

Respondent/Cross-Appellant.

REPLY BRIEF OF CROSS-APPELLANT

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I. ARGUMENT

Attorneys' fees are available to successful litigants under certain, limited circumstances in Washington. These include recovery of statutory attorneys' fees as "costs" under RCW 4.84.010 and 4.84.080, and recovery of prevailing party attorneys' fees under a contract or lease as provided in RCW 4.84.330. These two different avenues of recovering attorneys' fees have been summarized as follows: "In Washington, a distinction is made between statutory attorney fees and reasonable attorney fees. Statutory attorney fees are nominal in amount and are generally taxed as a cost by the prevailing party." 14A KARL B. TEGLAND, WASHINGTON PRACTICE: CIVIL PROCEDURE § 36:2 (2d ed. 2013). "The prevailing party, however, may be entitled to recover a reasonable attorney fee if the parties have so agreed by contract." *Id.*

When the trial court granted summary judgment in favor of Cardiac Study Center, Inc. ("Cardiac"), Cardiac became the prevailing party under its Shareholder Employment Agreement with former shareholder Robert Emerick. It was at that time that Cardiac became entitled to an award of prevailing party attorneys' fees under RCW 4.84.330. *See* Clerk's Papers ("CP") 654. Despite the trial court's conclusion that Cardiac was the prevailing party under the contract, the

trial court denied Cardiac's request for attorneys' fees Cardiac incurred in during the initial appeal of this case in *Emerick v. Cardiac Study Center, Inc.*, 170 Wn. App. 248, 286 P.3d 689 (2012) (*Emerick I*). To the extent the trial court denied Cardiac's request for attorneys' fees based on an error of law, the trial court's decision should be reversed.

A. Cardiac Became Entitled to Its Reasonable Attorneys' Fees Incurred On Appeal in *Emerick I* After Prevailing On Summary Judgment on Remand.

Emerick first contends that the trial court's decision was proper by conflating the different statutes that permit recovery of attorneys' fees. Emerick concludes that in order for Cardiac to have recovered its costs (including statutory attorneys' fees) under RCW 4.840.010 in *Emerick I*, this Court must have concluded that Cardiac was the prevailing party under the parties' Shareholder Employment Agreement. Reply Br. of Appellant/Cross-Respondent at 21. This argument is wholly inconsistent with Emerick's position before the trial court and again on appeal, where Emerick asserts that he is the prevailing party under that Agreement.

Perhaps more importantly, this argument ignores the difference between statutory attorneys' fees available to a party prevailing in a proceeding, and reasonable attorneys' fees available to a party prevailing on a contract that permits the recovery of reasonable attorneys' fees. *See, e.g., In re Bailey*, 162 Wn. App. 215, 221, 252 P.3d 924 (2011) ("Even

when reasonable attorney fees are not authorized by contract, statute or equity, statutory attorney fees are typically allowed as costs for the substantially prevailing party on review of a civil action.” (citing RAP 14.2, RAP 14.3(a), *Hudson v. Hapner*, 170 Wn.2d 22, 34-35, 239 P.3d 579 (2010)). Following this Court’s decision in *Emerick I*, Cardiac was not yet the prevailing party under the Shareholder Agreement, but was the prevailing party “on review of a civil action” – *i.e.*, that appeal. Cardiac was therefore entitled to recover costs (including statutory attorneys’ fees) under RCW 4.84.010 following *Emerick I*. Later, when Cardiac prevailed on the underlying contract claims following remand, Cardiac became entitled to request its prevailing party fees as provided under the Agreement and consistent with RCW 4.84.330. The trial court erred as a matter of law in concluding that Cardiac could not seek an award of its reasonable attorneys’ fees incurred on appeal in *Emerick I* and this error should be corrected by this Court on appeal.

B. This Court’s Opinion in *Emerick I* Did Not Deny Cardiac Its Reasonable Attorneys’ Fees under the Shareholder Employment Agreement.

This Court issued its opinion in *Emerick I*, and then amended that opinion twice. *See* CP 1381-91 (Unpublished Opinion filed 2/23/12); CP 1392-93 (Order Amending Opinion filed 7/10/12); CP 1394-95 (Order Amending Opinion and Granting Motion to Publish filed 8/8/14). In the

first order amending, the Court denied the award of fees under RAP 18.1, but in the second order the Court removed this language and inserted: “We also award Cardiac its statutory attorney fees.” See CP 1395; and *Emerick v. Cardiac Study Center, Inc.*, 170 Wn. App. at 259.

Emerick argues on appeal that this Court has denied Cardiac’s reasonable prevailing party attorneys’ fees for work done in *Emerick I*. That is simply not the case, and it was not the case when Emerick’s attorney made a similar misrepresentation to the trial court. See Verbatim Transcript of Proceedings, October 18, 2013 (“10/18/13 VTP”) at 11:9-13. After prevailing on summary judgment, Cardiac became the “prevailing party” under the parties’ Shareholder Employment Agreement, and was at that point entitled to request and recover fees incurred in “any suit or action for any type of relief ... including any appeal thereof, arising out of this Agreement.” CP at 654.

This result is consistent with the decisions reached in *Belfor USA Group, Inc. v. Thiel*, 160 Wn.2d 669, 670, 160 P.3d 39 (2007); *Satomi Owners Ass’n v. Satomi, LLC*, 167 Wn.2d 781, 817-18, 225 P.3d 213 (2009); and *Landberg v. Carlson*, 108 Wn. App. 749, 758, 33 P.3d 406 (2001). Having now prevailed under the contract, which allows Cardiac to recover its reasonable attorneys’ fees, Cardiac is entitled to those fees, “including any appeal.”

C. Cardiac Is Not Judicially Estopped from Requesting an Award of Fees and Cardiac Appropriately Assigned Error to The Trial Court's Denial of Cardiac's Motion for Attorneys' Fees Incurred on Appeal.

Cardiac has not taken a prior inconsistent position in this case and received a benefit that could conceivably bar Cardiac's request to the trial court for an award of attorneys' fees incurred in *Emerick I*. Cardiac's last submission to this Court in *Emerick I* highlighted the same legal authority as Cardiac provided to the trial court to support its motion for fees incurred on appeal before it ultimately became the prevailing party under the Shareholder Employment Agreement. Moreover, even if Cardiac had taken a different or inconsistent opinion in the course of this litigation, Emerick cannot demonstrate that Cardiac benefited from it in any regard. The fact that Cardiac received an award of statutory attorneys' fees under RCW 4.84.010 (which are set at \$200 by RCW 4.84.080) is hardly a "benefit" if it meant that Cardiac had somehow waived its claim to over \$80,000 in prevailing party attorneys' fees on appeal it is entitled to under the parties' Agreement. Emerick's true contention throughout this case has been that Cardiac was required to seek an award of attorneys' fees as the prevailing party under the parties' Agreement before Cardiac had prevailed on its contract claims. This argument is illogical and wrong.

Emerick raises issues with Cardiac assigning error to the trial court's denial of Cardiac's *Emerick I* attorneys' fees. The parameters of this argument are unclear. Cardiac complied with RAP 10.3(a)(4) in assigning error to the trial court's denial of "Cardiac's request for its attorneys' fees for work relating to its successful initial appeal." Br. of Respondent/Cross-Appellant at 2. If this Court finds that the trial court erred as a matter of law, the Court has ample information to determine the appropriate award of attorneys' fees or has the option to remand the case for additional findings by the trial court on this discrete point.

II. CONCLUSION

When the trial court granted Cardiac's motion for summary judgment enforcing the non-competition provisions in Cardiac's Shareholder Employment Agreement with Emerick, it found that Cardiac substantially prevailed in the litigation. Under the attorneys' fee provision in the Agreement, Cardiac is entitled to recover its reasonable attorneys' fees, including fees for work done on appeal in *Emerick I*. The trial court erred as a matter of law when it concluded that it lacked authority to award Cardiac its reasonable attorneys' fees incurred on appeal. Cardiac therefore respectfully requests that this Court reverse the trial court's denial of Cardiac's motion for attorney's fees incurred on appeal and either enter an award of Cardiac's reasonable attorney's fees as

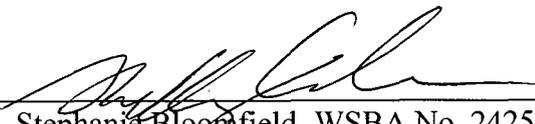
demonstrated by the record, or remand this matter to the trial court for entry of an award of Cardiac's reasonable attorney's fees.

Cardiac also requests an award of its statutory attorneys' fees and costs and its prevailing party attorneys' fees from this Court pursuant to RAP 18.1, the parties' Shareholder Employment Agreement, and RCW 4.84.330.

Dated this 30th day of May, 2014.

Respectfully submitted,

GORDON THOMAS HONEYWELL LLP

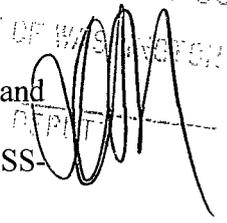
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BY



DECLARATION OF SERVICE

I declare that on this 30th day of May, 2014, I caused a true and correct copy of the REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT to be delivered to the following individuals in the manner described below:

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I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Tacoma, Pierce County Washington.

/s/ Gina A. Mitchell
Gina A. Mitchell