

No. 50998-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

Stuart McColl (Plaintiff)

Appellant

v.

Geoffrey Anderson (Defendant)

Respondent,

APPELLANT'S OPENING BRIEF

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DIVISION II
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A. Assignment of Error and Issue

The Clallam County Superior Court erred when it awarded the Defendant \$35,610 in attorney fees in an action brought for Declaratory Relief (RCW 7.24) and Injunctive Remedy (RCW 7.40).

Does the American rule, where each party pays their own attorney's fees, apply in cases filed for Declaratory Relief and Injunctive Remedy?

B. Statement of the Case

The Defendant's attorney failed to assert Quiet Title in his Answer.

The Defendant purchased his property in the 1970s, over 20 years after a community cistern was installed on the Defendant's property in the 1950s. CLP44 Someone, Defendant or otherwise, cut off the Plaintiff's only supply of drinking water which came from the Defendant's property and the community cistern installed on the Defendant's property. CLP26 This Plaintiff responded peacefully and civilly by seeking the Court's wisdom through Declaratory Relief. CLP28 Plaintiff's Prayer in Complaint named the Defendant personally, did not name future owners or the property itself, and prayed only the Defendant personally not interfere with the Plaintiff's only supply of drinking water. CLP32

Neither RCW 7.28.010, nor "Quiet Title", nor "Title", was ever cited in the Complaint or Answer of the case.

After Summary Judgment in Defendant's favor, the Court awarded Defendant attorney's fees through RCW 7.28.083(3).

C. AUTHORITY & ARGUMENT

All citizens of Washington State including the Plaintiff have a right to access the Court's Wisdom through the law of Declaratory Relief (RCW 7.24) without the fear of punitive attorney's fees from a separate chapter of law.

"Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed."

RCW 7.24.010

"The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate." CR57

The Plaintiff here is in Clallam County represented Pro Se against a Seattle lawyer billing \$400 an hour. The Court of Appeals of Washington has written:

"Underlying the rule that the prevailing litigant is ordinarily not entitled to collect his counsel fees from the loser is the principle that no person should be penalized merely for defending or prosecuting a lawsuit. An additional important consideration is that the threat of having to pay an opponent's costs ~~411~~~~411~~ might unjustly deter those of limited resources from prosecuting or defending suits. Harkeem v. Adams, 117 N.H. 687, 690, 377 A.2d 617, 619 (1977)", Dempere v. Nelson, 76 Wash.App. 403, 407-10, 886 P.2d 219 (1994),*

A litigant must "**bring**" a Quiet Title action to assert title.

"Quiet Title Action. An action to quiet title is equitable and designed to resolve ~~624~~~~624~~ competing claims of ownership. In Washington, such actions are governed by RCW 7.28.010. An action to quiet title allows a person in peaceable possession or claiming the right to possession of real property to compel others who assert a hostile right or claim to come forward and assert their right or claim and submit it to judicial determination. " Kobza v. Tripp, 105 Wn. App. 90, 95, 18 P.3d. 624 (2001)*

“Any person having a valid subsisting interest in real property, and a right to the possession thereof, may recover the same by action in the superior court of the proper county, to be brought against the tenant in possession;”

RCW 7.28.010

A Quiet Title action commences when a plaintiff files a complaint, or a defendant files a cross complaint, with the court. CR3 & CR13

“Second, the Clarks did not file ‘an action’ by filing an answer to the Longs’ complaint. An ‘action’ commences when a plaintiff files a complaint with the court. Ariz. R. Civ. P. 3.”
Long v. Clark, No. 1-CA-CV-09-4774 (2010) 244 P.3d 99 (2010)

Electing to file an Answer as the Defendant Clark did was not “in effect a counter claim”. Quote from Page 4.

The Arizona Appellate court reversed the trial court’s award of attorney’s fees to Clark because Clark failed to “bring the action” required for a Quiet Title action. If fees were to be requested, Defendant here was required in this case, like Clark was required there, to “bring the action” under RCW 7.28.010. Defendant failed to “bring the action”.

There is no statutory authority that allows award for attorney’s fees under RCW 7.28.083(3) for any action other than actions which pray for Quiet Title relief under RCW 7.28.010.

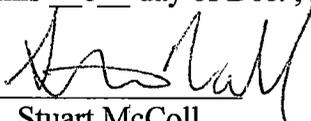
D. Conclusion

We do not know whether the Defendant strategically chose to not bring a Quiet Title action to protect himself from the risk of a Quiet Title case involving the Plaintiff's attorney fees Defendant would have to pay should he lose, or whether the Defendant's attorney simply made a mistake he only now regrets.

The American Rule, requiring each party pay their own attorney's fees, applies in Washington State when an action is brought for Declaratory Relief as the Plaintiff did do. Declaratory Relief, without attorney's fees, leaves open the door of the court and its Wisdom to all the people of Washington State.

This Plaintiff Appellant asks this court to apply the American Rule and reverse the court's Judgment on fees under RCW 7.28.083(3) awarded to the Defendant Respondent.

Respectfully submitted this 8 day of Dec. , 2017.



Stuart McColl

¶1 Arizona Revised Statutes ("A.R.S.") section 12-1103(B) authorizes the superior court to award attorneys' fees to a party who brings an "action to quiet title to real property" if that party timely tendered a quit claim deed and five dollars to the opposing party. This appeal requires us to decide

T I M E R, Chief Judge

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AFIRMED IN PART, REVERSED IN PART

The Honorable Donna J. Grimsley, Judge

Cause No. CV2006011

Appeal from the Superior Court in Apache County

ROBERT and LINDA LONG, husband and wife,
Plaintiffs/Appellants,
v.
ROGER and CINDY CLARK, husband and wife,
Defendants/Appellees.

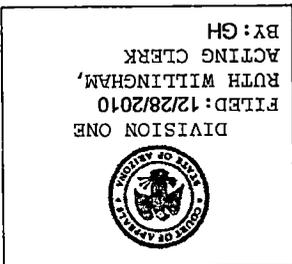
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DEPARTMENT E

1 CA-CV 09-0474

**IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE**

APPENDIX



whether § 12-1103(B) authorizes an award of fees to defendants in a quiet title action who make the required tender but do not file their own action to quiet title. We hold that defendants are not entitled to fees in this circumstance. Because the superior court awarded fees to appellees Roger and Cindy Clark in their successful defense to a quiet title action initiated by appellants Robert and Linda Long, we reverse that portion of the judgment. For the reasons set forth in a companion unpublished memorandum decision, we affirm the court's grant of summary judgment in favor of the Clarks.

ANALYSIS

¶2 After entering summary judgment for the Clarks on the Longs' action to quiet title to a claimed easement over the Clarks' property, the superior court awarded attorneys' fees to the Clarks pursuant to A.R.S. § 12-1103(B), which provides as follows:

If a party, twenty days prior to bringing the action to quiet title to real property, requests the person, other than the state, holding an apparent adverse interest or right therein to execute a quit claim deed thereto, and also tenders to him five dollars for execution and delivery of the deed, and if such person refuses or neglects to comply, the filing of a disclaimer of interest or right shall not avoid the costs and the court may allow plaintiff, in addition to the ordinary costs, an attorney's fee to be fixed by the court.

The Longs argue the court erred in making this award because, although the Clarks tendered a request for execution of a quit claim deed and five dollars to the Longs before filing an answer to the complaint but never filed "an action." The Clarks respond the Longs waived this argument by failing to make it at the time of the tender and, regardless, the Clarks effectively filed a counterclaim by filing an answer that asked the court to deny relief to the Longs. We reject the Clarks' arguments and agree with the Longs.

¶3 First, the Longs did not waive their argument by failing to raise it at the time of tender. The Clarks correctly point out that "[o]bjection[s] to a tender should be made at the time of the tender, and silence is construed as a waiver of any objection." *Mariposa Dev. Co. v. Stoddard*, 147 Ariz. 561, 565, 711 P.2d 1234, 1238 (App. 1985). "Tender" in this case was the Clarks' delivery of five dollars and a request for execution of the quit claim deed. See *id.* (describing delivery of money under § 12-1103(B) as the "tender"). Although the Longs did not object at the time to the form or substance of the Clarks' tender, the Longs now object to the Clarks' entitlement to fees because they never satisfied § 12-1103(B) by filing an action. The Longs could not have objected at the time of the tender to the Clarks' subsequent failure to file an action because § 12-

1103(B) requires tender before initiation of an action. The appropriate time to raise the objection was when the Clarks sought fees; the Longs did so, and the merit of the objection was properly before the trial court.

¶4 Second, the Clarks did not file "an action" by filing an answer to the Longs' complaint. An "action" commences when a plaintiff files a complaint with the court. Ariz. R. Civ. P. 3. The Clarks never filed an "action" asserting a claim for relief. We disagree with the Clarks that defending against the Longs' prescriptive easement claim was "in effect a counterclaim." A counterclaim is a "cause of action in favor of [the] defendant upon which he might have sued the plaintiff and recovered judgment in a separate action. It is not . . . a defense to an action but is an independent claim . . ." *Valley Gin Co. v. McCarthy*, 56 Ariz. 181, 187, 106 P.2d 504, 507 (1940). Indeed, the Clarks' answer reserved the right to later file a counterclaim, but they never did so. While the Clarks' position may reflect a sound policy, it is for the legislature to adopt it rather than this court.

¶5 In order to recover attorneys' fees in a quiet title action, a party must meet all requirements set forth in A.R.S. § 12-1103(B). *Lange v. Lotzer*, 151 Ariz. 260, 262, 727 P.2d 38, 40 (App. 1986). Because the Clarks did not do so, the trial court should not have awarded them attorneys' fees. In light of

our decision, we need not address the Longs' remaining arguments concerning the propriety of fees.

ATTORNEYS' FEES ON APPEAL

¶6 The Longs request attorneys' fees on appeal pursuant to A.R.S. § 12-1103(B). We decline this request because the Longs did not prevail in their quiet title action even though we agree the Clarks were not entitled to an award of attorneys' fees in the superior court. Because the net result of this appeal is a reduction of the monetary judgment against the Longs, they are entitled to their costs on appeal upon compliance with Arizona Rule of Civil Appellate Procedure 21(a). A.R.S. § 12-342 (2003).

CONCLUSION

¶7 For the foregoing reasons and those explained in our companion memorandum decision, we affirm the superior court's grant of summary judgment in favor of the Clarks but reverse the attorneys' fees award. We decline to award attorneys' fees on appeal.

/s/
Ann A. Scott Timmer, Chief Judge

CONCURRING:

/s/
Philip Hall, Presiding Judge

/s/
Sheldon H. Weisberg, Judge

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**WASHINGTON STATE COURT OF APPEALS
DIVISION II**

STUART F. MCCOLL, a married man
dealing with his separate property,

Plaintiff,

vs.

GEOFFREY A. ANDERSON, a married man
dealing with his separate property,

Defendant.

**Court of Appeals Division II
Case No.**

50998-9-II

**Clallam Superior Court
Case No.**

17-2-00222-7

Proof of Service

TO: Clallam County Superior Court Clerk

On this day I deposited in the U.S. Mail a properly stamped and addressed envelope to:

George Mix, Mix Sanders Thompson, PLC
1420 Fifth Avenue, Suite 2200
Seattle, WA 98101

Containing 1 copies each of: Appellants Opening Brief.

I declare under penalty of perjury under the laws of the State of WA that the foregoing is true and correct, that I am at least 18 years old, and a resident of WA State, Executed at Sequim, WA this 8 day of December, 2017.

x  