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COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

Stuart F. McColl (Plaintiff),

Appellant,

V.

Geoffrey A. Anderson (Defendant),

Respondent,

BRIEF OF RESPONDENT

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I. INTRODUCTION

This only issue on appeal is the trial court's award of attorneys' fees under RCW 7.28.083(3) in an action seeking declaratory and injunctive relief in the form of a prescriptive easement.

II. COUNTERSTATEMENT OF ISSUES

A. Whether Washington law allows the award of attorneys' fees in an action for declaratory judgment for an easement and injunction.

(Yes)

B. Whether the trial court properly exercised its discretion in awarding attorneys' fees to the prevailing party under RCW 7.28.083(3), when the Defendant prevailed on summary judgment in an action by the Plaintiff asserting a prescriptive easement.

(Yes)

III. COUNTERSTATEMENT OF THE CASE

When Defendant, Mr. Anderson, purchased his property, he was made aware that his property was host to a spring collection system that provides water to neighbors with water right permits from the Washington Department of Ecology. CP 11. Neighbors with water right permits always

ask for Mr. Anderson's permission to access the tank, valves, and pipes for maintenance purposes. *Id.*

Plaintiff, Mr. McColl, purchased a neighboring lot. *Id.* Plaintiff does not possess a water right permit and has made several attempts to purchase an easement to the spring collection system. *Id.* He has repeatedly trespassed on Defendant's property, and in an email exchange with neighbors, admitted that he vandalized a valve on the collection system's tanks to prevent water flow to his property from being turned off. *Id.* Plaintiff filed the Complaint in this case seeking a declaratory judgment that he had a prescriptive easement over the Defendant's property to access the water system and an injunction preventing the Defendant from interfering with Plaintiff's access. CP 28. The undisputed facts established Plaintiff could not overcome the presumption of permissive use and the trial court dismissed Plaintiff's claims on Summary Judgment. CP 7.

The trial court awarded the Defendant attorneys' fees as the prevailing party under RCW 7.28.083(3). *Id.* Plaintiff filed this appeal on the sole issue of the availability of an award of attorneys' fees in declaratory judgment and injunctive relief actions. *Plaintiff's Brief* at 3. Plaintiff has not challenged the amount of the award or the applicability of the statute

itself. Regardless, given this narrow issue before the court, the Defendant has addressed each as part of the broader question.

IV. ARGUMENT

Plaintiff's challenge on appeal centers around the application of the American rule. "In order to reverse an attorney fee award, an appellate court must find the trial court manifestly abused its discretion." *Chuong Van Pham v. City of Seattle, Seattle City Light*, 159 Wn.2d 527, 538, 151 P.3d 976 (2007).

A. Washington's version of the American rule allows fees when provided by contract, statute, or a recognized ground in equity.

The Plaintiff's second assignment of error appears to assert that attorneys' fees cannot be awarded in an action for declaratory or injunctive relief under any circumstances. Under Washington's version of the "American rule," attorneys' fees are available when provided by contract, statute, or recognized ground in equity. *City of Seattle v. McCready*, 131 Wn.2d 266, 275, 931 P.2d 156 (1997).

The Plaintiff has not cited any controlling authority exempting actions for declaratory or injunctive relief from this rule, and no such authority exists. To the contrary, in the context of a claim for declaratory judgment, the Washington Supreme Court has consistently applied Washington's version of the American rule and denied the award of attorneys' fees only

in the absence of a contract, statute, or recognized ground in equity. *See Seattle Sch. Dist. No. 1 of King Cty. v. State*, 90 Wn.2d 476, 540, 585 P.2d 71 (1978).

In the instant case, the trial court awarded attorneys' fees pursuant to RCW 7.28.083(3), which provides:

The prevailing party in an action asserting title to real property by adverse possession may request the court to award costs and reasonable attorneys' fees. The court may award all or a portion of costs and reasonable attorneys' fees to the prevailing party if, after considering all the facts, the court determines such an award is equitable and just.

Id. The trial court did not abuse its discretion by considering whether a Washington statute provided for the award of attorneys' fees in this case. Therefore, the only issue that remains is whether the trial court abused its discretion in applying the statute to this case.

B. The trial court did not abuse its discretion because RCW 7.28.083(3) provides for the award of attorneys' fees.

The Plaintiff's argument regarding the applicability of this statute appears to have two premises—first, that the statute does not apply because the Defendant did not independently bring a cause of action or counterclaim, *Appellant's Opening Brief (Plaintiff's Brief)* at 4–5, and second, that the statute does not apply because this was not an action to quiet title, *Plaintiff's Brief* at 5.

- i. *It does not matter which party instituted the action, RCW 7.28.083(3) only requires that the party seeking attorneys' fees prevail in that action.*

The Plaintiff's argument provides no explanation as to why the Defendant should be required to bring his own quiet title action when the Plaintiff's Complaint alleged that the Defendant owned the property in question. CP 29. The Defendant never had to assert title in this lawsuit, but he did have to defend against its meritless claims at his own expense.

The Plaintiff's argument fails to appreciate the distinction between the broader category of being the "prevailing party in *an* action" and the narrower one of being the party who prevails in an action they have instituted. The Washington statute contemplates the former. It does not matter whether the Defendant affirmatively asserted a cause of action in this case.

"In general, a prevailing party is one who receives an affirmative judgment in his or her favor." *Riss v. Angel*, 131 Wn.2d 612, 633, 934 P.2d 669 (1997). This general rule clearly establishes Defendant's position. An affirmative judgment in one's favor is not the same as succeeding on an affirmative cause of action. The Defendant received an affirmative judgment in his favor when the trial court granted his Motion for Summary Judgment and entered a judgment to that effect.

The provision of Washington law that describes “who may maintain actions” for quiet title to property, RCW 7.28.010, is separate and distinct from RCW 7.28.083(3), and does not speak to the issue of who may recover attorneys’ fees. The Defendant was the “prevailing party in an action”—the action brought by the Plaintiff. *Id.*

The Plaintiff’s argument, that attorneys’ fees are only recoverable by the party who brings an action to quiet title, relies solely on a case from the Arizona Court of Appeals, interpreting the Arizona Revised Statutes. *Plaintiff’s Brief* at 5 (citing *Long v. Clark*, 226 Ariz. 95, 244 P.3d 99 (2010)). While this decision may provide a valid interpretation of Arizona law, it cannot provide any guidance for this court to interpret the Washington law at issue, which bears no resemblance to the Arizona statute.

The outcome of this appeal does not depend on which party instituted the cause of action or on an Arizona court’s interpretation of Arizona law. The only relevant issues are RCW 7.28.083(3) and its interpretation by Washington courts, and whether the trial judge’s award of attorneys’ fees rises to the level of abuse of discretion.

- ii. *The court did not abuse its discretion because a claim for prescriptive easement qualifies as a claim for adverse possession under the statute.*

The Washington Court of Appeals, Division I, has awarded attorneys' fees under RCW 7.28.083(3) in a case involving a claim for prescriptive easement. In an unpublished decision, *Erbeck v. Springer*, 191 Wn. App. 1049, 2015 WL 9274096 (Dec. 21, 2015), the court awarded the appellants attorneys' fees on appeal:

RCW 7.28.083(3) uses the term "adverse possession." The present case involves prescriptive easements. But these doctrines "are often treated as equivalent[s]," and the elements required to establish adverse possession and prescriptive easements are the same. Thus, we conclude that this statute applies in this case and exercise our discretion to award the Erbecks reasonable attorney fees.

Erbeck, 2015 WL 9274096 at *8 (citing *Kunkel v. Fisher*, 106 Wn. App. 599, 602–03, 23 P.3d 1128 (2001)).¹ While this case is not binding authority, it may be accorded such persuasive value as this court deems appropriate. GR 14.1. The same principles are applicable in this case. One of the primary issues on summary judgment before the trial court was whether the Plaintiff's use of the property was permissive, CP 15–18, a crucial consideration in a claim of adverse possession. The elements of adverse possession and prescriptive easement are the same.

¹ Notably, the easement claims in *Erbeck* were also brought as claims for declaratory and injunctive relief. *Erbeck*, 2015 WL 9274096 at *2.

When this Court, Division II, has previously denied attorneys' fees under RCW 7.28.083(3) in prescriptive easement cases, it has done so on other grounds without any consideration of whether the statute applied on its face. *See Zonnebloem, LLC v. Blue Bay Holdings, LLC*, 200 Wn. App. 178, 188, 401 P.3d 468, (2017) ("because we conclude that neither party substantially prevailed on this appeal, we exercise our discretion and decline to award attorney fees to either party"); *Hannigan v. Novak*, 197 Wn. App. 1017 (2016), *review dismissed*, 188 Wn.2d 1016, 396 P.3d 997 (2017) ("[T]he trial court found that Hannigan had an express easement, not a prescriptive easement. Therefore, we hold that RCW 7.28.083(3) is inapplicable and does not support the trial court's award of attorney fees."). Holding that RCW 7.28.083(3) does not apply to prescriptive easement claims would be a marked departure from the implicit position this Court has taken in the above cases. The Defendant respectfully requests this Court to continue applying RCW 7.28.083(3) to such cases.

iii. The trial court did not abuse its discretion because the award of attorneys' fees was equitable and just.

After considering all the facts, the trial court believed that it was equitable and just to award attorneys' fees in this case. Plaintiff's failure to provide any evidence supporting the basic elements of his claim warranted this award. Having lived there less than ten years, Plaintiff did not meet

even the black letter requirements for a prescriptive easement, and yet he chose to bring this claim anyway. The trial court did not abuse its discretion in choosing to award attorneys' fees to the Defendant, who was forced to litigate this meritless action through no fault of his own.

V. REQUEST FOR ATTORNEYS' FEES

Pursuant to RAP 18.1, if the Defendant prevails in this appeal, the Defendant hereby requests the Court to award attorneys' fees under RCW 7.28.083(3). For the reasons stated above, this statute provides for the award of attorneys' fees in such actions and the text of the statute does not limit its application to trial court proceedings.

VI. CONCLUSION

The issues presented in this case are easily resolved. First, under well-established precedent, Washington's version of the American rule permits an award of attorneys' fees in equitable actions where allowed by statute. Second, a party need not bring its own cause of action to be considered the prevailing party under RCW 7.28.083(3). Third, RCW 7.28.083(3) is applicable to this case because of the identical elements in claims for prescriptive easement and adverse possession. Finally, the trial court did not manifestly abuse its discretion in choosing to make this award. The Defendant respectfully requests this Court to affirm the trials court's

award of attorneys' fees. In addition, the Defendant respectfully requests the Court to award attorneys' fees pursuant to RCW 7.28.083(3) and RAP 18.1.

Dated this 8th day of February, 2018

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