

NO. 28717-3-III

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DIVISION III
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ROBERT LAWRENCE PRATT and SHARON PRATT,
husband and wife,

Respondents,

vs.

JAMES RICHARD DAVEY and DANA DAVEY

Appellants.

BRIEF OF RESPONDENTS PRATT

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TABLE OF CONTENTS

A. COUNTER-STATEMENT OF ISSUES PRESENTED . . .p 1

B. COUNTER-STATEMENT OF THE CASEp 2

C. STANDARD OF REVIEW.p 7

D. ARGUMENT IN RESPONSE.p 9

E. REQUEST FOR AWARD OF ATTORNEY FEES. . . . p 18

F. CONCLUSION. p 19

TABLE OF AUTHORITIES

Table of Cases

- DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 372 P.2d 193 (1962) . . p.17
- Ferrin v. Donnellefeld, 74 Wn.2d 283, 444 P.2d 701 (1968). . p.17
- Fisch v. Marler, 1 Wn.2d 698, 97 P.2d 147 (1930). . p.17
- Green v. Normandy Park Riviera Section Community Club, Inc., 137 Wn.App. 665, 151 P.3d 1038 (2007) . p.19
- LaPlante v. State, 85 Wn.2d 154, 531 P.2d 299 (1975). p.8, p.12
- Morris v. McNichol, 83 Wn.2d 491, 519 P.2d 7 (1974) p.8, p.11, p.12
- Mountain Park Homeowners Ass'n v. Tydings, 125 Wn.2d 337, 883 P.2d 1383 (1994) . . p.7, p.11
- Panorama Village Condominium Owners Association Board of Directors v. Allstate Ins. Co., 144 Wn.2d 130, 26 P.3d 910 (2001) . . p.18
- Singleton v. Frost, 108 Wn.2d 723, 742 P.2d 1224 (1987). . p.19
- Wilson v. Steinbach, 98 Wn.2d 434, 656 p.2d 1030 (1982). . p.7, p.8, p.11, p.12
- Young v. Key Pharmaceutical, Inc., 112 Wn.2d 216, 770 P.2d 182 (1989) . . p.8, p.12, p.13

Court Rules

CR 56 . . .	p.1
CR 56(c) . . .	p.7, p.9, p.10, p.11
CR 56(e) . . .	p.8, p.13, p.14
CR 56(h) . . .	p.10
CR 60(b) . . .	p.17
RAP 2.5(a) . . .	p.17
RAP 18.1(d) . . .	p.16
RAP 10.3(a)(6) . . .	p.17
RAP 12.2 . . .	p.12.2, p.18
RAP 18.9(a) . . .	p.19
RAP 18.14 . . .	p.3

Statutes

RCW 4.84.185 . . .	p.19
RCW 4.84.330 . . .	p.19

A. COUNTER-STATEMENT OF ISSUES PRESENTED

1. Whether the appellants' unsubstantiated claims on pages 3 and 4 of their "Brief" that the superior court failed or neglected to consider the November 30, 2009, "declaration of James R. Davey" [CP 87-91] have now been rendered moot, and are thus no longer an issue on this appeal, in light of the superior court's entry of its "amended order on motion granting judgment for loss of use" on October 25, 2010 [CP 109-10], wherein said declaration of Mr. DAVEY is specifically identified as having been considered by the court during the post-trial hearing on December 4, 2009 [CP 101]?

2. Whether, and to the extent that the subject December 4, 2009, post-trial hearing and proceeding on final determination of respondent PRATTs' damages for loss of use of the subject home and premises can be considered a CR 56 proceeding, the superior court properly entered judgment against the appellants

insofar as the DAVEYs failed to meet their shifting burden of establishing under CR 56(e) the existence of any genuine issue of material fact and that the respondents PRATT were not entitled to judgment as a matter of law?

3. Whether, in light of the fact that appellants failed to raise any challenge to the award of attorney fees before the superior court, the issue of attorney fees has not been preserved for appeal?

B. COUNTER-STATEMENT OF THE CASE

This second and related appeal of JAMES RICHARD and DANA DAVEY, concerns a decision entered by the superior court on December 4, 2009 concerning respondents' post-trial motion for damages associated with their continued loss of use of the subject residence suffered by ROBERT LAWRENCE and SHARON PRATT. The hearing on said motion was held following this court's dismissal of appellants' earlier appeal on February 6, 2009, in no. 26620-6-III concerning the same real estate

transaction on February 6, 2009 [CP 19-32, 33], and the subsequent denial by the Washington supreme court of appellants' related petition for discretionary review in case no. 82851-2 on September 8, 2009 [CP 34]. Prior to these decisions, a commissioner' ruling had been entered by this court on November 21, 2008, granting Mr. and Mrs. PRATTs' RAP 18.14 motion on the merits. [CP 19-32]. In the same "order," they were granted attorney fees as the prevailing party. [CP 31].

The issue of damages for loss of use had been earlier "reserved" by the superior court per an order entered by Judge Robert D. Austin on December 21, 2007 in Spokane County superior court, State of Washington, cause no. 07-2-04300-9. [December 4, 2009 RP 3; CP 12-13]. Said post-trial hearing concerning said damages was later held before Judge Maryann C. Moreno on December 4, 2009 [CP 101] after the appeal process, as outlined above, had run its course to completion in the first appeal of the

DAVEYs. [CP 19-32, 33, 34].

Although respondents PRATT had not denominated their post-trial "motion" for damages for loss of use as being a CR 56 motion [CP 1, 2, 3-77], appellants DAVEY chose to characterized the same as being governed by that superior court civil rule.

[December 4, 2009 RP 4]. In this regard, their only evidentiary basis or proof for objecting to respondents' motion for damages for loss of use was the "declaration" of Mr. DAVEY along with an attached, unincorporated and unsworn e-mail from Anthony V. Carollo, president of Steward Title of Spokane, ostensibly addressed to Mr. DAVEY on November 10, 2009. [CP 87-91].

Ultimately, the December 4 post-trial hearing resulted in a final resolution of the issue of loss of use and an award of monetary damages for injuries suffered by Mr. and Mrs. PRATT as a result of the ongoing intransigence of Mr. and Mrs. DAVEY in refusing to acknowledge the finality the subject real

estate transaction so that respondents PRATT could secure title insurance and then effectively have access and use of the subject home and dwelling. [December 4, 2009 RP 3-15; CP 2, 3-77, 92-100]. The superior court entered a final order to this effect on the same date. [December 4, 2009 RP 12-15; CP 101, 102-04].

Therein, the court awarded damages of \$20,490.06 as having accrued "from December 21, 2007 until December 4, 2009," along with those additional judgment sums which had accrued prior to this time. [CP 103]. Without there having been raised any objection or challenge by Mr. and Mrs. DAVEY concerning the PRATTs' request for fees, the superior court also awarded respondents \$9,356.20 in reasonable attorney "fees incurred by [them] subsequent to the Order . . . entered in this matter . . . [on] . . . November 15, 2007." [CP 103]. With this award of fees, total judgment was entered against the DAVEY for a sum of \$42,674.71. [CP

103-04].

Following this post-trial award of damages and judgment, appellants filed a second notice of appeal in this matter on December 31, 2009. [CP 105-08]. After the filing of appellants' brief on June 16, 2010, respondents PRATT filed with this court a motion seeking dismissal of this appeal for failure of appellants to perfect the trial court record on this appeal, along with a further request that they be awarded reasonable attorney fees in having to defend against this appeal.

On October 13, 2010, during the pendency of respondents' motion to dismiss, appellants DAVEY returned to the superior court and requested the entry an "order amended on motion granting judgment for loss of use." Said request was granted by the superior court's entry of said order on October 25, 2010. [CP 109-10].

Subsequently, on December 3, 2010, a "commissioner's ruling" was entered in this appeal

allowing appellants DAVEY to file "a [supplemental] designation of clerk's papers adding the documents designated in the [foregoing] amended order to this appeal." As to the respondents' remaining request for an award of reasonable attorney fees, the court commissioner per the same December 3 order referred the issue to the panel deciding this appeal.

C. STANDARD OF REVIEW

The grant of a motion for summary judgment is reviewed de novo. Mountain Park Homeowners Ass'n v. Tydings, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994). The reviewing court engages in the same decision-making process as the trial court. Id.

Under Rule 56(c) of the Washington Civil Rules for Superior Court [CR], summary judgment will be entered when the pleadings, together with the evidentiary facts submitted, demonstrate there is no genuine issue of material fact in dispute and the moving party is entitled to judgment as a matter of law. Wilson v. Steinbach, 98 Wn.2d 434, 437, 656

p.2d 1030 (1982). A material fact is one upon which the litigation depends either in whole or in part. Morris v. McNichol, 83 Wn.2d 491, 494, 519 P.2d 7 (1974). Although the facts submitted, and all reasonable inferences therefrom, are to be considered in the light most favorable to the adverse party, summary judgment will be granted when all reasonable persons could reach but one conclusion, that the moving party is entitled to judgment as a matter of law. Wilson, at 437; Morris, at 494-95.

When the moving party's initial burden of proving the absence of any genuine issue of material fact has been satisfied, the adverse party may not rest upon mere allegations or supposition in the pleadings, but must demonstrate through admissible, competent evidence the existence of a genuine issue which can only be resolved by a trier of fact. CR 56(e); Young v. Key Pharmaceutical, Inc., 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989); LaPlante v. State, 85 Wn.2d 154, 158, 531 P.2d 299 (1975). If the

adverse party fails to so respond and satisfy this shifting burden of proof, summary judgment will be entered in favor of the moving party. Id.

D. ARGUMENT IN RESPONSE

1. Counter-issue no. 1: As outlined in respondents' counter-statement of facts, on October 13, 2010, during the pendency of respondents' motion to dismiss based upon appellants' failure to perfect the record on this second appeal, appellants DAVEY returned to the superior court and requested the entry an "order amended on motion granting judgment for loss of use." Said request was granted by the superior court's entry of said order on October 25, 2010. [CP 109-10]. Subsequently, on December 3, 2010, a "commissioner's ruling" was entered in this appeal allowing appellants DAVEY to file "a [supplemental] designation of clerk's papers adding the documents designated in the [foregoing] amended order to this appeal."

In light of these events, appellants DAVEYs'

various unsubstantiated claims, and related assertions concerning CR 56(h), on pages 3 and 4 of their "Brief" to the effect that the superior court failed consider the November 30, 2009, "declaration of James R. Davey" [CP 87-91] have now been rendered moot, and are thus no longer an issue on this appeal. Simply put, the superior court's entry of its "amended order on motion granting judgment for loss of use" on October 25, 2010 [CP 109-10], specifically identifies the declaration of Mr. DAVEY as having been considered during the December 4 hearing. [CP 109-10].

2. Counter-issue no. 2: On pages 4 through 8 of their "Brief," the appellants DAVEY argue that the present controversy before the superior court was governed by CR 56(c) and, in that regard, the superior court improperly determined there were no genuine issue of material fact created by the declaration of Mr. DAVEY [CP 87-91] in opposition to Mr. and Mrs. PRATTs' post-trial for damages for loss of use. To

the extent that the subject post-trial motion and hearing were, in fact, governed by that court rule, such decision of the superior court is reviewed de novo. Mountain Park Homeowners Ass'n v. Tydings, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994).

Again, under CR 56(c), summary judgment will be entered when the pleadings, together with the evidentiary facts submitted, demonstrate there is no genuine issue of material fact in dispute and the moving party is entitled to judgment as a matter of law. Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 p.2d 1030 (1982). A material fact is one upon which the litigation depends either in whole or in part. Morris v. McNichol, 83 Wn.2d 491, 494, 519 P.2d 7 (1974). Although the facts submitted, and all reasonable inferences therefrom, are to be considered in the light most favorable to the adverse party, summary judgment will be granted when all reasonable persons could reach but one conclusion, that the moving party is entitled to judgment as a

matter of law. Wilson, at 437; Morris, at 494-95.

When the moving party's initial burden of proving the absence of any genuine issue of material fact has been satisfied, the adverse party may not rest upon mere allegations or supposition in the pleadings, but must demonstrate through admissible, competent evidence the existence of a genuine issue which can only be resolved by a trier of fact. CR 56(e); Young v. Key Pharmaceutical, Inc., 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989); LaPlante v. State, 85 Wn.2d 154, 158, 531 P.2d 299 (1975). If the adverse party fails to so respond and satisfy this shifting burden of proof, summary judgment will be entered in favor of the moving party. Id.

Given the particular focus of their arguments on pages 4 through 8 of their "Brief" concerning summary judgment, Mr. and Mrs. DAVEY appear to have conceded that the PRATTS met their initial burden of proof in terms of the evidence they submitted [CP 35-77, 92-100]. The only arguable exception is

appellants' bald claims on pages 7 and 8 that there is "nothing in record reflect[ing] that the properties used by [the court and proffered by PRATTs' expert, John Westover [CP 35-45,]] for determination the [loss of use] award were rentals. However, no where in their brief, or in Mr. DAVEY's underlying declaration [CP 87-90], do the appellants either claim or prove that they possess the necessary skill, training, education or experience or expertise to refute and bring into issue the accuracy of the amount of damages for loss of use formulated by Mr. Westover. Aside from this indisputable fact, a simple review of respondents' proffered evidence and documentation of damages including, but not limited to, the declarations of ROBERT LAWRENCE PRATT [CP 35-45] and John Westover [CP 46-65], bear this out in terms of shifting the burden of proof to the appellant DAVEY under CR 56(e). Young, at 225-26.

By the same measure, a simple review of the opposing declaration of Mr. DAVEY [CP 87-91] makes

clear that he has offered nothing in terms of any evidentiary proof to establish the existence of any genuine issue of material fact. Id. Instead, said declaration is replete with bald conclusory statements, mere conjecture, and endless supposition and speculation with no underlying factual basis. Simply put, the reliance upon such proof does not fulfill the appellants' shifting burden of proof under CR 56(e). Young, at 225-26. By the same token, the unsworn statements and conclusions of Mr. Carollo [CP 91] add nothing to the creation of any genuine issue of material fact. Id.

Most telling of all, the superior court determined that with respect to CR 56(e) the DAVEYs had failed to identify, by way of Mr. DAVEY's declaration or otherwise, any genuine issue of material fact requiring any further evidentiary hearing. Specifically, the court stated:

I frankly don't see any material issues of fact that would require this matter be sent

to any evidentiary hearing. There's not been any declarations or affidavits filed that raise any competent issue of material fact.

[December 4, 2009 RP 12]. For these reasons alone, the decision of the superior court should be affirmed, and present appeal dismissed with prejudice. RAP 12.2.

3. Counter-issue no. 3: Finally, on page 8 of their "Brief," the appellants DAVEY argue for the first time on appeal that Mr. and Mrs. PRATT should not have been awarded attorney fees of \$9,356.20 by the superior court on December 4, 2009, because said award included ostensibly the sum of \$4,926.20 incurred during the course of appellants' first appeal in no. 26620-6-III and, for which, the court commissioner later denied respondent's request for the same on February 3, 2010, because on "Tuesday, December 2, 2008, the Pratts filed an untimely affidavit of fees, one day past the tenth day

following the filling of the [November 21, 2008][CP 19-32] ruling" in violation of RAP 18.1(d).

[Emphasis added]. [See, appendix "A-1" attached to appellants' "Brief"].

Simply put, Mr. and Mrs. DAVEYs' challenge to the superior court's award of attorney fees is totally without merit. First, they never once challenged the award of fees on any basis or at any time prior to entry of the superior court's decision on December 4, 2009 [December 4, 2009 RP 1, et seq.; CP 102-04]. Second, the superior court's award of fees on December 4 pre-dates the commissioner's February 3 decision and making that ruling moot on the issue of attorney fees. [CP 102-04]. Third, the latter's subsequent denial of fees was technical or procedural in nature, and did not effect the commissioner's earlier ruling on November 21 that the PRATTs were legally entitled by contract to claim the said fees as against the DAVEYs. [CP 31]. Fourth,

even after the February 3 commissioner's ruling the appellants DAVEY have never once sought to raise the issue anew before the trial court by way of a CR 60(b) motion or otherwise. In the interest of public policy and fundamental justice, they cannot now raise this issue for the first time in the present appeal. See, RAP 2.5(a); see also, Ferrin v. Donnellefeld, 74 Wn.2d 283, 285, 444 P.2d 701 (1968); Fisch v. Marler, 1 Wn.2d 698, 97 P.2d 147 (1930). Finally, and by the same measure, appellants have failed to cite to any legal authority suggesting they might otherwise have a right to challenge the trial court's award of fees in this particular case. Hence, their unsubstantiated argument on the issue of attorney fees awarded by the trial court should not be considered on this review given their indisputable failure to comply with the basic requirements of RAP 10.3(a)(6) regarding legal citation. See also, DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 372 P.2d 193 (1962).

For these additional reasons, the present appeal should be dismissed with prejudice. RAP 12.2.

E. REQUEST FOR AWARD OF ATTORNEY FEES

It is a long-standing rule that a party is entitled to recovery of his reasonable attorney fees when a statute, contract or recognized ground in equity allows for the same. See, Panorama Village Condominium Owners Association Board of Directors v. Allstate Ins. Co., 144 Wn.2d 130, 143, 26 P.3d 910 (2001). Here, paragraph 14(h) of the subject July 28, 2007, real estate purchase and sale agreement with earnest money provision between appellants and respondents provides that if the buyer and seller ". . . involved in this transaction is involved in any dispute relating to any aspect of this transaction or this Agreement, each prevailing party shall recover their reasonable attorneys' fees." That same general provision goes on to state that such award of attorney's fees ". . . shall survive

Closing." [See, Appeal no. 26620-6-III CP 10; Exh. P-1]. Based upon these contractual provisions, the respondents maintain that they should be entitled to an award of said attorney's fees in the event they prevail on this appeal. See generally, RCW 4.84.330; see also, Singleton v. Frost, 108 Wn.2d 723, 742 P.2d 1224 (1987). Furthermore, and insofar as this second appeal, like its predecessor, is simply based upon "sellers' remorse" and is, therefore, frivolous, devoid of merit and interposed simply for the purposes of delay, an award of attorney's fees is further warranted under RCW 4.84.185. See also, RAP 18.9(a); Green v. Normandy Park Riviera Section Community Club, Inc., 137 Wn.App. 665, 678-81 & n.9, 151 P.3d 1038 (2007).

F. CONCLUSION

Based upon the foregoing points and authorities, respondents, ROBERT LAWRENCE PRATT and SHARON PRATT, respectfully request (1) that, the December 4, 2009, decision and post-trial judgment

entered by the superior court of Spokane County,
State of Washington, in this matter be affirmed and
(2) that, accordingly, this second appeal of the
appellants, JAMES RICHARD DAVEY and DANA DAVEY, be
dismissed with prejudice, and (3) that respondents
be awarded the total sum of their costs and expenses,
including a reasonable attorney fee, incurred as a
result of their having been forced to defend against
this frivolous and warrantless appeal.

DATED this 8th day of March, 2010.

Respectfully submitted:



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