

FILED

DEC 30 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

No. 300641

COURT OF APPEALS,
DIVISION III,
OF THE STATE OF WASHINGTON

Deep Water Brewing, LLC, Plaintiff; Robert D. Kenagy
and Roberta D. Kenagy,

Plaintiffs-Respondents-Cross-Appellants,

v.

Fairway Resources , Ltd., Defendant; Jack A. Johnson, Key
Development Corporation and Key Bay Homeowners'
Association,

Defendants-Appellants-Cross-Respondents.

RESPONSE BRIEF OF RESPONDENTS/CROSS
APPELLANTS

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A. INTRODUCTION

Deep Water Brewing, LLC and Robert D. Kenagy and Roberta D. Kenagy, respondents/cross appellants, (collectively the “Kenagys”), respectfully request that this Court affirm the trial court’s award of interest on attorney fees on remand.

B. ISSUES ON APPEAL

1. Whether the trial court correctly calculated interest on costs and attorney fees on remand from the date of the trial court’s initial attorney fee award when this Court remanded for further support for the fee award without vacating the initial award;

2. Whether the trial court abused its discretion in not awarding all of Kenagys attorney fees for the previous appeal; and

3. Whether the Kenagys are also entitled to attorney fees for the current appeal.

C. STATEMENT OF THE CASE

The present case is the second appeal by Fairway Resources Limited, Jack A. Johnson, Key Development Corporation and Key Bay Homeowners’ Association, appellants/cross appellants, (collectively

“Key”) in hard-fought litigation that involved a bifurcated trial and in which the Kenagys prevailed against Key on the merits of the case.¹

At the end of the trial, the trial court awarded attorney fees to the Kenagys that compensated them for most, but not all, of the attorney fees and costs they had incurred, and entered judgment on March 17, 2008 (the “2008 Judgment”). CP 480-82. Key appealed the trial court’s decision on several bases including the attorney fee award. The Court of Appeals affirmed the trial court on all substantive bases, but, without expressly vacating the attorney fee award, determined that the award required more support under the standards that the Supreme Court established in *Mahler v. Szucs*, 135 Wn.2d at 398, 434-35, 957 P.2d 632 (1998). *Deep Water Brewing, LLC v. Fairway Resources Ltd.*, 152 Wn. App. 229, 285, 215 P.3d 990 (2009). The Court of Appeals:

remand[ed] for the entry of appropriate findings of fact and conclusions of law to support the award of fees and costs attributable to the Kenagys’ claims related to securing a successful recovery.

Deep Water Brewing, LLC, 152 Wn. App. at 285.

¹ The facts underlying the first appeal are found in the Court of Appeals’ opinion *Deep Water Brewing, LLC v. Fairway Resources Limited*, 152 Wn. App. 229, 215 P.3d 990 (2009).
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On remand, the trial court followed the Court of Appeals' directive to more fully support its award of fees, but not make "new findings." Verbatim Report of Proceedings, November 8, 2010, ("RP") p. 4. The trial court explained that:

[t]he Court of Appeals simply ordered that this court supplement the record to determine whether or not there were sufficient facts to support this Court's original attorney's fee award of \$243,000 for fees and \$35,000 for costs.

CP 875.

On April 14, 2011, the trial court issued findings supporting its 2008 Judgment, and calculated interest from that original judgment. CP 884. However, the trial court, without explanation, failed to award Kenagys all of their fees and costs on appeal. The trial court did not make any award for the \$6,124 in attorney fees and costs that the Kenagys incurred in a motion to release a portion of the supersedeas security. CP 881. The trial court also ruled that:

[t]he Plaintiffs [Kenagys] have incurred \$7,443.50 in attorney fees between November 25, 2010 and April 20, 2011, of which \$6,098 were reasonable.

CP 882.

The only issues before this Court is whether the trial court correctly calculated interest on remand from the date of its judgment and whether the Kenagys are entitled to all of their costs and fees on the prior and the present appeal.

D. SUMMARY OF ARGUMENT

Interest running from the date of the 2008 Judgment is appropriate because the 2008 Judgment was not reversed or vacated. The 2008 Judgment remained in place during the remand and is still valid. The scope of the remand was limited to providing factual support for the 2008 Judgment under the requirements of *Mahler*. The trial court properly entered findings that support the amount of the 2008 Judgment. Key has essentially conceded that the 2008 Judgment is valid by not challenging the amount of the underlying fee award on this second appeal. Because these circumstances are similar to those in *Hadley v. Maxwell*, 120 Wn. App. 137, 84 P.3d 286 (2004), interest properly runs from the date of the trial court's judgment before remand, in this case, the 2008 Judgment.

In the alternative, the 2008 Judgment serves as a liquidated damages amount, which is subject to pre-judgment interest on the trial court's remand ruling of April 14, 2011, also pursuant to *Hadley*, 120 Wn. App. 137. For these reasons, the trial court was correct in awarding

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interest on the award of attorneys fees and costs from the date of the 2008 Judgment, and the April 2011 order calculating interest from the date of the 2008 Judgment should be affirmed.

Finally, the trial court abused its discretion when it failed to award the Kenagys all of their attorney fees on appeal, without adequate justification.

E. ARGUMENT

1. Standard of Review

The trial court did not err as a matter of law in awarding interest from the 2008 Judgment because it closely followed the Court of Appeals' directive on remand in *Deep Water Brewing, LLC*, 152 Wn. App. at 285. Therefore, even under *de novo* review, the trial court's calculation of interest from the 2008 Judgment should be upheld.

2. A Judgment Left Intact on Review Remains Valid.

When a reviewing court remands a matter to the trial court with a specific directive, but leaves the underlying judgment intact, the trial court has no discretion to alter or amend the judgment. By not explicitly reversing or vacating the judgment, the reviewing court impliedly affirms the judgment. *See Hadley*, 120 Wn. App. at 146-47. Because the judgment remains valid, any interest on that judgment must run from the

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date of its entry under RCW 4.56.110; *see Hadley v. Maxwell*, 120 Wn. App. 137, 145, 84 P.3d 286 (2004). When a judgment is remanded “and the only action necessary in the trial court is compliance with the mandate,” interest runs from the initial entry of the judgment. *Sintra, Inc. v. City of Seattle*, 96 Wn. App. 757, 799, 980 P.2d 796 (1999).

a. The Court of Appeals Did Not Vacate the 2008 Judgment.

The Court of Appeals remanded the case to the trial court for additional findings in support of the 2008 Judgment, but did not vacate the 2008 Judgment, and therefore impliedly affirmed it. Nowhere within the Court’s exhaustive opinion in *Deep Water Brewing, LLC* does the Court use the terms “remand” or “vacate.” Instead, the Court simply remanded “for the entry of appropriate findings of fact and conclusions of law to support the award of fees and costs . . .” *Deep Water Brewing, LLC*, 152 Wn. App. at 285.

When courts wish to reverse or vacate a judgment or award of attorney fees, they expressly do so. *E.g., Osborne v. Seymour*, ___ Wn. App. ___, ___ P.3d ___ (2011) (WL 5420805) (published decision issued November 9, 2011) (“We *vacate* the trial court’s award of attorney fees and costs and remand to the trial court . . .”) (emphasis added); *In re Marriage of Chua and Root*, 149 Wn. App. 147, 150, 202 P.3d 367 (2009) {ERFW0184512.DOC;1\20038.055001\}

(“We affirm in part, *reverse* in part, and remand for entry of findings of fact related to the allocation of travel expenses.”) (emphasis added); *In re Marriage of Bobbit*, 135 Wn. App. 8, 30, 144 P.3d 306 (2006) (“Thus, we *vacate* the judgment for attorney fees and remand for a new hearing on attorney fees based on adequate information and for entry of specific findings of fact and conclusions of law regarding any attorney fee award”) (emphasis added).

Because the Court of Appeals used no such language here, the amount of the March 17, 2008 judgment was impliedly affirmed. *See Hadley*, 120 Wn. App. at 146-47; *Sintra, Inc.*, 96 Wn. App. at 764.

b. The Trial Court Had No Discretion To Alter the 2008 Judgment on Remand.

Because the amount of the judgment was not expressly vacated or reversed, the trial court had no authority to alter it. While the trial court exercised limited discretion in making these findings, it had no discretion on remand to alter the award itself because a valid judgment “bars the court from entering another, so long as the first remains on the record, not vacated nor reversed . . .” *Morrison v. Berlin*, 37 Wash. 600, 602, 79 P. 1114 (1905). Therefore, the 2008 Judgment remains valid and interest properly runs from it under RCW 4.56.110.

c. The Trial Court Correctly Followed the Court of Appeals' Directive on Remand.

The language that the Court of Appeals used underscores the limits of the trial court's ability to alter the 2008 Judgment on remand. The Court of Appeals specifically:

remand[ed] for the entry of appropriate findings of fact and conclusions of law to support *the* award of fees and costs attributable to the Kenagys' claims related to securing a successful recovery.

Deep Water Brewing, LLC, 152 Wn. App. at 285 (emphasis added).

The Court of Appeals' use of the definite article "the" strongly indicates that it meant for the trial court to support "the" judgment already entered with additional findings and conclusions without altering the judgment. "The" is "used as a function word to indicate that a following noun ... refers to someone or something previously mentioned or clearly understood from the context or the situation." Webster's Third New International Dictionary 2368 (1993). The Court of Appeals' use of this word in the context of supporting "the award of fees and costs attributable to the Kenagys' claims" indicates that the Court intended the trial court to find additional support for the award of fees already in place: the 2008 Judgment.

The trial court correctly read the trial court's directive in *Deep Water Brewing, LLC* and explained that:

[t]he Court of Appeals simply ordered that this court supplement the record to determine whether or not there were sufficient facts to support this Court's original attorney's fee award of \$243,000 for fees and \$35,000 for costs.

CP 875.

The trial court's reading was correct, especially given the Court of Appeals' directive to support "the" award of fees and costs in the 2008 Judgment, as well as the Court's choice not to reverse or vacate the 2008 Judgment.

3. *Hadley v. Maxwell Is Factually Analogous And Supports Calculating Interest from the 2008 Judgment.*

Hadley v. Maxwell is analogous to the present case because both cases involved a judgment left in place by the reviewing court while the matter was remanded for additional factual findings. 120 Wn. App. 137, 84 P.3d 286. In *Hadley*, after a trial, the trial court also awarded the plaintiff damages with post-judgment interest running from the date of the judgment. *Hadley*, 120 Wn. App. at 140. The defendants appealed, and the Court of Appeals affirmed. *Id.* The defendants sought review by the Court of Appeals and eventually petitioned the Supreme Court for review.

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Hadley, 120 Wn. App. at 140. The Supreme Court granted review on liability alone, and like the present case, left the underlying damages award intact. *Hadley v. Maxwell*, 144 Wn.2d 306, 315, 27 P.3d 600 (2001). Accordingly, on remand the trial was limited to issues of liability. *Hadley*, 120 Wn. App. at 140. Similar to the present case, the remand essentially affirmed the result of the first trial. *Hadley*, 120 Wn. App. at 140.

Similar to the present case, the defendants appealed again after remand on whether interest on the judgment should run from the trial court's judgment after the first trial. *Hadley*, 120 Wn. App. at 139. The Court of Appeals held that under RCW 4.56.110, the judgment amount after the first trial was impliedly affirmed on review when not specifically vacated, even though the matter was remanded for additional fact finding. *Hadley*, 120 Wn. App. at 146-47. Similarly, here, the Court of Appeals remanded for fact finding in support of the judgment, but never expressly vacated the amount of the judgment. *Deep Water Brewing, LLC*, 152 Wn. App. at 285. As in *Hadley*, because the reviewing court left the judgment intact after the first trial, it impliedly affirmed that judgment.

Although there are some differences between *Hadley* and the present case, they are not consequential to the analysis. For example, in

Hadley the Court of Appeals noted that the amount of the damages award was unchallenged before remand, although it had been challenged at the Court of Appeals in the first appeal. *Hadley*, 120 Wn. App. at 147. Here, although the amount of attorney fees was at issue on remand and the subject of the additional findings, the 2008 Judgment was not at issue. *Deep Water Brewing, LLC*, 152 Wn. App. at 285. As in *Sintra*, 96 Wn. App. at 799 , the trial court simply had to follow the mandate of the trial court. Here the mandate was to meet the requirements of *Mahler v. Sucz* in supporting the fee award in the 2008 Judgment. *Deep Water Brewing, LLC*, 152 Wn. App. at 285.

Furthermore, in the present matter, Key does not challenge the amount of the underlying award, or the trial court's findings in support of it, essentially conceding that the amount of the March 18, 2008 award was proper. Arguments that interest should not run from the date of that award should therefore be rejected.

Key's reliance on *Fisher Properties, Inc. v. Arden-Mayfair, Inc.* is misplaced. 115 Wn.2d 364, 789 P.2d 799 (1990). In *Fisher*, the Supreme Court held that when a reviewing court "Merely modifies the trial court award and the only action necessary is the trial court is compliance with the mandate," interest runs from the original judgment. *Fisher*, 115

Wn.2d at 373 (quoting *Fulle v. Boulevard Excavating, Inc.*, 25 Wn. App. 520, 522, 610 P.2d 387 (1980)). Here, unlike in *Fisher*, the original judgment was not vacated before remand.

The present case is also distinguished from *Zink v. City of Mesa*, 162 Wn. App. 688, ___ P.3d ___ (2011). In the present case, although the trial court necessarily exercised discretion in making findings in support of the 2008 Judgment, it had no discretion to alter the judgment itself because it had not been vacated.

4. The March 2008 Award Serves as Liquidated Damages On Which to Base Prejudgment Interest.

In the alternative², because the amount of the March 17, 2008 judgment was fixed, it serves as liquidated damages and therefore is subject to prejudgment interest on the trial court's ruling after remand. *Hadley*, 120 Wn. App. 137, 145, 84 P.3d 286 (2004). "Generally prejudgment interest is favored because the law assumes that one who retains money owed to another should be charged interest on it." *Hadley*, 120 Wn. App. at 142 (internal quotations omitted). In *Hadley*, the court held, based on the constellation of facts in that case, that "an unchallenged damages award on an unliquidated claim results in a liquidated claim for

² The Court of Appeals can affirm on any basis supported by the record and the case law. RAP 2.5(a); *Hadley*, 120 Wn. App. at 143.
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purposes of a subsequent trial on liability alone.” *Hadley*, 120 Wn. App. at 144.

A similar holding is appropriate to the facts in the present case. Like the plaintiff in *Hadley*, the Kenagys prevailed at trial and obtained an award of damages, which was impliedly affirmed on appeal. Like in *Hadley*, the matter was remanded for a subsequent fact finding, while leaving the amount of the damages intact. Although the issue on remand in *Hadley* involved an issue of liability, and the issue on remand in the present case involved issues closer to the question of damages, the important similarity is that in both cases the amount of damages was unaffected by the remand. Even though the defendants in *Hadley* and the present case may not have been happy about the amount of the award, the judgment after the first trial enabled them to “ascertain the amount owed” after the first trial. *Hadley*, 120 Wn. App. at 142.

“The prevailing party to a lawsuit is generally entitled to prejudgment interest on liquidated damages.” *Hadley*, 120 Wn. App. at 141 (internal quotations omitted). The earlier judgment served as the basis for prejudgment interest on the trial court’s remand judgment because the earlier judgment served as a liquidated amount, upon which “it is possible to compute the amount with exactness.” *Hadley*, 120 Wn. App. at 142.

Even if the defendants in *Hadley* or the present case had been able to mount defenses to the amount of the judgment on remand, “the defendant’s claim that he or she is not liable for part or all of the plaintiff’s liquidated damages will not preclude a successful plaintiff from receiving prejudgment interest.” *Hadley*, 120 Wn. App. at 143. “[A] liquidated claim remains so, even if the defendant is partially successful in reducing his or her share of liability.” *Hadley*, 120 Wn. App. at 144.

In short, the differences in the facts between the present case and *Hadley* do not change the fact that judgment became ascertainable liquidated damages upon which prejudgment interest can be based.

F. THE TRIAL COURT ERRED IN NOT AWARDING ALL OF KENAGYS’ ATTORNEY FEES AND COSTS ON THE FIRST APPEAL.

In the alternative, if this Court determines that the Kenagys are only entitled to interest running from April 14, 2011 on the initial fee award because the trial court had discretion to modify the 2008 Judgment amount, the Kenagys are also entitled to recalculation of the fees based on a 1.5 multiplier under *Mahler* because the trial court abused its discretion in not applying that multiplier under the facts presented by the Kenagys on remand. On remand, the Kenagys argued that they were entitled to additional fees, including a multiplier of 1.5 under the lodestar factors

because of the novelty and complexity of the issues and the level of skill required by the attorneys. CP 581, 584-91. The trial court affirmed its earlier award and entered additional findings pursuant to *Mahler*. However, the trial court denied the Kenagys' request for adding a lodestar multiplier to the award, ruling that:

since Plaintiffs did not request a lodestar multiplier at trial, the Court did not consider their argument about the multiplier now. The Court holds that Plaintiff is precluded from arguing for one now because Plaintiffs did not cross appeal nor moved to reopen.

CP 875, Additional Findings of Fact and Conclusions of Law, p. 3, ll. 13-15.

This legal conclusion is wrong, however, if this Court disagrees with the Kenagys' position above, and agrees with Key that the trial court had discretion to completely revise the fee award according to the *Mahler* factors. This matter must be remanded for consideration of whether a multiplier is appropriate in this case, based on the Kenagys' exhaustive briefing in support of a multiplier. CP 581-97.

Finally, the trial court abused its discretion when it did not award to the Kenagys all of the fees they requested on appeal. Courts review attorney fee awards for abuse of discretion and only reverse the awards if

the lower court “exercised its discretion on untenable grounds or for untenable reasons.” *In re Recall of Lindquist*, 172 Wn.2d 120, 258 P.3d 9 (2011). Courts findings must be sufficient under *Mahler v. Sucz* to support an award. *Deepwater*, 152 Wn. App. at 282-83.

On remand, although the Court of Appeals was specific that sufficient findings must be made to support a fee award, the trial court denied portions of the Kenagys’ post-trial fees without explanation. Despite an exhaustive explanation of the fees incurred by the Kenagys, including declarations by Kenagys’ counsel, (CP 443, 451, 458, 461), the trial court’s award does not compensate the Kenagys for the fees incurred regarding complications involving the supersedeas bond, in the amount of \$6,124.00. CP 881. In addition, the trial court only awarded \$6,098 of the \$7,443.50 incurred between November 25, 2010 and April 20, 2011, without explanation. CP 882. Because the trial court failed to justify why these fees were not reasonable under *Mahler* and *Deepwater*, the exclusion of those fees in the April 14, 2011 award is unreasonable and this matter should be remanded for inclusion of those fees in a revised award, with interest running from April 14, 2011 under *Hadley*, 120 Wn. App, 137.

G. ATTORNEY FEES ON APPEAL

The Kenagys request attorney fees and expenses for responding to this second appeal. Under RAP 18.1(a) a party can recover attorney fees and expenses, if applicable law grants the right to such recovery. Here, similar to the first appeal in this matter, the Kenagys are entitled to an award of fees based on contract and RAP 18.1(a) and (i).

H. CONCLUSION

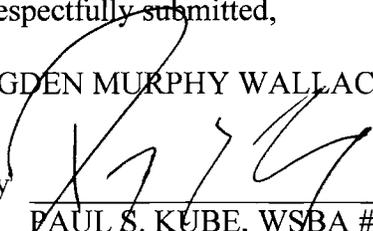
The trial court properly followed the Court of Appeals' directions on remand and made findings in support of the 2008 Judgment, but had no discretion to alter the 2008 Judgment because the Court of Appeals did not vacate it. Therefore, the trial court properly calculated interest from the date of the 2008 Judgment. In the alternative, the Kenagys are entitled to prejudgment interest calculated from the date of the 2008 Judgment to the trial court's remand decision because the 2008 Judgment is a liquidated amount upon which to base prejudgment interest. Finally, the Kenagys are entitled to all of their attorney fees for the prior appeal as well as the present appeal.

RESPECTFULLY SUBMITTED this 21 day of December, 2011.

Respectfully submitted,

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