

FILED

No. 301451

MAY 21 2012

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

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By _____

JOHN T. SANNA,

Appellant,

vs.

BEN VEENHUIZEN, ET. AL.,

Respondent

APPEAL FROM THE SUPERIOR COURT OF STEVENS COUNTY

THE HONORABLE ALLEN C. NEILSON, JUDGE

BRIEF OF RESPONDENT

Elizabeth R. Tereno, WSBA #43245
Slate & Jones Law Firm, PC
Attorneys for Respondent
358 E. Birch St., Suite 201
Colville, WA 99114
(509) 684-6332
Fax: (509) 684-3475

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I. INTRODUCTION

The Plaintiff/Appellant, John T. Sanna, appeals the failure of the court below to award his reasonable attorneys' fees. The Respondent/Defendant, Ben Veenhuizen, requests that the judgment of the Superior Court be affirmed and further moves for the dismissal of this appeal as frivolous pursuant to RAP 18.9(c).

II. ASSIGNMENTS OF ERROR

Respondent assigns no error to the proceedings of the Court below. Appellant has assigned error to the Court's order denying his request for attorney's fees and costs.

From the Issues Pertaining to Assignments of Error referenced in Appellant's Brief and from the argument presented therein, Respondent concludes that Appellant means to assign error to the Conclusion of Law finding that Appellant was not the prevailing party on the Consumer Protection Act Claim (Conclusion of Law C).

A. Issues Pertaining to Assignments of Error

1. Whether the Court manifestly abused its discretion by not awarding attorney's fees to the Appellant.

III. STATEMENT OF THE CASE

The Appellant, John T. Sanna, began this suit with a number of causes of action as against Ben and Clay Veenhuizen. CP 67. Mr. Sanna's allegations in his amended complaint included eight claims: replevin; conversion or trespass to chattel; negligent repair or breach of implied warranty; negligent bailment; violation of the Auto Repair Act – 1977 Chevrolet truck; violation of the Auto Repair Act – 1991 Ford Explorer; violation of the Auto Repair Act – Chevrolet S-10 Blazer; and violation of the Consumer Protection Act. CP 54. Only half of these claims went to the jury while the other four were dismissed as meritless; further, Clay

Veenhuizen was dismissed at the end of Mr. Sanna's case due to a lack of evidence presented. CP 54-5.

The jury verdict determined that Mr. Veenhuizen was not liable for conversion, but listed the value of the converted property at \$1500. CP 91. At hearing after trial on June 14, 2011, the Court determined: "I take that to mean that's just a gratuitous finding that they felt obligated to make, because they didn't find there was any liability for conversion on the part of the defendant, they just offer a value of the personal property." RP 280. The Court made a finding of fact to this effect on the order entered after a hearing on Reconsideration: "The Jury Verdict Form (document no. 177) found the defendant, Ben Veenhuizen, not to be liable for conversion, but set the value of the property at \$1,500." CP 55.

The jury found that although the Auto Repair Act and Consumer Protection Act were violated that Mr. Sanna suffered no damage and therefore was not harmed by these violations. CP 91; CP 55. The Court made a factual finding that "virtually no time at trial was spent" on the Auto Repair Act and Consumer Protection Act issues. CP 56.

Based on the jury's finding that the truck should be returned, the Court reached the conclusion of law that Mr. Sanna's only successful claim was the replevin claim, which entitled him to the return of his truck. CP 91; CP 56. The Court concluded that Mr. Sanna was not entitled to attorneys' fees, but also concluded that his claims were not wholly meritless and advanced without reasonable cause except as against Clay Veenhuizen. CP 57. The Court entered a conclusion of law stating that Mr. Sanna's claims against Clay Veenhuizen were frivolous. CP 57.

The Court denied all requests for attorneys' fees and required that each party bear their own costs. CP 60-61.

IV. ARGUMENT

A. STANDARD OF REVIEW

The standard of review on the award of attorneys' fees is that of an abuse of discretion. *State v. Ralph Williams' North West Chrysler Plymouth, Inc.*, 87 Wn.2d 298, 553 P.2d 423 (1976). In order to find that the court below abused its discretion in failing to award attorneys' fees, the Court on appeal must find that its decision was manifestly unreasonable, based on untenable grounds or impermissible reasons. *Noble v. Safe Harbor Family Preservation Trust*, 167 Wn.2d 11, 17, 216 P.3d 1007, 1010 (2009).

B. FAILURE TO AWARD ATTORNEYS' FEES

RCW 19.86.090 permits anyone "injured" by a violation of the Consumer Protection Act to "bring a civil action in superior court to enjoin future violations, to recover the actual damages sustained by him or her, or both, together with the costs of the suit, including a reasonable attorney's fee." RCW 19.86.090. The plain language of the statute shows that in order to prevail on a Consumer Protection Act claim for the purposes of attorney's fees, a plaintiff must be "injured." *Id.*

"Even if there were a CPA violation, the amount of attorney's fees and costs awarded the prevailing party is within the discretion of the trial court." *Eriks v. Denver*, 118 Wn.2d 451, 465, 824 P.2d 1207, 1214-5 (1992). In that case, the Court found that there was no CPA violation, but believed that the court's failure to award attorneys' fees under the CPA would have been

harmless error even if there had been a CPA violation because attorneys' fees are within the sound discretion of the trial court. *Id.*

The case law is clear that monetary damages are not necessary so as to prove injury under the CPA; however, some measure of otherwise nonquantifiable harm is necessary. *Mason v. Mortgage America*, 114 Wn.2d 842, 855, 792 P.2d 142, 149 (1990). The *Mason* case stands for the proposition that injury without damages under the CPA permits an attorney fee award; it does not stand for the proposition that an attorney fee award under the CPA is mandatory. There is a significant difference at law between a Court that fails to find an abuse of discretion in a fee award and a Court that finds an abuse of discretion in the failure to award. *Mason* supports an exercise of the broad discretion accorded to the trial court to determine an appropriate fee award granted the statutory authority to do so. *Id.*

Unchallenged factual findings become verities on appeal. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 819, 828 P.2d 549, 558 (1992). Conclusions of law not assigned error become the law of the case. *Millican of Washington, Inc., v. Wienker Carpet Service, Inc.*, 44 Wn.App. 409, 413, 722 P.2d 861, 864 (Div 1 1986).

The Court made an express factual finding that “virtually no time at trial was spent” on the Auto Repair Act and Consumer Protection Act issues. CP 56. The Court made an express factual finding that Mr. Sanna was not damaged by these violations, per its wholly reasonable interpretation of the jury’s verdict form. CP 55. In light of its factual findings that Mr. Sanna did not spend time at trial on the Consumer Protection Act and that Mr. Sanna was not damaged by any violation of the Consumer Protection Act, the Court did not abuse its discretion in failing to award Mr. Sanna any attorney’s fees referent to the Consumer Protection Act. In order to sustain

a fee award under the statute, Mr. Sanna would have to suffer an injury; while the law does not require that this injury be quantifiable, it does require that it exist. The factual findings of the Court and the verdict of the jury both show that, while Mr. Veenhuizen may have technically violated the Consumer Protection Act, Mr. Sanna was not injured and is therefore not entitled to recover.

The Court reached the conclusion of law that Mr. Sanna only prevailed upon his replevin claim. CP 56. This conclusion was based on a reasonable interpretation of the jury's verdict form, which interpretation was memorialized in an unchallenged finding of fact on appeal. CP 55. The Court's unchallenged conclusions of law include its determination that the jury finding as to the Consumer Protection Act violation was sufficient to protect Mr. Sanna from a finding that his claims as against Ben Veenhuizen were frivolous. CP 56. When a claim barely survives frivolity, it is not reasonable to conclude that it is a "prevailing" claim.

Further, even if Mr. Sanna is correct and the Court was wrong to find that he did not prevail upon his Consumer Protection Act claim, any error is harmless, per the *Eriks v. Denver* Court cited *supra*, because the amount of an award of attorneys' fees is still within the sound discretion of the trial court. It is not an abuse of discretion not to award attorneys' fees based on claims on which "virtually no time" was spent at trial. The court's conclusions follow naturally from its factual findings and from sound legal reasoning. There is no abuse of discretion.

C. FRIVOLOUS APPEAL

In determining whether an appeal is frivolous, the Court must undertake the following considerations:

- (1) A civil appellant has a right to appeal under RAP 2.2;
- (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant;

(3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal. *Delany v. Canning*, 84 Wn.App. 498, 510, 929 P.2d 475, 481 (Div. 3 1997).

To challenge a factual finding on appeal, the appellant bears the burden of proving it is not supported by substantial evidence in the record. Substantial evidence means a sufficient quantum of evidence to persuade a reasonable fact-finder of the truth of the fact-finding. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313, 315 (1994).

The question at issue here is whether Mr. Sanna has raised any debatable issues on which reasonable minds can differ. To forward his contention that he is actually the prevailing party, he can point to no factual findings of the trial court or of the jury. The only evidence he raises as an issue is the value the jury found of the personal property it returned pursuant to the replevin action; this same replevin action is the only one that the Court concluded he prevailed on, which action does not come with an associated statutory right to attorney fees.

Mr. Sanna has assigned no error to any findings of fact or conclusions of law pursuant to RAP 10.3(a)(4); only the Court's order denying attorney's fees is assigned error. Given that the conclusions of law and findings of fact wholly support the Court's order denying the fee award, there are no debatable issues on which reasonable minds may differ.

Mr. Sanna's brief appears to make an argument of error as to the Court's conclusion of law that he did not prevail on his Consumer Protection Act claim. There are no factual findings that support Mr. Sanna's contentions on appeal. Even assuming *arguendo* but by no means conceding that Mr. Sanna has challenged the factual finding that he was not injured and that the \$1500 finding was related to the value of the personal property as subject of the replevin action, he cannot meet his burden to overturn this factual finding, and does not appear to have made the

attempt; rather, he has asserted that the “only reasonable interpretation” is different from the one made by the trial court without the support of any evidence aside from his own assertion (Appellant’s Brief at 10). The jury was not persuaded that Mr. Sanna was injured under the Consumer Protection Act; therefore, he did not prevail. Mr. Sanna has not challenged the factual findings that support this conclusion, but even if he had done so, he has not even attempted to meet the burden on appeal to overturn a factual finding.

On review of this matter as a whole, this appeal is not the only frivolous filing put forward by Mr. Sanna under this case number. The Court found all of Mr. Sanna’s claims frivolous as against Clay Veenhuizen. This is a similar attempt to harass the Veenhuizens and to run up their legal costs by forcing them to respond to frivolous and procedurally deficient filings.

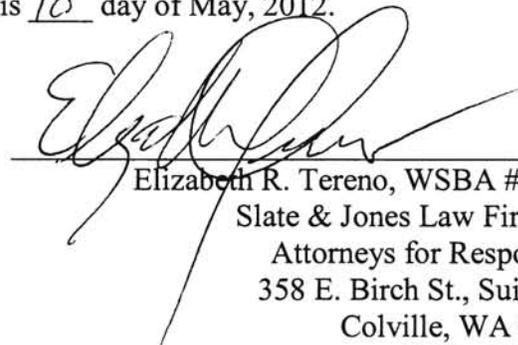
D. FEES ON APPEAL

Mr. Veenhuizen should not be forced to bear the costs of responding to a frivolous appeal. RAP 18.9(a) authorizes an award of compensatory damages against a party who files a frivolous appeal. RAP 18.9(a); *Delany*, 84 Wn.App. at 510, 929 P.2d at 481.

V. CONCLUSION

The decision of the trial court should be affirmed and this appeal dismissed as without merit.

Respectfully submitted this 18th day of May, 2012.



Elizabeth R. Tereno, WSBA #43245
Slate & Jones Law Firm, PC
Attorneys for Respondent
358 E. Birch St., Suite 201
Colville, WA 99114
(509) 684-6332
Fax: (509) 684-3475