

**FILED**

OCT 11 2012

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 307760

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

---

Gregory Welch dba Custom Marble Granite Tiles and All Others,

Appellant,

v.

Keith B. Arndt, Trustee, Arndt Living Trust,

Respondent.

---

**APPELLANT'S REPLY BRIEF**

---

Thomas R. Nicolai, WSBA #44669  
Stoel Rives LLP  
900 SW Fifth Ave., Suite 2600  
Portland, OR 97204  
(503) 294-9294  
*trnicolai@stoel.com*

Ross R. Rakow, WSBA #4879  
117 E. Main St.  
Goldendale, WA 98620  
(509) 773-4988  
*Rakow@Gorge.net*

Attorneys for Appellant

**TABLE OF CONTENTS**

	<b><u>PAGE</u></b>
I. <u>STATEMENT OF THE CASE</u> .....	1
II. <u>STANDARD OF REVIEW</u> .....	2
III. <u>ARGUMENT</u> .....	3
A. <i>The Trial Court’s Decision Limiting to \$2,000 the Amount of Attorney Fees Awarded Welch is Not Supported by Specific Findings of Fact and Conclusions of Law on Material Issues, Including the Effect of Arndt’s Wrongful Conduct on the Amount of Welch’s Attorney Fees</i> .....	3
B. <i>The Mellotte Statement Ignored Material Facts in the Record and is Unreliable as Support for Limiting Welch’s Attorney Fees to \$2,000</i> .....	5
C. <i>The Trial Court Denied Attorney Fees for Work Performed by Nicolai on the Basis of an Incorrect Legal Standard, Not Because of Collective Unreasonableness of Fees</i> .....	7
D. <i>Arndt’s Claim That Welch’s Requested Attorney Fees Include Fees for Time Spent on Nicolai’s Separate Claim Against Arndt is Refuted by the Record</i> .....	8
E. <i>Both the Trial Court and Arndt Fail to Distinguish Between Fees Incurred Before the Voluntary Non-Suit with Respect to Unlawful Detainer Issues and Fees Incurred Thereafter with Respect to Enforcement of the Attorney Fee Provision of the Lease</i> .....	9
IV. <u>CONCLUSION</u> .....	10

TABLE OF AUTHORITIES

CASES

PAGE

*Gander v. Yeager*,  
167 Wn. App. 638 (2012).....2

## I. STATEMENT OF THE CASE

Appellant (“Welch”) disagrees with the completeness and accuracy of Respondent’s (“Arndt”) Statement of the Case in several respects, including the following:

1. Arndt omits any reference to the 10-day grace period for payment of rent under the lease between Welch and Arndt (“Lease”) that prohibited Arndt’s exercise of remedies for alleged rent default before expiration of such grace period. CP at 107.

2. Arndt omits any reference to his changing of the locks on the doors to the leased premises on May 7, 2009, three days before expiration of the 10-day grace period for May rent under the Lease. CP at 113.

3. Arndt misstates the date on which Washington counsel for Welch was retained. Ross R. Rakow (“Rakow”) was engaged on or after September 21, 2009, not on September 5, 2009. CP at 178.

4. Arndt omits any mention of (a) Rakow’s attempted negotiations with the attorney then representing Arndt for the purpose of postponing the scheduled sheriff’s sale and settlement, (b) letters from Thomas R. Nicolai (“Nicolai”) to Arndt’s counsel in which he (i) provided notice of defective default judgment and (ii) requested a copy of the lease, access to the leased premises to examine Welch’s business records, and

cooperation to reduce litigation costs and attorneys' fees, and (c) Arndt's ignoring of such attempted negotiations, letters and requests. CP at 119, 126-127.

5. Attorney fees requested by Welch in connection with dismissal of the unlawful detainer action and vacation of the default judgment through the date of Arndt's taking a voluntary non-suit were \$17,575, not \$26,000. CP at 254-256.

6. Personal relationships between Arndt, on the one hand, and Welch and Heather White, on the other, involved facts that were relevant to various lease issues, including rent default, waiver and abandonment, and to prima facie defenses on which Welch's motion to vacate the default judgment was predicated. CP at 57-64.

## II. STANDARD OF REVIEW

The discussion in the Standard of Review section of Respondent's Brief does not challenge or alter the analysis of the applicable standard of review contained in Appellant's Opening Brief. *Gander v. Yeager*, 167 Wn. App. 638 (2012), cited in Respondent's Brief, does not limit de novo review by an appellate court of a lower court's attorney fee award where the lower court made its determination solely on the basis of the record and legal argument. *See* Appellant's Opening Brief at 16-17.

### III. ARGUMENT

A. *The Trial Court's Decision Limiting to \$2,000 the Amount of Attorney Fees Awarded Welch is Not Supported by Specific Findings of Fact and Conclusions of Law on Material Issues, Including the Effect of Arndt's Wrongful Conduct on the Amount of Welch's Attorney Fees.*

The trial court began its oral ruling by characterizing this case as “a fairly routine” (RP at 23) and “a fairly straightforward” (RP at 25) unlawful detainer action. It then proceeded to make no specific findings regarding the effect on, or reasonableness of, the amount of Welch’s attorney fees due to several material factors: Arndt’s seven-month unlawful lockout; Arndt’s ignoring Welch’s early notices of defective default judgment and requests for information and cooperation to reduce attorney fees and costs; Arndt’s unrelenting efforts to complete a sheriff’s sale of Welch’s property, notwithstanding such notices and requests; the several “technical” errors committed by Arndt in the case, and legal work relating to such errors and other issues on which Welch’s motions to dismiss the unlawful detainer action, to vacate the default judgment and to grant leave to file an answer, affirmative defenses and counterclaims were based. The trial court refused to question Nicolai regarding his and Rakow’s time records in the court file regarding the reasonableness of attorney fees related to all such matters. RP at 20. The trial court also failed to discuss or respond in any way to specific findings of fact and

conclusions of law proposed by Welch (CP at 242-248) that were submitted as an aid to the trial court to fulfill its obligations under law to make detailed findings of fact and conclusions of law in support of its ruling.<sup>1</sup>

While Arndt's current counsel concedes that the case involved many pre-dismissal errors (RP at 21, lines 14-15 and 19-22), he asserts at this stage of the case that these errors were "technical" (Respondent's Brief at 1) and "undisputed" (Respondent's Brief at 13). The record shows the actual facts are different: all issues raised and all relief sought by Welch were strenuously disputed or opposed by Arndt in the pleading filed by his prior counsel on December 2, 2009 (CP at 96-107), before taking a voluntary dismissal, without notice, a few days later. Arndt's mischaracterization of the issues facilitates his oft-repeated, but incorrect, assertion that the issues in the case were easily resolvable and the case

---

<sup>1</sup> In addition to mischaracterizing the case as fairly "routine" and "straightforward," the record suggests the trial court was either not adequately informed of material facts or otherwise unprepared to make specific findings and conclusions when it ruled on August 30, 2011. The court said that it "had an opportunity to review the file before court started this morning" (RP at 23, lines 5-6), a file containing several lengthy and fact-intensive declarations and a number of pleadings addressing complex legal issues. Also, with respect to the simple matter of the amount of fees billed by Rakow, the trial court stated that "(a)ctually Mr. Rakow's fees come under two thousand dollars. \* \* \* like eighteen hundred and seventy-five dollars I think – I added it up." RP at 26, lines 14-15, and at 27, lines 24-25. The actual amount of Rakow's fees through the time of Arndt's voluntary non-suit, per his fee statement then in the court file, was \$2,455. CP at 188. Upon reconsideration on March 12, 2012, the trial court did not correct or supplement its earlier ruling in any respect.

itself “simple.” Respondent’s Brief at 15. The omitted facts and unfounded assertions of simple, undisputed issues amount to no more than a thinly veiled attempt to divert attention from Arndt’s obstructive and other wrongful conduct that increased Welch’s attorney fees.

Arndt’s obstructive conduct and the narrow time window to stop the scheduled sheriff’s sale demonstrate the unreasonableness of Arndt’s argument that there was too little “in court” activity to justify the requested fees. The reality was that there was too little time and too much delay risk with an approach based on contested motions in court. The approach taken instead – documenting through declarations and pleadings a compelling case against Arndt’s claims and the legality of a sheriff’s sale – was pragmatic and reasonable under the circumstances. They persuaded the Klickitat County Sheriff’s Office that postponement of the sheriff’s sale was prudent. They also persuaded Arndt that he could not win on his claims. Arndt then resorted to a voluntary dismissal in hopes of escaping liability for prevailing party attorney fees, not to mention damages.

**B. *The Mellotte Statement Ignored Material Facts in the Record and is Unreliable as Support for Limiting Welch’s Attorney Fees to \$2,000.***

The thrust of the Mellotte Statement parallels the theme of Arndt’s false narrative of this being a “simple” case. If one fairly considers the facts and issues actually involved in the case, the Mellotte Statement’s

opinion that not more than 10 hours of time were reasonably required to represent Welch is patently unreliable. There is no reference to Arndt's unlawful lockout, stonewalling, and other obstructive conduct that increased the amount of legal work required on behalf of Welch. There is no recognition of the distant locations and difficult circumstances of communicating with Welch and Heather White, or the passage of time since critical events occurred, all of which complicated and required more time and effort to complete the investigation of facts and preparation of documents. The incompleteness and vagueness of the Mellotte Statement suggest that the opinion regarding time reasonably required to represent Welch is based on an assumption of a "simple" unlawful detainer case, and not on the actual facts and circumstances contained in the record. With these infirmities, the Mellotte Statement is unreliable and unreasonable as a basis for limiting attorney fees awarded to Welch and should be disregarded as to the issue of time reasonably required to represent Welch. Additionally, it is important to note that the Mellotte Statement applies only to attorney fees incurred in the case through Arndt's voluntary non-suit, and has no bearing on the amount of attorney fees incurred by Welch after the voluntary non-suit to enforce the attorney fee provision in the Lease.

**C. *The Trial Court Denied Attorney Fees for Work Performed by Nicolai on the Basis of an Incorrect Legal Standard, Not Because of Collective Unreasonableness of Fees.***

Arndt asserts that the “dispute has always been with the reasonableness of the fees requested by the Appellant.” Respondent’s Brief at 5. This assertion is explicitly contradicted by the record. On June 16, 2011, Arndt filed his Memorandum in Opposition to Defendant’s Motion for Compensatory Terms Upon Plaintiff’s Voluntary Dismissal, in which Arndt urged the trial court to deny all attorney fees related to Nicolai’s work, not for unreasonableness, but for other, legally untenable reasons, stating:

“Mr. Nicolai is not entitled to recover his claimed attorney’s fees. He is not licensed to practice law in Washington State. \* \* \* Defendant has provided no evidence that Mr. Welch did in fact engage Mr. Nicolai as an attorney-of-record.\* \* \* For the foregoing reasons, Thomas Nicolai may not recover attorney’s fees for the work he performed regarding this matter.”

CP at 196.

Arndt contends that the trial court did not exclude work performed by Nicolai in determining a reasonable attorney fee award (notwithstanding Arndt’s urging the court to do so), but limited the award based upon its consideration of the unreasonableness of the gross amount of attorney fees requested. Respondent’s Brief at 7. This argument is

inconsistent with the actual words used by the trial court. There was no reason for the trial court to emphasize that Nicolai “never appeared as attorney in this file” (RP at 23, lines 21-22), that Nicolai was “not licensed to practice in Washington ” (RP at 23, line 23), and that Rakow was “the only attorney of record” (RP at 26, line 12) for Welch if the collective reasonableness of fees requested by Welch was the basis of its decision. The trial court went on to discuss the reasonableness of a \$2,000 attorney fee award based on Rakow’s time alone. The actual, unambiguous words used by the trial court in its ruling must be given effect if the requirement that a trial court must articulate tenable grounds or reasons supporting its decision is to have any meaning. The legal standard urged by Arndt to exclude fees related to Nicolai’s work, and that the court applied in its decision, was an incorrect standard. *See* Appellant’s Opening Brief at 19-22.

**D. *Arndt’s Claim That Welch’s Requested Attorney Fees Include Fees for Time Spent on Nicolai’s Separate Claim Against Arndt is Refuted by the Record.***

The claim that Welch’s attorney fee request includes time spent on Nicolai’s separate claim against Arndt is thoroughly disproved by uncontradicted evidence in the record. Such evidence includes:

(1) Nicolai's sworn declaration that time spent on behalf of Welch was completely segregated from time spent on Nicolai's separate claim against Arndt (CP at 212, ¶ 4);

(2) Arndt's sworn declaration that agreement resolving Nicolai's separate claim against Arndt occurred on or before October 16, 2009<sup>2</sup> (CP at 199, ¶ 8); and

(3) Nicolai's time records relating to Welch's attorney fee request which show that the few time entries before October 16, 2009 related solely to work on behalf of Welch (CP at 182).

***E. Both the Trial Court and Arndt Fail to Distinguish Between Fees Incurred Before the Voluntary Non-Suit with Respect to Unlawful Detainer Issues and Fees Incurred Thereafter with Respect to Enforcement of the Attorney Fee Provision of the Lease.***

The trial court denied all attorney fees incurred after Arndt's voluntary non-suit, but then improperly included those same fees in its consideration of the reasonableness of the amount of fees incurred before the voluntary non-suit when it described the total amount of fees for the unlawful detainer portion of the case as being approximately \$26,000.

---

<sup>2</sup> The record incorrectly reflects that Nicolai filed a lawsuit against Arndt to recover his granite slabs. Nicolai did engage Rakow to represent him in a potential lawsuit against Arndt to recover the granite slabs, but the filing of a lawsuit became unnecessary when Arndt agreed to release the slabs in mid-October 2009.

Arndt's assertion that Rakow's estimate of work division between himself and Nicolai demonstrates excessiveness of Welch's attorney fee request is based upon self-serving assumptions and incorrect arithmetic. Arndt erroneously assumes that Rakow's estimate that he performed 20 percent and Nicolai performed 80 percent of legal work for Welch applied to requested attorney fees for the entire case, whereas in fact the estimate applies only to legal work through the date of Arndt's voluntary dismissal. The specific legal work performed and the actual time spent are detailed in the time records contained in the record. CP at 254-264. They are reasonable in the context of the specific facts and circumstances of this case, which were unique and complex. Whether attorney fees incurred by Welch are payable by him in full without condition, or on a contingency basis, or only to the extent of prevailing party fees actually received, is irrelevant to the reasonableness of the fees or Arndt's liability for them pursuant to the attorney fee provision of the Lease.

#### IV. CONCLUSION

This case is not one of unreasonable lawyering or excessive attorney fees, as Arndt contends. Rather, the total amount of attorney fees incurred by Welch in this matter is a direct consequence of extraordinary legal issues and circumstances arising from Arndt's own conduct, beginning with his unlawful lockout and continuing thereafter with his

stonewalling, ignoring notices of defective default judgment, refusing to cooperate to reduce legal fees and litigation costs, and other related conduct that drove up Welch's attorney fees. By such conduct, Arndt forced Welch to incur attorney fees materially higher than otherwise necessary up to the time of Arndt's voluntary non-suit. Thereafter, the significant amount of attorney fees incurred by Welch to collect prevailing party fees under the Lease, including in connection with this appeal, is the direct result of Arndt's continuing unreasonable efforts to evade liability for the consequences of his prior wrongful conduct. Having caused Welch to incur substantial litigation expense, it is fair and just that Welch be awarded his reasonable attorney fees in connection with trial court matters. It is also fair and just that Welch be awarded his reasonable attorney fees in connection with this appeal.

DATED: October 10, 2012.

Respectfully submitted,



Thomas R. Nicolai, WSBA #44669  
Attorney for Appellant



Ross R. Rakow, WSBA #4879  
Attorney for Appellant

CERTIFICATE OF SERVICE AND FILING

I, Susan L. Ellingson, am a legal secretary for the law firm of Stoel Rives LLP, 900 SW Fifth Avenue, Suite 2600, Portland, Oregon 97204.

I hereby certify that on October 10, 2012, I caused the foregoing *Appellant's Reply Brief* and the accompanying *Certificate of Service and Filing* to be filed with the Court of Appeals of the State of Washington, Division III (an original and one copy) by overnight courier; and on this same date I also caused a true and correct copy of the same documents to be served on the persons listed below by mailing via U.S. first class mail, postage prepaid:

Carter L. Fjeld,  
Attorney at Law  
405 East Lincoln Ave.  
P.O. Box 22550  
Yakima, WA 98907

Ross Rakow  
Attorney at Law  
117 E. Main Street  
Goldendale, WA 98620

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed this 10 day of October, 2012, at Portland, Oregon.

  
Susan L. Ellingson

Certificate of Service and Filing