

FILED

SEP 12 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

No. 307760

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

KEITH B. ARNDT, TRUSTEE, ARNDT LIVING TRUST,
RESPONDENT.

V.

GREGORY WELCH DBA CUSTOM MARBLE GRANITE TILES
AND ALL OTHERS,
APPELLANT,

RESPONDENT'S BRIEF

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I. STATEMENT OF THE CASE

This action started as an unlawful detainer complaint for back rent due on commercial property. The Appellant, Mr. Gregory Welch ("Welch") was the lessee of the property under a written lease dated December 17, 2007 calling for monthly rental payments due on the first day of each month. (CP 105-107). The use of the premises was specifically limited to business purposes, see paragraph 2(a). (CP 106). Although the lease provides for a late charge assessment after the 10th day of due date, the lease is in default following the date the rent is due and unpaid.

Sometime on or about January 2009 Welch was, and remained, jailed at all times relevant to this case. (CP 87). Lease payments were sporadic, and in May no lease payments were made. (CP 108-115). This is un-rebutted by Welch. The lessor, Arndt Living Trust, Keith B. Arndt, trustee ("Arndt"), brought an unlawful detainer action against Welch on May 20, 2009. (CP 105-107).

The attorney representing Arndt in the unlawful detainer action was accused by Welch of failing to follow statutory law and court rules in pursuing the unlawful detainer action. The alleged errors were technical and included her failure to, (i) provide verification of service of

appropriate notice of failure to pay rent; (ii) use of the wrong subpoena for an unlawful detainer action;¹ (iii) default was taken despite an answer being timely filed²; (iv) that improper service of Notice to Show Cause was made on Welch as the affidavit of service shows that Welch was not served with notice of the hearing until June 9, 2009, 2 days before the hearing and that service was out of state; and (v) that the complaint alleged Welch had failed to pay April and May rent when in fact he had paid April's rent. (CP 46-48, 49-60, 61-64). It is important to note that at no time has Welch alleged that he paid the May rent, which was due on the date the notice was sent, the complaint was filed and at all times relevant to this case.

Welch retained counsel on September 5, 2009. (CP 94). Welch filed pleadings to set aside the default and dismiss the action and a "Proposed" Answer, Affirmative Defenses and Counterclaim was filed, together with declarations and supporting memoranda on November 3, 2009. (CP 46 -94). Up through and including the date of the entry of the Order of Voluntary Non-Suit, Welch's attorneys had not appeared at any "in court" hearing nor had any discovery been undertaken. Welch's first

¹ These allegations and several other defenses were based on the mistaken belief that the residential landlord tenant statute RCW 59.18 was applicable, when in fact this was a commercial and not a residential lease.

² The answer was denoted as a "Response to Unlawful Detainer Action" and filed June 1, 2009

physical court appearance was following the entry of the “Order of Voluntary Non-Suit.” (CP 133).

As the filing of the non-suit made Welch the prevailing party, Welch filed a motion for compensatory terms seeking an award of attorney fees in excess of \$26,000. (CP 177-188). In light of the shocking and apparent abusive overreaching claim by Welch for attorney fees, Arndt retained counsel and a Memorandum in Opposition to Defendant’s Motion for Compensatory Terms was filed by Arndt. (CP 191-197). The court was shocked at the time expended by the defendants on this matter and the fees charged. After considering the legal issues involved, the reasonable scope of the work needed to defend this matter in light of the paucity of court appearances, discovery and the voluntary non-suit, the court considered the pleadings and sworn statements before it awarded the defendant \$2,000.00 in attorney fees. (CP 304-306, 331).

The Appellant alludes to personal relationships between Welch and Arndt and Heather White, a friend of Welch’s, in his Statement of the Case. To the extent that Appellant’s inclusion of these irrelevant statements is to color the case with an insinuation of some ill will on the part of Arndt towards Welch, Appellant’s personal allegations are rebutted by Arndt. (CP at 108-115). The personal relationship between the parties

was irrelevant to the legal issues before the lower court and is likewise irrelevant with respect to the issues before the Appellate court. As these matters are not relevant to the matters before the court they are only addressed in this part of the Response to prevent the Appellant from claiming that they are un-rebutted by Arndt. No further responses to those matters will be made in this Response.

II. STANDARD OF REVIEW

Respondent agrees with Appellant that trial court attorney fee awards are discretionary decisions that are subject to appellate review only where it can be proven that the award constitutes an abuse of discretion. *Allard v. First Interstate Bank of Wash.*, 112 Wn.2d 145, 148, 768 P.2d 998, 773 P.2d 420 (1989).

In the recent *Gander v. Yeager*, 167 Wash.App. 638, 646 (2012) case, the *Gander* court reconciled two recent Supreme court rulings, *In re Marriage of Freeman*, 169 Wash.2d 664, 676, 239 P.3d 557 (2010), that states that appellate courts review a trial court's decision granting *or denying* attorney fees for an abuse of discretion while *Sanders v. State*, 169 Wash.2d at 866, 240 P.3d 120 (2010), states that the decision whether to award attorney fees is a question of law that appellate courts review *de novo*. The *Gander* court at 647 ruled as follows:

Thus, we apply a two-part review to awards or denials of attorney fees: (1) we review de novo whether there is a legal basis for awarding attorney fees by statute, under contract, or in equity and (2) we review a discretionary decision to award or deny attorney fees and the reasonableness of any attorney fee award for an abuse of discretion.

The initial question of whether attorney fees can be properly awarded is reviewed de novo. Respondent does not dispute that attorney fees are provided for by the lease that was the subject of the underlying action. (CP 105-107). So this issue is moot.

However, the reasonableness of the attorney fee award is reviewed on an abuse of discretion basis.

III. ARGUMENT

1. *The Trial Court's Decision With Respect To The Award Of Attorney Fees Was Appropriate As The Amount Of Attorney Fees Awarded.*

The Respondent does not dispute that the prevailing party should be awarded attorney fees. The dispute has always been with the reasonableness of the fees requested by the Appellant.

The trial court considered all of the facts in the record and ruled:

Mr. Rakow's fees come in under \$2,000 and my understanding is that Mr. Nicolai might have assisted in some of these preparation of

some of the briefing and whatnot but I certainly don't think this is a \$26,000 case. Especially the fact that there was one court appearance on behalf of Mr. Welch, not counting today, two if you count today. The fact that it's a fairly small amount in controversy. The amount of work that appears to have been done in this case—of the file. Again, I'm smart enough to know that attorneys do a lot of work that's outside the file but in this case I simply cannot honor the request for \$26,000.

I do find that \$2,000 is a reasonable amount for attorneys' fees and I will award \$2,000 as attorneys' fees to Mr. Welch.

(CP 331).

The hearing at which the court made the above ruling was not whether Welch was the prevailing party in the case. That was determined by Arndt's filing of "Order of Voluntary Non-Suit." The gravamen of the motion was the reasonableness of the attorney fees.

The Washington court in *Custom Track, Inc. v. Vulcan Min., Inc.*, 62 Wash.App. 208, 813 P.2d 626 (1991), in a lien foreclosure action where a motion was brought by the prevailing party for an award of attorney fees, ruled ". . . if the prevailing party is not successful on its motion for attorney fees at the trial level, they may not be awarded on appeal unless the appellate court finds an abuse of discretion. *CH2M Hill*,

Inc. v. Greg Bogart & Co., 47 Wash.App. 414, 418-19, 735 P.2d 1330, review denied, 108 Wash.2d 1023 (1987).” *Custom Track, Inc.* at 211-212.

Welch’s request for attorney fees of over \$26,000 was reduced to \$2,000. (CP 304-306 and CP 331). Welch was not the prevailing party on that motion. Based on the inherent nature of unlawful detainer actions, a trial court’s determination that \$2,000 was a reasonable amount of fees to be incurred in the instant case cannot be reasonably found to be a manifest abuse of discretion.

2. *Appellant Misstates The Facts When He Asserts That The Trial Court Abused Its Discretion When It Refused To Award Welch Attorney Fees For Work Performed By Nicolai That Rakow Delegated, Supervised, And Approved.*

At no point of the court’s oral ruling was it disputed that Nicolai’s fees were not awardable because the work was delegated to him by Rakow. The court simply ruled that in its estimation the gross amount of the fees were unreasonable.

As I indicated, it’s a fairly straightforward unlawful detainer action. There has been a substantial amount of briefing done later on, mostly the briefing was in support of this motion today for attorneys’ fees. I have reviewed Mr. Nicolai’s attorneys’ fees statement. I’m not disputing that maybe Mr. Nicolai spent that time on the case, however, I guess the court has to consider whether that was a reasonable amount of time to spend on this case, and I also considered the affidavit that was filed by the Arndt Trust, the affidavit of Mr. Mellotte, an attorney in Yakima who is

experienced in matters such as this and his opinion billing at \$200 an hour which I find is a reasonable rate, in his opinion this case should have—the attorneys’ fees should have been somewhere in the neighborhood of \$2,000.

After reviewing Mr. Rakow’s statement, Mr. Rakow again being the only attorney of record in this case for the— Mr. Welch. I find his fees to be reasonable, very reasonable actually. Mr. Rakow’s fees come in under \$2,000 and my understanding is that Mr. Nicolai might have assisted in some of these preparation of some of the briefing and whatnot but I certainly don’t think this is a \$26,000 case, especially the fact that there was one court appearance on behalf of Mr. Welch, not counting today, two if you count today. The fact that it’s a fairly small amount in controversy. The amount of work that appears to have been done in this case—of the file. Again, I’m smart enough to know that attorneys do a lot of work that’s outside the file but in this case I simply cannot honor the request for \$26,000. I do find that \$2,000 is a reasonable amount for attorneys’ fees and I will award \$2,000 as attorneys’ fees to Mr. Welch. Counsel have an order.

(CP 331).

How the attorney fees awarded to Welch are divided up is irrelevant. The issue before the court was the collective reasonableness of those fees.

3. *The Trial Court's Determination That This Case Involved No Extraordinary Legal Issues Is Reasonable And Supported By The Record.*

The trial court exercised its own determination of the difficulty of the underlying unlawful detainer action and found that “. . . it’s a fairly straightforward unlawful detainer action.” (CP 331). The trial court’s

opinion was buttressed by the Sworn Statement of Brad Mellotte In Support of Plaintiff's Opposition To Motion For Compensatory Terms. Mr. Mellotte had been a practicing attorney in real estate law at that time for 25 years. He opined in paragraph six of his sworn statement:

6) I estimate that to assist the defendant in this case I would have spent approximately 10 hours of legal work, as follows:

- a) One hour to ascertain the facts of the case,
- b) One hour to draft a notice and motion,
- c) One and one-half hours to write a memorandum,
- d) Two hours on negotiation and miscellaneous lawyering,
- e) Two hours for attending the hearing,
- f) One-half hour on the order setting aside the judgment, and
- g) Two hours for the Answer.

(CP 203-204).

Based on Mr. Mellotte's opinion, the trial court's finding cannot reasonably be either an abuse of discretion nor result in a manifest injustice.

It is interesting to note that does not explain why the issues it lists are extraordinary. One of the issues listed by Appellant as an extraordinary legal issue, "(a) the legal effect Arndt's 'unlawful' lockout." Appellant's Opening Brief, p. 23, had no bearing on the relevant legal issue of whether the judgment should be set aside. Additionally there is

no conclusion that the lockout was illegal. The lease was of commercial property, the rent was due. Although there is no finding or support at the illegality of the lock out, even if it had been illegal, it was irrelevant.

Appellant gives no explanation why the remaining six issues listed by Appellant are extraordinary. To the extent that each is relevant and reasonably required to accomplish the necessary result of getting the judgment set aside, the research and work can not justify the extraordinary time invested in accomplishing the collective research and examination of the issues. Given the multitude of reported cases on any legal issue and most particularly in the fields that Appellant has listed as extraordinary in its brief, legal counsel could expend a near limitless amount of time in research, but it would not be needed or reasonably justified in the practical performance of the legal representation of a client in the case at issue.

4. *The Attorney's Fees Requested Are Excessive, Unreasonable and In Violation of RPC 1.5.*

The fees requested by the defendant, totaling over \$26,095.00, (CP 178) are patently unreasonable. The court is charged with using several factors to determine the reasonableness of attorney's fees, and the burden of proving the reasonableness of fees requested is on the fee applicant.

Scott Fetzer Co. v. Weeks, 122 Wash.2d 141, 859 P.2d 1210

Wash. (1993). In *Fetzer*, the Washington Supreme Court, reviewing the Superior Court's determination of reasonable fees, held that awarding attorney's fees for 481.89 hours was patently unreasonable. *Id.* at 157. The court reduced the award to 70 hours, the number of hours reasonably expended for the matter at issue. *Id.* at 143, 153. The Supreme Court explained that the trial court must first determine the "lodestar" award by "multiplying a *reasonable* hourly rate by the number of hours *reasonably* expended on the matter." *Id.* at 149-50 (emphasis original). Rather than merely relying on the fee applicant's billing records, the trial court makes an independent determination of what represents a reasonable amount of attorney's fees. *Id.* at 151. Since the court must limit the lodestar figure based on the hours reasonably expended, the court should discount hours spent on unsuccessful claims, duplicated effort, and unproductive time. *Id.* at 151 (citing *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597 (1983)). Furthermore, while the lodestar figure is a proper starting place, the court may then adjust the figure according to a number of factors. *Id.* at 150. These factors include: (1) the customary charges of other attorneys for similar matters, (2) the disparity between the amount requested and the amount in controversy, (3) the difficulty of the question involved, (4) the skill required, (5) the time expended, (6) the benefit

resulting to the client, (7) the contingency or certainty of collecting the fee, and (8) the character of the employment. *Id.*

Appellant failed at the trial court hearing to meet its burden of proof of proving those fees were reasonable and necessary.

For a matter such as this one, attorney's fees of over \$26,000.00 grossly exceed the customary charges of other attorneys working on similar matters. To address the needs of a defendant such as Mr. Welch, an attorney familiar with this area of law practicing in a similar locale would charge a defendant for roughly 10 hours of legal services. Sworn Statement of Brad Mellotte in Support of Plaintiff's Opposition to Motion for Compensatory Terms, p. 1-2 (filed, June 14, 2011). (CP203-204). Accepting that \$200 per hour is a reasonable hourly rate, a reasonable total fee for a matter like this would total \$2,000.00. *Id.*

5. *The Efforts Of Appellant's Counsel At The Trial Court Level Were To Some Extent To Retrieve His Own Property And Pursue His Own Interests.*

Appellant's attorney Nicolai was a customer of Appellant prior to Appellant's arrest. He had purchased large granite slabs from Appellant and the slabs were apparently located in the commercial property subject to the unlawful detainer action. When Respondent refused to allow him to the property to retrieve his slabs without first going through

Respondent's attorney and providing proof of ownership (CP-115) he became concerned for his personal investment. As a result a law suit was initiated by Mr. Nicolai personally against Respondent. (CP 118).

A review of the time records (CP 182-188) of Appellants attorney and the work that was done was far in excess of what Respondent's expert witness an attorney with *twenty five (25)* years of experience would have expected. (CP 203-204). None of the issues claimed by Appellant as unique were unique and the issue first alleged as extraordinary, the lock out, was not relevant to setting aside a default judgment such as the one that is the genesis of this appeal. The relevant issues were undisputed; flawed issued related summons used, service of summons, and ineffective notice of Show Cause hearing. Each of which could have been sufficient to have vacated the judgment. Keeping in mind that Arndt's trial attorney filed a non-suit prior to the any of the issues even being argued respondent's attorney.

Lawyers can study and prepare forever on a case. But is such excessive study reasonable? Should it be the basis of an award for attorney fees. Appellants Washington attorney Mr. Rakow estimated that he performed perhaps 20% of the work and Mr. Nicolai 80%. (*see* Appellant's Opening Brief, page 20). Accepting for sake of argument that

lead counsel's estimate was correct. As Mr. Rakow's billing were approximately \$2,000 when one takes out the time conferring with co-counsel Mr. Nicolai (CP 188), then Mr. Nicolai's billing would have been only (\$8,000) for a total of \$10k, still this amount would be only approximately 38% of what was actually sought by Appellant. Further demonstrating that the Appellant's attorney fee request was excessive by the estimate of Mr. Rakow and supporting the trial court's similar finding. No sworn statement has been submitted to infer that such a request for payment has been submitted by Appellant's lawyer to Appellant, for payment.

6. Arndt Requests That Attorney Fees And Costs Be Awarded On This Appeal.

The lease upon which this suit is based expressly allows attorney fees to be awarded to the prevailing party on appeal. The attorney fee provision in the lease states:

In case suit or action is instituted to enforce compliance with any of the terms, covenants or conditions of this lease, or to collect the rental which may become due hereunder, or any portion thereof, the losing party agrees to pay the prevailing party's reasonable attorney fees incurred throughout such proceeding, including at trial, on appeal, and for post judgment collection.

CP at 107.

Arndt requests an award of his attorney fees incurred on this appeal.

IV. CONCLUSION

The Appellants excessive legal work on this case puts one in mind of a comments made by Supreme Court Associate Justice Ruth Bader Ginsburg in remarks for the American Bar Association on May 2, 2006, citing to the Charles Dickens' 1853 novel Bleak House, where the assets of a once sizeable estate are exhausted by attorney fees over a passage of some 20 years where every conceivable issue had been researched and litigated. "The one great principle of the English law is to make business for itself. There is no other principle distinctly, certainly, and consistently maintained through all its narrow turnings." Bleak House, Charles Dickens 1853. This is precisely what Appellant's attorneys did, they researched and wrote and thereby made business for themselves. One questions whether legal services can ever be reachable or affordable by the general populace if a simple unlawful detainer action, such as this would cost over \$26,000.

For the reasons stated above the trial court's determination of reasonable attorney fees should be confirmed.

Respectfully submitted this 10th day of September, 2012.

VELIKANJE HALVERSON P.C.
Attorneys for Respondent

By: _____



Carter L. Fjeld, WSBA 11290

CERTIFICATE OF SERVICE

I, JENNIFER FITZSIMMONS, hereby certify under penalty of perjury under the laws of the State of Washington that the following is true and correct.

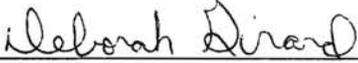
On September 10, 2012, I caused to be mailed by U.S. Mail, postage pre-paid, the original and one copy of the foregoing document to the following:

Clerk, Court of Appeals, Div. III
500 N. Cedar Street
Spokane, WA 99210

On September 10, 2012, I caused a true and correct copy of the foregoing document to be served on the following in the manner indicated below:

Thomas R. Nicolai Stoel Rives, LLP 900 SW Fifth Ave., Suite 2600 Portland, OR 97204	<input checked="" type="checkbox"/> First Class U.S. Mail
Ross R. Rakow 117 E. Main Street Goldendale, WA 98620	<input checked="" type="checkbox"/> First Class U.S. Mail

DATED at Yakima, Washington, this 10 day of September, 2012.



Deborah Girard, Legal Assistant
Velikanje Halverson P.C.