

FILED

No. 330613

FEB 19 2008

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

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

KPS MANAGMENT,

Appellant,

v.

EDWARD ESIWILY and EUKENIO ESWINI,

Respondents.

APPELLANT'S REPLY BRIEF

**J. Steve Jolley, WSBA #12982
Herman, Herman & Jolley, PS
12340 E. Valleyway
Spokane Valley, WA 99216
(509) 928-8310
Attorney for Appellant**

TABLE OF CONTENTS

I. SUPPLEMENTAL STATEMENT OF THE CASE 1

II. ARGUMENT 3

 A. Respondent was not the Prevailing Party and Where Both Parties
 Prevail on Major Issues Each Party Must Bear Their Own Attorney
 Fees 3

 B. The Trial Court Abused Its Discretion in Finding that \$12,820.00
 Constitutes Respondent’s Reasonable Attorney Fees for Proceedings
 Below 4

 C. Cases Cited by Respondent in his Response Brief Do Not Support
 the Exorbitant Award of Attorney Fees in this Case 11

 D. RAP 18.1 Request for Attorney Fees..... 12

V. CONCLUSION 13

TABLE OF AUTHORITIES

Table of Cases

Hawkins v. Diel, 166 Wn. App. 9-10 (2011).....3
Phillips Bldg. Co. v. An, 81 Wn. App. 696 (1996)3
Hertz v. Riebe, 86 Wn. App. 102 (1997).....3
Seashore Villa Ass’n v. Hugglund Family Ltd. P’ship, 163 Wn. App. 531
(2011).....3
Country Mano v. John Doe Occupant, 176 Wn. App. 601 (2013)3
Scott Fetzer Co. v. Weeks, 122 Wn.2d 141 (1993)4, 5
Mahler v. Szucs, 135 Wn.2d 398 (1998)5
Nordstrom v. Tampourlos, 107 Wn.2d 735 (1987)7
Brand v. Dept. of L&I, 91 Wn. App. 280 (1998)10
Hensley v. Eckerhart, 461 U.S. 424 (1983)10
Hall v. Feigenbaum, 178 Wn. App. 811, 827 (2014)11
Angelo v. Hafiz, 167 Wn. App. 789, 807, 234 P.3d 1075 (2012)11
Housing Authority of City of Seattle v. Bin, 260 P.3d 900 (2011)12

Regulations and Rules

RAP 18.1.....13

I SUPPLEMENTAL STATEMENT OF THE CASE

Respondent has included the following factual statements in his response brief which are either not a part of the record or directly contrary to the record.

Mr. Pfundt states at page 1 of Respondent's Response Brief that the Court appointed him to represent Mr. Esiwily, "due to the fact that he is severely disabled" (emphasis added) and cites CP 7. CP7 is the Order of appointment and says nothing about a disability of any kind. Also, recall that the Trial Judge stated:

There is one other thing I would add and that is it. (sic) You have all kinds of findings I did not make. You might have wanted me to make them, but I did not. This is (sic) Order reflects what happened.

Respondent's rejected Order included a finding that Edward Esiwily is handicapped/disabled which required an accommodation by KPS. CP 25.

Respondent's proposed Order also included a conclusion of law that:

"Defendant has satisfied the prima facia elements proving the Plaintiff's failure to reasonably accommodate Defendant's disability." CP 25. All these proposed findings were rejected by the Trial Judge.

Appellant included the following statement at page 7 of its Opening Brief: "In KPS's experience, the average cost to pursue an

uncontested unlawful detainer action is \$850 to \$1,000 including costs. CP 40. The cost to engage in a contested hearing is another 2 hours of an attorney's time. CP 40." Contrary to the record, Respondent states at page 7 of his Response Brief: "*nothing* in the record support this assertion". In Mr. King's Brief he made the foregoing statement subject to the provisions of CR 11 and as an officer of the court.

At page 11 or his Response Brief Respondent states that: "Appellant fails to acknowledge that Respondent did discount legal services, including all time expended drafting a proposed order that did not meet Judge O'Connor's requirements." This is a misrepresentation to this Court. See, Pages 3-4 of Appellant's Opening Brief where Appellant points out that the Order Mr. Pfundt claims to have spent 23.5 hours preparing was so bad the Trial Judge rejected the order and scolded Mr. Pfundt for including numerous findings which the Court did not make. This represents but another example of a major issue upon which Appellant prevailed.

II ARGUMENT

[A] RESPONDENT WAS NOT THE PREVAILING PARTY AND WHERE BOTH PARTIES PREVAIL ON MAJOR ISSUES EACH PARTY MUST BEAR THEIR OWN ATTORNEY FEES.

As a preliminary matter note that in section “A” of his Response Brief, Respondent argues that Appellant cannot argue the merits of the case in this appeal. Appellant does not disagree with this position and has not argued otherwise in Appellant’s Opening Brief. However, the law does not prevent this court from determining on a de novo basis that neither party was the prevailing party for purposes of attorney fee shifting. Hawkins v. Diel, 166 Wn. App. 9-10, 269 P.3d 1049 (2011).

As stated in Phillips Bldg. Co. v. An, 81 Wn.App. 696, 702, 915 P.2d 116 (1996), if both parties are awarded “some measure of relief and there is no singularly prevailing party, neither party may be entitled to attorney fees. . .” In Hertz v. Riebe, 86 Wn. App. 102, 104-05, 936 P.2d 24 (1997), the plaintiffs succeeded on their breach of contract claim and the defendants succeeded on their collections claim. The court held that because both parties prevailed on major issues, neither party was entitled to attorney fees. *Id.* Also See, Seashore Villa Ass’n v. Hugglund Family Ltd. P’ship, 163 Wn. App. 531, 547, 260 P.3d 906 (2011) affirming the rule to be that if both parties prevail on major issues, both parties bear their own attorney fees. Finally, and significantly, Country Manor v. John

Doe Occupant, 176 Wn. App. 601, 613, 308 P.3d 820 (2013) applied the foregoing rule in the context of an unlawful detainer action.

In Section A of its Opening Brief, Appellant demonstrated that each party prevailed on major issues before the Trial Court. Respondent ignores this argument in his Response Brief at his peril. Accordingly, this Court should reverse the trial court's award of attorney fees to the Respondent. Only in this way can justice be served and the appropriate fee shifting standard be applied to this case.

[B] THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING THAT \$12,820.00 CONSTITUTES RESPONDENT'S REASONABLE ATTORNEY FEES FOR PROCEEDINGS BELOW.

Under the lodestar method of determining reasonable attorney fees a court is required to "exclude from the requested hours any wasteful or duplicative hours and any hours pertaining to unsuccessful theories or claims. Scott Fetzer Co. v. Weeks, 122 Wash.2d 141, 151, 859 P.2d 1210.

Respondent fails to rebut the numerous instances of wasteful hours, duplicative hours, and hours pertaining to unsuccessful claims and defenses as detailed in Appellant's Opening Brief.

"Courts must take an *active* role in assessing the reasonableness of fee awards, rather than treating cost decisions as a litigation afterthought.

Courts should not simply accept unquestioningly fee affidavits of counsel”. Mahler v. Szucs, 135 Wn.2d 398, 434-435, 957 P.2d 632 (1998). “The burden of demonstrating that a fee is reasonable is upon the fee applicant.” Scott Fetzer Co. v. Weeks, 122 Wn.2d 141, 151, 859 P.2d 1210 (1993).

As detailed in Appellant’s Opening Brief in the case at bar the trial court erred in failing to exclude from the requested hours wasteful or duplicative hours and hours pertaining to unsuccessful theories or claims. Fetzer, 122 Wash.2d at 151, 859 P.2d 1210 (1993). This case required a hearing to determine whether or not KPS Management was entitled to a Writ of Restitution for non-payment of rent. KPS succeeded in establishing that the rent was not paid. Thus the sole issue before the Court was whether or not the Defendants had a viable defense for not paying the rent. This was not a novel or difficult issue and was based upon facts specific to this case.

In this case, Respondent’s attorney fees far exceeded the normal cost of a contested hearing due to: delays caused by the Defense; wasteful hours; and, hours pertaining to unsuccessful theories and claims. Also, recall that KPS Management agreed to continue the Show Cause Hearing twice based upon defense counsel’s promise that the rent would be paid

current. CP 40. The first continuance was filed with the Court on August 6, 2014, the date set for the original Hearing. CP 6. Mr. Pfundt's time records show that he took no action between August 6, 2014 and August 15, 2014 with the Respondent's Payees to have the rent paid current. CP 36, Ex. E. Mr. Pfundt requested a second continuance on August 12, 2014, which was also granted. CP 8. Finally, on August 15, 2014, Mr. Pfundt's time records show he contacted Spokane Housing Authority, one of the Payee's for Respondent. Mr. Pfundt's time records never show he contacted Goodwill Industries about payment of their share of the rent prior to the Hearing. CP 36, Ex. E. Had Mr. Pfundt acted promptly on his promise to have the rent paid current by both Payees for the Respondent, no hearing would have been necessary. Thus, in all fairness none of Mr. Pfundt's fees after August 15, 2014 are justifiable because he could easily have brought the rent current by that date thereby bringing the case to an end.

Mr. Pfundt's time records show he expended 10.2 hours on August 19, 2014 "Drafting Pleadings and Hearing Prep". CP 36, Ex. E. The pleadings drafted consisted of a 4 page Answer and Affirmative Defenses. CP 11. This is an extraordinary amount of time which equals or exceeds the average total cost of a contested hearing. Moreover, none of the affirmative defenses plead in this document were successful. In addition,

the hearing preparation was wasted time because Mr. Pfundt did not arrange to have an interpreter present at the hearing which necessitated a continuance. CP 14.

“The amount of time actually spent by a prevailing attorney is relevant but not dispositive. Particularly in cases where the law is settled, there is a great hazard that the lawyers involved will spend undue amounts of time and unnecessary effort to present the case”. Nordstrom v. Tampourlos, 107 Wn.2d 735, 744, 733 p.2d 208 (1987).

Mr. Pfundt’s Affidavit in support of the fees being requested represents but one example of substantial wasted time in this case. CP 36. Paragraph 6 of this Affidavit addresses the number of Unlawful Detainer Actions KPS has filed over the years. In addition Mr. Pfundt attached 50 plus pages of court records regarding these actions. All of this was irrelevant and a total waste of everyone’s time.

By researching and attaching the foregoing 50 court records to his declaration, Mr. Pfundt obviously intended to prejudice the Trial Judge against KPS and encourage the court to punish KPS with its award of attorney fees. Punishment of a party represents an improper deviation from Washington’s lodestar fee analysis regimen. Clearly, Mr. Pfundt

engaged in a wasteful and improper argument for which no fees should have been awarded.

No affidavit of prejudice was prepared or filed by Mr. Pfundt with regard to Judge Tompkins, yet Mr. Pfundt's time records represent that he prepared and filed such a pleading. CP 36, Ex. E. In truth, almost immediately after the hearing began and the Defendants disclosed their witnesses, Judge Tompkins declared a possible conflict and recused herself.

This matter was immediately reassigned to Judge Triplett to be heard that same morning. At the hearing began before Judge Triplett, the court determined that a court approved interpreter was necessary for the Defendants and that defense counsel had not made arrangements beforehand for such a person, thus the matter could not continue at that time. CP 14. Incredibly enough defense counsel now argues that it was Appellant's responsibility to provide an interpreter for Mr. Pfundt's client. Page 10, Respondent's Response Brief. Clearly, no fees should be awarded for the hearing before Judge Triplett due to Mr. Pfundt's error.

Over the next two days, August 21-22, 2014, Mr. Pfundt logs an additional 14 hours drafting memos for the Court, researching and further hearing prep. According to his time records, Mr. Pfundt delivered two

memos to the Court and an additional pleading as well during this time.

CP 36, Ex. E.

Mr. Phundt's August 22, 2014 memorandum was 2 pages long and addressed the Respondent's unsuccessful affirmative defense of lack of personal jurisdiction. CP 19. No second memorandum appears in the record. Clearly, no time should be allowed for researching and drafting two memorandums relating to unsuccessful affirmative defenses.

Despite the fact that Mr. Pfundt had already spent 10.2 hours in preparation for this Hearing prior to August 20, 2014 when the Hearing should have been heard, Mr. Pfundt claims an additional 14 hours drafting memos, researching and delivering documents to the Court on August 21 and 22, 2014 and another 20.3 hours of "Hearing Prep" between August 23, 2014 and the day of the Hearing, August 25, 2014. Clearly, most of this preparation time related to Respondent's unsuccessful affirmative defenses. In addition the time recorded is extraordinarily excessive for a 2 hour hearing.

With as much expertise in this area of the law as Mr. Pfundt claims to have, spending 44.5 hours preparing for a Show Cause Hearing on whether a Writ of Restitution should be issued is clearly excessive and wasteful. CP 36, Ex. E. Mr. Pfundt documents a total of 88.5 hours he

dedicated to this case defending against a Motion for a Writ of Restitution. (He waives his fees for 25.3 hours of his time and well he should, his work product from that time was so deficient it was unusable by the Court). Mr. Pfundt either has no billing judgment or he is attempting to punish the Appellant with an extraordinarily excessive claim for attorney fees.

“Ultimately, the fee award must be reasonable in relation to the results obtained”. Brand v. Dept. Of L & I, 91 Wn. App. 280, 292 (1998) quoting from Hensley v. Eckerhart, 461 U.S. 424, 440 (1983). The case at bar involved no exceptional issues and should have cost a client approximately \$1,500.00 in attorney fees. KPS succeeded in securing payment of back rent. Once the rent was paid there remained no basis for issuance of a writ of restitution. Mr. Pfundt could have easily obtained that result before any of the hearings so no fees should be allowed after August 12, 2014.

Recall that the trial court refused to enter a finding that Respondent suffered from a disability. CP 25, 28 and RP 127. Inexplicably and without support in the record the trial court concluded in part that the requested fees were justified due to Respondent’s disability. CP 45, 2:19. This represents an untenable ground for the fee award.

The court also based its decision in part two prior failed hearings. CP 45, 2:25-28. Recall that Mr. Pfundt's failure to arrange for an interpreter for his client was the reason one of the hearings failed. CP 14.

This was a simple case where none of Respondent's affirmative defenses succeeded yet the trial court abused its discretion by awarding all the fees requested by defense counsel including fees for the unsuccessful claims and defenses. There is simply no justification for the award of attorney fees in this case to be almost ten times the fees normally incurred in an unlawful detainer action. Accordingly, the award of attorney fees should either be reversed or substantially reduced to an amount consistent with the normal attorney fees incurred in simple unlawful detainer actions.

[C] CASES CITED BY RESPONDENT IN HIS RESPONSE BRIEF DO NO SUPPORT THE EXORBIANT AWARD OF ATTORNEY FEES IN THIS CASE.

At page 7 of his Response Brief Respondent cites 3 cases which he claims support the exorbitant fee award in this case. Hall v. Feigenbaum, 178 Wn. App. 811, 827 (2014)ⁱ involved a hotly contested commercial unlawful detainer action which was litigated in Whatcom County Superior Court. Clearly, this case and the attorney fees involved bear no relationship to the case at bar.

Respondent claims that in Angelo v. Hafiz, 167 Wn.App.789, 807, 234 P.3d 1075 (2012), the Court awarded costs and attorney fees totaling \$134,876.05. In point of fact the trial court awarded \$70,473.00 and the total judgment including the damage award was \$134,876.05. Moreover, a significant portion of the attorney fee award was vacated by the Court of Appeals. Angelo, at 825. Also, this commercial lease dispute involved much more than an unlawful detainer action (i.e. retaliatory eviction counterclaim, summary judgment motion, trial and several hearings). This case obviously affords no help in addressing the exorbitant fee award at issue in the present case.

Hous. Auth. Of City of Seattle v. Bin, 260 P.3d 900 (2011) is more analogous to the present case except for the fact that it was litigated in King County where attorney fees tend to run higher than in Spokane County. The actual award of attorney fees in Bin was \$7,375; however, the case was more involved than the case at bar because a grievance hearing preceded the unlawful detainer action and there was a summary judgment motion and hearing. This case illustrates that a simple residential unlawful detainer action in Spokane County should cost at most \$2,500.

[D] RAP 18.1 REQUEST FOR ATTORNEY FEES.

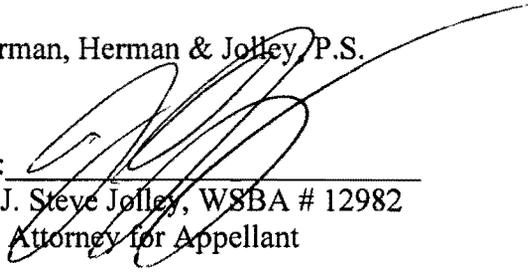
The Parties' Lease includes an attorney fee clause which provides for an award of attorney fees to the prevailing party in litigation arising out of the Lease. CP 36, Exhibit "A", clause 15. Pursuant to RAP 18.1 Appellant requests an award of reasonable attorney fees and cost if it is the prevailing party on this appeal.

V CONCLUSION

Based upon the points and authorities cited in its Opening Brief and in this Reply Brief, Appellant respectfully requests that this Court either reverse the award of attorney fees or substantially reduce the award of attorney fees to an amount typical for a simple unlawful detainer case; and, award Appellant attorney fees on appeal.

Respectfully Submitted this 1st day of February, 2016.

Herman, Herman & Jolley P.S.

By: 

J. Steve Jolley, WSBA # 12982
Attorney for Appellant

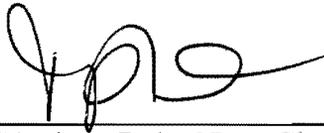
ⁱ Respondent's citation was incorrect but this appears to be the case he was referring to in his Response Brief.

CERTIFICATE OF SERVICE

TONYA PLUNKETT, paralegal to attorney J. STEVE JOLLEY, attorney for KPS hereby certifies that on February 12, 2016, I placed a true and exact copy of the foregoing Apellant's Reply Brief in the U.S. Mail, postage prepaid and addressed as follows:

Barry Pfundt
Center for Justice
35 W. Main, Ste. 300
Spokane, WA 99201

Herman, Herman & Jolley, P.S.

A handwritten signature in black ink, appearing to be 'TP', written over a horizontal line.

By: _____
Tonya Plunkett, Rule 6 Law Clerk
& Paralegal to J. Steve Jolley