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Division III
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No. 35890-9-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

MAINLINE ROCK AND BALLAST, INC., Appellant,

v.

BARNES, INC., Respondent,

On Appeal from Spokane County Superior Court
Cause No. 17-2-03345-1

Judge Tony Hazel

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

Barnes, Inc. ("Barnes") initiated the post-arbitration proceedings in this case by filing a motion to vacate the arbitration award, *after* Mainline Rock and Ballast, Inc. ("Mainline") had fully satisfied the award. (CP 88-89) In order to bring finality to this dispute, Mainline then had to oppose Barnes' motion to vacate and to obtain an order confirming the award. (CP 49-61) Mainline was successful before the trial court in these post-arbitration proceedings and should have been awarded its reasonable attorney's fees and litigation costs to bring conclusion to this dispute.

When denying Mainline's request for fees and costs, the trial court abused its discretion because it misunderstood the issue presented and applied the incorrect legal analysis. As a result, the trial court's decision should be reversed and judgment should be entered in favor of Mainline on its request for attorneys' fees and reasonable litigation costs for the post-arbitration proceedings. RCW 7.04A.250(3).

II. ARGUMENT

Mainline recognizes that the trial court has the discretion whether to add "attorneys' fees and other reasonable expenses of litigation incurred in a judicial proceeding" to a judgment confirming an award. RCW 7.04A.250(3). In this case, the trial court abused its discretion because it misunderstood the issue being presented as a request for fees relating to

the underlying dispute and it relied on the judgment of the arbitration panel regarding the underling dispute, rather than exercising its own independent judgment about whether Mainline should be awarded fees and costs in the *post-arbitration* proceedings.

"Among other things, discretion is abused when it is based on untenable grounds, such as a misunderstanding of law." *Little v. King*, 160 Wn.2d 696, 703, 161 P.3d 345 (2007). An abuse of discretion also occurs when a trial court "applies the wrong legal standard" to an issue. *Dave Johnson Ins. Inc. v. Wright*, 167 Wn.App. 758, 775, 275 P.3d 339 (2012). A trial court's failure to use any applicable legal standard is also an abuse of discretion. *State v. Lamb*, 175 Wn.2d 121, 128, 285 P.3d 27 (2012).

In this case, the trial court clearly misunderstood the issue presented. In its Order Denying Attorney's Fees, the trial court mistakenly described the issue as a "cross" motion by the parties. (CP 153) Barnes argues that there was a cross-motion because Barnes included one reference in its opposition to seeking fees as "the prevailing party in the arbitration." (CP 142) However, Barnes never actually filed a motion for fees, never submitted any evidence in support of a motion for fees, and never even submitted any argument to support such a motion. In

fact, in the "Conclusion" section of its opposition filed with the trial court, Barnes did not ask for an award of fees or costs. (CP 146)

In reality, the singular reference in Barnes' opposition pleading likely created the confusion with the trial court, leading the trial court to mistakenly believe that Mainline was also asking the trial court to re-determine the arbitration panel's decision on attorney's fees, which was simply not the case. Mainline's motion for fees and costs was solely related to the post-arbitration proceedings. (CP 124-127)

This confusion created by Barnes' opposition caused the trial court to apply an incorrect standard to determine Mainline's motion. Rather than evaluating Mainline's motion under RCW 7.04A.750(3) for post-arbitration proceedings, the trial court looked back to the decision of the arbitration panel with respect to the award of attorney's fees for the underlying dispute. The trial court then used the decision of the arbitrators as the sole consideration on Mainline's motion for attorney's fees and costs for the post-arbitration proceedings. When stating the basis for its decision, the trial court refers only to the arbitration panel's findings that there was no prevailing party and makes no analysis of Mainline's rights under RCW 7.04A.250(3) for the post-arbitration proceedings. (CP 153)

Barnes also argues that the trial court did not abuse its discretion because the issue regarding Barnes' motion to vacate the arbitration

remains disputed (on appeal) and the trial court did not need to make a determination at that stage. (*Respondent's Brief, p. 5*) However, Barnes admits that the trial court rejected Barnes' motion to stay the issue pending the appeal. (*Respondent's Brief, p. 6*) Therefore, the fact that the motion to vacate remains an open question on appeal was not a basis of the trial court's decision regarding attorney's fees and costs.

Finally, Barnes argues that the trial court properly denied Mainline's request for fees and costs because they were "largely optional." (*Respondent's Brief, p. 6-7*) This argument completely ignores the fact that Barnes is the party who initiated the post-arbitration proceedings, not Mainline. When Barnes filed its motion to vacate, Mainline was compelled to oppose the motion. In order to bring finality to the dispute, Mainline was further compelled to seek an order confirming the award, as a decision simply denying a motion to vacate is not a final order that disposes of the case. *See* RCW 7.04A.280.

III. CONCLUSION

Based on the foregoing, Mainline requests the trial court's decision be reversed and that judgment be entered in favor of Mainline on its request for attorneys' fees and reasonable litigation costs under RCW 7.04A.250(3). In the alternative, Mainline requests that the matter be remanded to the trial court for a redetermination on the fee issue, with

instructions on the law consistent with the errors of law assigned in Mainline's opening brief.

DATED this 20th day of August, 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of August, 2018, I caused to be served a true and correct copy of the forgoing document to the following:

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