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COURT OF APPEALS, STATE OF WASHINGTON,
DIVISION III

DENNIS SIERACKI and SALLY SIERACKI,

Appellants,

v.

CHARLES L. SHEELEY,

Respondent.

APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT 4

A. Respondent Concedes that Appellants Were Entitled to an Award of Attorney's Fees and that the Lodestar Analysis is the Proper Method for Calculating Appellants' Fees 4

1. The trial court abused its discretion in reducing the award of attorney's fees in Appellants' favor based on non-lodestar factors 5

2. Appellants were not required to pursue their claim against Respondent in small claims court 10

B. Respondent is Not Entitled to Attorney's Fees on Appeal 11

III. CONCLUSION 12

TABLE OF AUTHORITIES

Cases

Bowers v. Transamerica Title Ins. Co., 100 Wn.2d 581, 675 P.2d 193 (1993) 6, 7

Gabelein v. Diking Dist. No. 1 of Island Cty of State, 82 Wn. App. 217, 328 P.3d 1008 (2014) 9

Guillen v. Contreras, 169 Wn.2d 769, 238 P.3d 1168 (2010) 12

Hayes v. USAA Cas. Ins. Co., 185 Wn. App. 1055, 2015 WL 677143 at *9 (2015) (unreported) 10

Lincoln Property Co. v. Roche, 546 U.S. 81, 126 S. Ct. 606 (2005) 10

Mehlenbacher v. DeMont, 103 Wn. App. 240, 11 P.3d 871 (2000) 7

Riss v. Angel, 131 Wn.2d 612, 934 P.2d 669 (1997) 12

Sales v. Weyerhaeuser Co., 163 Wn.2d 14, 177 P.3d 1122 (2008) 10

San Juan County v. No New Gas Tax, 160 Wn.2d 141, 157 P.3d 831 (2007) 8, 9

Target Nat. Bank. v. Higgins, 180 Wn. App. 165, 321 P.3d 1215 (2014) 6, 8

Statutes

RCW 4.84.330 11
RCW 12.40.010 10
RCW 12.40.080(1) 11

Other Authorities

RAP 18.1(a) 12

I. INTRODUCTION

Respondent, Charles L. Sheeley, breached the subject road maintenance agreement ("Agreement") by planting pepper crops in the roadway, known as Kitty Cat Lane, which prevented the Appellants, Dennis and Sally Sieracki, from installing an all-weather road on Kitty Cat Lake, as called for in the Agreement. Despite multiple letters, a request that Respondent remove the crops during a Road Maintenance Association meeting, and despite mailing him a copy of the Summons and Complaint, Respondent still did not remove the crops from the roadway. Appellants then formally served Respondent with the Summons and Complaint and, thereafter, Respondent finally removed the crops, thereby allowing the road work to be completed.

Having incurred attorney's fees to compel Respondent to remove the crops, Appellants sought recovery of their fees by proceeding with the filing of their Complaint. Appellants subsequently attempted to settle the dispute, however, Respondent refused and answered the Complaint by denying any wrongdoing and contesting the applicability of the fee-shifting provision in the Agreement.

Thereafter, Appellants deposed Respondent and filed a Motion for Summary Judgment. The trial court held that Respondent breached the Agreement. Appellants then filed a Motion for Attorney's Fees. The trial

court awarded the fees associated with drafting and serving the Complaint, but denied all fees incurred after Appellants filed their Complaint to enforce the fee-shifting provision of the Agreement, including the fees incurred as a result of having to depose the Respondent and file the Motion for Summary Judgment. In so holding, the trial court reasoned that while the fees incurred in compelling the removal of the crops were necessary, the proceedings to recover those fees (i.e., the deposition and the Motion for Summary Judgment) were unnecessary, as the dispute had been resolved by Respondent's removal of the crops.

In so holding, the court failed to take into account, as a practical matter, that Appellants had to proceed with their Complaint in order to recover the fees incurred in compelling Respondent to remove the crops as a result of Respondent's refusal to both acknowledge his breach of the Agreement and his refusal to reimburse Appellants for the fees incurred up to that point in time. The alternative, based on the trial court's reasoning, was for Appellants to hope that Respondent would ultimately, voluntarily agree to reimburse them for the fees incurred in compelling him to remove the crops or to simply forgo recovery of their fees all together. Notwithstanding, the trial court erred as a matter of law by substantially reducing Appellants' recovery of attorney's fees based on the court's opinion as to whether Appellants should have proceeded on their Complaint

to recover their fees. In doing so, the trial court deviated from the factors the court is allowed to consider under the lodestar analysis for determining an award of attorney's fees, thereby constituting an abuse of the court's discretion.

In his responsive brief, Respondent argues that the trial court did not abuse its discretion in awarding substantially reduced fees because (1) the attorney's fees claimed by Appellants were appropriately diminished based on the "technical" victory achieved by Appellants, and (2) Appellants' decision to proceed on their Complaint in Benton County Superior Court made certain attorney's fees incurred by Appellants unnecessary. Both of these arguments fail. The value of the case, the reasons for Appellants' decision to proceed on their Complaint and the court in which they filed their action are not factors the court may consider in determining the amount of fees awardable under a lodestar analysis. Moreover, civil defendants are not entitled to dictate the venue or procedure of litigation in accordance with their own preferences.

Appellants request that this case be remanded to the trial court for entry of judgment in favor of Appellants for all of the attorney's fees incurred by Appellants in enforcing the Agreement and in compelling an award of Appellants' attorney's fees, less the fees previously awarded.

Appellants further request an award of attorney's fees incurred in bringing this appeal.

II. ARGUMENT

A. Respondent Concedes that Appellants Were Entitled to an Award of Attorney's Fees and that the Lodestar Analysis is the Proper Method for Calculating Appellants' Fees.

In his brief, Respondent concedes that, under Washington law, an award of attorney's fees in Appellants favor was required. *See* Resp. Br. at pg. 4. Respondent further concedes that the lodestar analysis is the proper method for determining an award of fees and that the court abuses its discretion if the court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard or bases its ruling on an erroneous view of the law. *Id.* at pgs. 5-6.

Respondent essentially adopts the rational expressed by the trial court in significantly reducing Appellants' award of fees, arguing that: (1) the attorney's fees claimed by Appellants were appropriately diminished based on the "technical" victory achieved by Appellants, and (2) Appellants could have avoided incurring fees beyond the initial $2,900 in fees necessary to force Respondent to remove the crops if they had filed their action in small claims court. *Id.* at pgs. 6 and 7.

1. The trial court abused its discretion in reducing the award of attorney's fees in Appellants' favor based on non-lodestar factors.

Respondent's argument (and the trial court's oral findings and conclusions) are premised on the misconception that the lawsuit was "pretty much resolved prior to this lawsuit ever being filed" and that Respondents' breach of the Agreement was a technicality. *Id.* at pgs. 4-6; RP at 282-83 and 340-41. Both assertions are contradicted by the record and are impermissible considerations for purposes of determining an award of fees under the lodestar analysis.

First, Respondent's violation of the Agreement was not a mere technicality. While the court did state as part of its ruling on Appellants' Motion for Summary Judgment that the Respondent's breach of the Agreement may have been a technicality, the court further acknowledged that the Respondent himself admitted during his deposition that the portion of the road in which the crops were planted had, in fact, been used for ingress and egress. RP 281-282. Furthermore, removal of all "plantings and obstacles" was necessary for the contactor to install the all-weather road. CP 104. Lastly, the south side of the road, where Respondent acknowledged planting the crops, is subject to a utilities easement in favor of the Columbia Irrigation District. CP 46, 66-67.

Second, Appellants had incurred approximately $2,900 in attorney's fees prior to filing suit. Appellants' legal efforts up to that point were successful in that they resulted in Respondent removing his pepper crops. However, Appellants were still "in the hole" for their efforts due to their legal expenses. Appellants are entitled to their legal fees pursuant to the Agreement. Respondent refused to pay these expenses and, as established by his Answer, denied any wrongdoing or liability. CP at 19-21. Therefore, Appellants had no choice but to file the lawsuit in order to make themselves whole. Thus, the trial court's factual basis for significantly reducing the fees requested by Appellants is not supported by the record. Notwithstanding, the trial court further erred by considering such non-lodestar factors in determining the amount of fees to award Appellants.

The lodestar method requires two steps. First, an initial award is determined by "multiplying a reasonable hourly rate by the number of hours reasonably expended on the matter." *E.g.*, *Target Nat. Bank. v. Higgins*, 180 Wn. App. 165, 183, 321 P.3d 1215 (2014). In calculating this initial award, the court should "discount hours spent on unsuccessful claims, duplicated effort, or otherwise unproductive time." *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1993).

After the initial award has been calculated, "the court may consider the necessity of adjusting it to reflect factors not considered up to this

point." *Bowers*, 100 Wn.2d at 598. Such adjustments are considered under two categories: the contingent nature of success and the quality of work performed. *Bowers*, 100 Wn.2d at 598; *see also Mehlenbacher v. DeMont*, 103 Wn. App. 240, 248, 11 P.3d 871 (2000). The contingent factor only applies when there is no fee agreement that assures the attorney of fees regardless of the outcome of the case and, thus, does not apply to the instant matter. *Bowers*, 100 Wn.2d at 598-99. The quality of work performed factor "is an extremely limited basis for adjustment because in virtually every case the quality of work will be reflected in the reasonable hourly rate." *Bowers*, 100 Wn.2d at 599. Thus, "a quality adjustment is appropriate only when the representation is unusually good or bad." *Bowers*, 100 Wn.2d at 599.

In this case, the trial court substantially reduced Appellants' fees based on factors other than the contingent nature and quality of Appellants' counsel's work. Instead, the trial court improperly considered what it believed to be the relative value of the case, commenting that Respondent's breach of the Agreement was a mere technicality and that it was not necessary to continue with the lawsuit after the crops were removed. Notwithstanding the fact that both findings by the trial court in this regard are not supported by record, courts conducting a lodestar analysis cannot take the amount of the controversy into account when conducting a lodestar

analysis. *Target Nat. Bank v. Higgins*, 180 Wn. App. 165, 194, 321 P.3d 1215 (2014).

Respondent cites *Target* and *San Juan County v. No New Gas Tax*, 160 Wn.2d 141, 171, 157 P.3d 831 (2007), for the proposition that the court's lodestar analysis may be adjusted to account for subjective factors such as "the amount of potential recovery." *See* Resp. Br. at pg. 5. However, Respondent's citation to *Target* takes the case out of context, as Respondent neglects to mention in his brief that the Court's analysis following the cited language expressly directs trial courts to *not* consider the size of recovery as part of the lodestar analysis. *Target*, 180 Wn. App. at 185-93 ("[We] . . . hold that the size of the controversy must not be considered when fees are awarded . . ..").

The other case cited by Respondent in support of his argument in this regard: *San Juan County*, also is unavailing. The court in *San Juan County*, which predates *Target*, held that the lodestar analysis might include consideration of the amount of the potential recovery. *San Juan County*, 160 Wn.2d at 171 (Johnson, J., concurring). However, Respondent neglects to mention that this proposition was stated in the concurrence authored by Justice James Johnson (joined only by Justice Sanders) and, was not necessary to the court's decision and, thus, constituted non-binding dicta.

Gabelein v. Diking Dist. No. 1 of Island Cty of State, 82 Wn. App. 217, 239, 328 P.3d 1008 (2014) (citations omitted).

Moreover, in *San Juan County*, neither the trial court, nor the appellate courts engaged in a lodestar analysis. Rather, *San Juan County* involved the issue of whether the trial court erred in refusing to award fees based on the cited statute, which provides that the court "*may*" in its discretion award fees to the prevailing party. *Id.* at pg. 165. (emphasis in original). This is to be distinguished from the line of cases pertaining to a mandatory award of fees pursuant to a contractual provision, which Respondent concedes applies in the instant case. *See* Resp. Br. at pg. 4.

In sum, Appellants had a contractual and legal right to their attorney's fees (relatively small though they were) even though the fees exceeded the amount in controversy. Appellants were further forced to proceed with their Complaint in order to recover their fees and, even after proceeding on their Complaint, Respondent continued to deny any wrongdoing or that Appellants were entitled to recovery their attorney's fees. In significantly reducing the award of fees in Appellants' favor, the trial court applied an incorrect legal standard based on the court's own beliefs about the underlying value of Appellants' case, which were neither supported by the record, nor a permissible basis upon which the court has discretion to reduce an award of fees under the lodestar analysis.

2. Appellants were not required to pursue their claim against Respondent in small claims court.

Respondent's final argument as to why the trial court's decision should be affirmed is that Appellants' counsel's legal work was unnecessary and unreasonable because it could have been avoided. Respondent asserts that the Appellants should have pursued this matter in small claims court. *See* Resp. Br. at pg. 7 (citing RCW 12.40.010). However, Respondent did not challenge the trial court's subject matter jurisdiction as part of its defense of Appellants' claims, nor was this one of the reasons cited by the trial court as a basis for its decision. Notwithstanding, Respondent does not get to dictate how and where he is sued. Plaintiffs are the "master of the complaint," capable of selectively choosing the parties they sue and the forum in which they sue as long as it is in a court of competent jurisdiction. *E.g.*, *Hayes v. USAA Cas. Ins. Co.*, 185 Wn. App. 1055, 2015 WL 677143 at *9 (2015) (unreported) (citing *Lincoln Property Co. v. Roche*, 546 U.S. 81, 91, 126 S. Ct. 606, 614 (2005)); *Sales v. Weyerhaeuser Co.*, 163 Wn.2d 14, 19-20, 177 P.3d 1122 (2008).

Appellants in this case were within their rights to file suit in Benton County Superior Court. The Superior Court civil rules allowed Appellants' counsel to conduct limited and targeted discovery and to obtain a judgment against Respondent short of trial or arbitration. As Respondent has continually denied wrongdoing, one would expect that he would have

contested a small claims action and, thus, Appellants would have still had to litigate the merits of their case and without the benefit of counsel. *See* RCW 12.40.080(1).

B. <u>Respondent is Not Entitled to Attorney's Fees on Appeal.</u>

Respondent argues that, should this Court affirm the trial court's orders on Appellants' requests for attorney's fees, Respondent should be awarded his attorney's fees on appeal. *See* Resp. Br. at pg. 7.

Even if this Court affirms the trial court, Respondent is not entitled to attorney's fees on appeal. As a basis for attorney's fees on appeal, Respondent relies on RCW 4.84.330, which states:

> In any action on a contract . . . [that] specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party . . . shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements.
>
> . . .
>
> As used in this section "prevailing party" means the party in whose favor final judgment is rendered.

The trial court entered summary judgment against Respondent and awarded Appellants' fees and costs as the prevailing party. In this regard, for purposes of an award of fees on appeal to a prevailing party, the "prevailing party" is the party that receives judgment in its favor. *Guillen v. Contreras*, 169 Wn.2d 769, 775, 238 P.3d 1168 (2010) (citing *Riss v. Angel*, 131 Wn.2d 612, 633, 934 P.2d 669 (1997)). If neither party wholly prevails,

then the determination as to who is the prevailing party depends on who is the substantially prevailing party, which is determined by the extent of the relief afforded the parties. *Id.* (citing *Riss*, 131 Wn.2d at 633-34).

On appeal, Respondent does not seek to reverse the judgment against him. Respondent further does not dispute that Appellants are entitled to an award of attorney's fees. *See* Resp. Br. at pg. 4. Respondent also does not argue that the fees actually awarded by the trial court were improper. Thus, even in the event this Court affirms the trial court's decision, a final judgment will not be entered in Respondent's favor and, furthermore, Respondent cannot be considered the substantially prevailing party.

III. CONCLUSION

For the foregoing reasons, Appellants respectfully request that the trial court's decisions on Appellants' motions for attorney's fees be reversed. Appellants request that the Court remand this case to the trial court for entry of judgment in favor of Appellants for the total amount of Appellants attorney's fees incurred in enforcing the Agreement, less the fees already awarded. Appellants further request an award of attorney's fees incurred in bringing this appeal pursuant to RAP 18.1(a).

DATED this 22 day of January, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on this 22 day of January, 2019, I caused to be served a true and correct copy of the foregoing **APPELLANTS' REPLY BRIEF**, by the method indicated below and addressed to the following:

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