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Court of Appeals  
Division III  
State of Washington  
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No. 359387

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COURT OF APPEALS, STATE OF WASHINGTON,  
DIVISION III

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DENNIS SIERACKI and SALLY SIERACKI,

Appellants,

v.

CHARLES L. SHEELEY,

Respondent.

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**BRIEF OF RESPONDENT**

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## **I. INTRODUCTION**

This case involves a finding on summary judgment in favor of Appellants Dennis and Sally Sieracki that Respondent Charles L. Sheeley technically breached a road maintenance agreement by planting a pepper crop in the spring of 2016 on his own property that was subject to a road easement. The trial court found that there was a technical violation of the road maintenance agreement, but denied Appellant's summary judgment motion for violation of the easement and for trespass. Subsequent to entry of the order on Summary Judgment the Appellants filed a motion for attorney fees. The court granted attorney fees to Appellants up to the point of filing of the Complaint as by that date all obstructions to the roadway had been removed. The basis for the ruling was that the crop had been harvested previously and only the fruitless plants remained. On November 26, 2016 the Appellants served Respondent with Summons and Complaint. The next day the remnants of the plants were removed by Respondent. The Summons and Complaint were filed on December 30, 2018, thirty-three days after the remnants of the crop were removed. A twenty-foot roadway was installed by Appellants in April of 2017.

## **II. ISSUES PRESENTED/ASSIGNMENT OF ERROR**

1. Did the trial court properly deny Appellants' request for attorney fees incurred beyond the filing of Summons and Complaint?

2. Did the trial court properly exercise its discretion in awarding that portion of attorney fees assignable to time expended up to the time of filing of Summons and Complaint?

### **III. STATEMENT OF THE CASE**

Kitty Kat Lane is the common name of a sixty-foot-wide gravel road located in Benton County, Washington. Until three to four months after filing of the Complaint the road was a dirt road with a track of eight (8) feet and was no wider than twelve (12) feet at any point. Kitty Cat Lane serves six parcels. The parties each own a parcel benefitted by the Lane.

Previously, Benton County held a right of way interest in Kitty Cat Lane. On May 6, 2002 the county vacated and abandoned its right of way interest in Kitty Cat Lane pursuant to a Resolution of the Benton County Board of Commissioners. (CP 42-43). As a condition of the vacation and abandonment, an access easement benefitting the six parcels served by Kitty Cat Lane was granted. (CP 45-50).

In conjunction with the access easement, the owners of the six parcels entered into an Agreement for the maintenance of Kitty Cat Lane and provided for establishment of a Road Maintenance Association though there is no evidence that it was ever active before November, 2016. The central provision of the Agreement is the road-maintenance provision, which states:

*The Owners agree that the Roadway shall be maintained free of obstructions and noxious weeds with four (4) inches of base coarse gravel and two (2) inches of crushed gravel surface. It is the intent of*

*the Owners that the surface of the Roadway be maintained as an all-weather roadway for normal, daily vehicular traffic.*

The roadway was never graveled until April of 2017. Noxious weeds grew freely on the roadway, except for the eight to twelve foot traveled portion, until the roadway was graveled. Weeds continue to grow on either side of the now-existing twenty-foot roadway in the sixty-foot easement. (CP 22)

After removal of the remnants of the crop and the filing of the lawsuit, Appellants proceeded with discovery including the deposition of Respondent. A Motion for Summary Judgment was heard on August 18, 2017. The court denied that portion of the motion related to misuse of the easement and trespass, but granted the motion with respect to violation of the road maintenance agreement finding that a technical violation had occurred. (CP 44)

The Appellants subsequently filed a Motion for Attorney Fees. (CP 50). The fees requested by Appellants included those incurred in drafting and serving the Summons and Complaint, those incurred in deposing the Respondent, and for preparing and arguing the Motion for Summary Judgment. The Honorable Cameron Mitchell granted attorney fees in the sum of \$2,900.00, about 19% of the total requested by Appellants. The trial court excluded from that calculation all fees incurred for travel. (CP 57).

#### **IV. STANDARD OF REVIEW**

Respondent agrees that whether a party is entitled to attorney fees is an issue of law which is reviewed *de novo*. *Ethridge v. Hwang*, 105 Wn.App. 447, 460, 20 P3d 958 (2001). Whether the amount of fees awarded is reasonable is

reviewed under an abuse of discretion standard. *Am. Nat. Fire Ins. Co. v. B & L Trucking & Const. Co., Inc.*, 82 Wn. App. 646, 669, 920 P.2d 192 (1996), *aff'd*, 134 Wn.2d 413, 951 P.2d 250 (1998).

## V. ARGUMENT

### A. The Trial Court Did Not Err in Denying Appellant's Request for Attorneys Fees Incurred in Enforcing the Fee-Shifting Provision.

Respondent concedes that, under Washington law and based on the court's ruling, attorney fees were required in this case. The court granted attorney fees, but did not grant all of the attorney fees requested by Appellant. Judge Mitchell denied Appellants' motion for summary judgment regarding the easement misuse issue and trespass. He pointed out that case law "makes it clear that the owner has the right to use the portion of the easement of his property as he or she sees fit, as long as it does not unreasonably interfere or overburden the easement." Then Judge Mitchell went on to state:

*And technically under this road maintenance agreement and the fact where it's been acknowledged by the defendant that at least part of that area was used at times for ingress and egress, that the plaintiffs are entitled to a summary judgment regarding the violation of the road maintenance agreement.*

*And I say that, I guess, somewhat reluctantly, because it seems to me that this was a case that I would have hoped would have been resolved well short of this matter ever coming to court.*

*I think there's been a substantial, potentially even greater, I guess, incurring of attorneys' fees over something that from the record, it appears to me, was pretty much resolved prior to this lawsuit ever being filed.*

*While – again, I think it is technically a violation of this road maintenance agreement by the defendant. So I am, as I said, somewhat dismayed that it ended up getting to this point.*

*You had to file a lawsuit to accomplish something that had already been accomplished.*

A few lines later Judge Mitchell said:

*So, regarding the violation of the road maintenance agreement, I think there has been technical violation of that agreement.*

CP (44).

**B. The Trial Court Did Not Abuse its Discretion in Awarding Only 19% of the Fees Requested by Appellants in their Motion for Attorney Fees.**

Respondent concedes that when attorney fees are mandated the Washington courts utilize the lodestar method. Under the lodestar method the court considers several factors. The case of *Target National Bank v. Higgins*, 180 Wn.App. 165, 184, 321 P.3d 1215 (2014) sets forth the factors, including hours spent by the attorney, his/her hourly rate, and whether the case is a contingency fee case, but the court also states that “the lode star amount may be adjusted to account for subjective factors such as . . . the amount of potential recovery . . . and the undesirability of the case.” *San Juan County v. No New Gas Tax* 160 Wn.2d 141, 171, 157 P3d 831 (2007).

Both sides agree that the amount of the attorney fees award is reviewed by appellate courts on an “abuse of discretion” standard. “A court abuses its discretion when it makes a decision for untenable reasons or on untenable grounds.” *Hollins v. Zbaraschuk*, 200 Wn.App. 578, 582, 583, 402 P.3d 907

(2017). The trial court abuses its discretion if it 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. Mayer, 156 Wash.2d at 684, 132 P.3d 115.

Respondent submits that the Judge Mitchell reasonably made his decision while being aware of the following facts:

1. There were no damages incurred by Appellant.
2. The Appellants' use of the road was never interfered with in any way by Respondent's pepper crop.
3. The pepper crop was planted in an area of the easement which no one had used for years and which no one needed to use.
4. The pepper crop was harvested prior to the Appellants' request to install a road was heard by the Road Maintenance Association.
5. The remnant of the pepper crop was not removed prior to the meeting solely because of dust remediation concerns.
6. The remnants of the pepper crop were removed one day after the service of the Summons and Complaint and thirty-three days before filing of the Complaint.

The Appellant quotes from Judge Mitchell's decision:

[T]he court believes that the attorney fees incurred up to the point where the crops were removed were reasonable. The court does not believe that it was necessary to continue on with this lawsuit, incur the costs of summary judgment, et cetera, after the crops were removed.  
(RP 16-17)

With this record can this court say that no reasonable person could rule as Judge Mitchell did? The Appellant goes on to argue that had they not proceeded with the lawsuit there was no way to recover any of the fees owed pursuant to the agreement. That is not true. Nothing prevented the Appellants from filing a small claims action pursuant to RCW 12.40.010. Small claims court has a jurisdictional limit of \$5,000.00. The amount of attorney fees alleged for writing two letters and the preparing, serving and filing of a Summons and Complaint was \$2,900.00, well under the jurisdictional limit of small claims court.

C. **Respondent Requests an Award of Attorney Fees on Appeal Pursuant to RCW 4.84.330 and RAP 18.1(a).**

The Appellants ask for an award of attorney fees on appeal. Pursuant to RCW 4.84.330 Respondent requests attorney fees should this court rule in his favor. RCW 4.84.330 states in relevant part:

[W]here such contract . . . specifically provides that attorneys' fees and costs, which are incurred to enforce the provisions of the contract . . ., shall be awarded to one of the parties, the prevailing party, whether he . . . is the party specified in the contract . . . or not, shall be entitled to reasonably attorneys' fees in addition to costs and necessary disbursements.

V. **CONCLUSION**

Judge Mitchell reviewed all of the submittals of the parties at the motion for summary judgment. He found as the pepper crop was removed prior to the filing of the lawsuit, the lawsuit was unnecessary. There there was no impediment to Appellants putting in the road. Did Judge Mitchell rely on

unsupported facts and make a ruling that no reasonable person could make? The answer is that his decision was a reasonable one based on all of the facts known to him. This court should affirm his ruling and award attorney fees to Respondent.

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CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a true and correct copy of the BRIEF OF RESPONDENT ARTHUR D. KLYM, on the 21<sup>st</sup> day of December, 2018, addressed to the following:

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