

No. 71998-0-I

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

MAPLE VALLEY AT PARK PLACE, LLC.,

Respondent,

v.

MICHAEL AND TAMARA ROSS,

Appellants.

APPELLANTS' REPLY BRIEF

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I. Introduction

MVPP's introduction seems innocuous, yet on closer examination contains misrepresentations and is misleading.

MVPP erroneously asserts that in response to MVPP's action, the Rosses sought relief in the bankruptcy court. The Rosses' response to MVPP's action was to (1) notify MVPP of the applicability of their bankruptcy discharge, (2) assert it as an affirmative defense, and (3) then move for summary judgment on that defense. MVPP opposed summary judgment, and only after the trial court failed to grant summary judgment did the Rosses seek relief from the bankruptcy court. The Rosses sought relief in the bankruptcy court as a last resort. The fees the Rosses incurred in the bankruptcy court were necessarily incurred and recoverable under the attorney's fee provision in the lease.

MVPP erroneously asserts the Rosses sought fees from the trial court that had already been awarded by the bankruptcy court and paid by MVPP. The Rosses only sought fees in trial court that had not been awarded by the bankruptcy court nor paid by MVPP. The Rosses are not seeking a double-recovery of any fees.

Finally, MVPP misleadingly states that the Rosses are arguing that the amount of fees awarded by the trial court "should have been more."

The Rosses are not just generally asking for “more.” They do not dispute some of the reductions by the trial court that it deemed “excessive.” Their appeal points out specific instances where the trial court abused its discretion by (1) denying any fees for certain work, and (2) discounting fees for work on the summary judgment motions, both without providing a tenable basis for doing so.

MVPP’s brief fails to address many matters relevant review of the trial court’s decision. This appeal addresses the award of attorney’s fees to the Rosses as prevailing party under a provision in a lease, yet MVPP never addresses the lease provision. That provision provides in relevant part:

14. **ATTORNEYS FEES AND COSTS:** If ... it becomes necessary ... to employ attorneys, the prevailing party shall be reimbursed for reasonable costs, expenses, and attorney’s fees expended in, or incurred in connection therewith.

CP 12. There is no limitation to fees incurred in the state court action brought by one of the parties to recovery under the lease.

MVPP’s brief also fails to address, in any way, any of the legal authority cited in Appellants’ Opening Brief.

II. Reply to MVPP’s Statement of the Case

MVPP does not provide a statement of the case, as defined by RAP 10.3(a)(4). This is where MVPP could have pointed out where in the

record the trial court made findings regarding the presence or absence of factors relevant to determining the reasonable number of hours sought by the Rosses under the lodestar method, but there were no such findings.

III. Reply to MVPP's Argument

A. The trial court's refusal to award fees for all hours of work on specific tasks was an abuse of its discretion under the lodestar method.

MVPP points out several instances where the trial court reduced the fees sought by the Rosses, without mentioning that some of those reductions are not at issue in this appeal. Specifically, the Rosses are not disputing the reduction from 7.7 hours to 4 hours for work through the time of the answer, or from 28.7 hours to 14 hours for work on discovery.

While MVPP erroneously asserts that the trial court made a finding¹ that 45.0 hours was reasonable, MVPP goes on to correctly note that the trial court's determination regarding the reasonableness of the hours worked is reviewed for an abuse of discretion. Brief of Respondent, p. 5. That discretion is abused if it is based on untenable reasons, such as applying the wrong legal standard. *Sales v. Weyerhaeuser Co.*, 163 Wn.2d

¹The only "finding" by the trial court to which MVPP can cite is at the end of its order, where it states "the Court finds 45 hours were reasonable." CP 224. This is not a finding. A finding is defined as a determination from evidence provided by one party and denied by the other. *Para-Medical Leasing, Inc. v. Hangen*, 48 Wn.App. 389, 397, 739 P.2d 717 (1987).

14, 22, 177 P.3d 1122 (2008).² The trial court should explain why it is discounting certain hours from the fee request. *Absher Const. Co. v. Kent School Dist. No. 415*, 79 Wn.App. 841, 848, 917 P.2d 1086 (1995). MVPP does not address this abuse of discretion standard in its brief.

This appeal does not address the trial court's ruling that hours requested for certain work were "excessive." The appeal addresses the trial court's failure to award fees for work on certain tasks for which fees were recoverable, without making any findings as to why it was not awarding fees for such work.

B. The trial court abused its discretion by applying the wrong legal standard to the Rosses' fee request.

MVPP asserts the Rosses failed to cite "evidence" that the trial court abused its discretion. The Rosses' argument is that the trial court abused its discretion by applying the wrong legal standard when excluding hours included under the lodestar method.

MVPP again erroneously asserts the Rosses are seeking to recover fees they already recovered from MVPP in the bankruptcy court. This is false. The bankruptcy court, awarding fees recoverable as damages for contempt under 11 U.S.C. § 105(a), only awarded a portion of the fees the Rosses incurred in the bankruptcy court. In the trial court, the Rosses

² This case is cited in Appellants' Opening Brief, p. 10. MVPP does not challenge or dispute this authority.

were seeking fees as prevailing party in the action, under a broad attorney's fee provision in the lease under which MVPP was suing. The Rosses asked the trial court to award fees they incurred in the bankruptcy court that the bankruptcy court did *not* award and MVPP did *not* pay.

MVPP argues the Rosses did not segregate their fees for work amongst different claims. There was only one claim: breach of the lease. All of the Rosses fees arose out of work on that claim. The Rosses prevailed completely on that claim. Segregation was not applicable.

MVPP cited two cases to support its assertion that the Rosses were required, and failed, to segregate fees. Neither support MVPP's position. In *Hume v. Am. Disposal Co.*, 124 Wn.2d 656, 880 P.2d 988 (1994), the plaintiff asserted several claims, with fees only recoverable for work on one of them. The court noted that when attorney's fees are only recoverable for some of the claims, the award must properly reflect a segregation of the time spent on issues for which attorney fees are authorized from time spent on other issues. 124 Wn.2d at 672.³

In *Loeffelholz v. Citizens for Leaders with Ethics & Accountability (CLEAN)*, 119 Wn.App. 665, 82 P.3d 1199 (2004), again there were multiple claims, not a single claim. The court noted that the requirement

³ The *Hume* court went on to note that if the claims are so intertwined that segregation is not possible, segregation is not necessary. 124 Wn.2d at 673.

to segregate only applies when there were claims for which fees were not recoverable. 119 Wn.App. at 690-1.

Despite there being no basis for segregating fees for work on unsuccessful claims, the trial court did attempt to segregate hours spent on the summary judgment motions between two different defenses asserted by the Rosses. MVPP does not cite any authority that allows a trial court to make such a segregation based on defenses to a single claim.

The Rosses did segregate fees into six time periods to assist the court in determining if the amount of hours were reasonable for those tasks: (1) the initial response and answer, (2) discovery, (3) summary judgment motions, (4) bankruptcy court (5) post-bankruptcy through dismissal, and (6) fee request and reconsideration. The only amounts in dispute in this appeal involve time periods (3), (4), and (6). The chart below shows the segregation, amounts awarded, and the disputed hours.

<u>Time Period</u>	<u>Hours Sought</u>	<u>Hours Awarded</u>	<u>Hours At issue</u>
Response & Answer	7.7	4	0
Discovery	28.7	14	0
Summary judgment	33.0	10	23.0
Bankruptcy	20.9 ⁴	0	20.9
Dismissal	17.0	17	0
Fee request	13.7	0	<u>13.7</u>
			57.6

⁴ This figure was calculated in Appellants' Opening Brief, p. 6, fn. 4. The Rosses incurred 76.1 hours in the bankruptcy court, of which the bankruptcy court awarded 55.2 of fees under 11 U.S.C. § 105(a), leaving 20.9 for the Rosses to seek to recover in the trial court.

MVPP does not show that the Rosses were required to make any further segregation.

1. The cross-motions for summary judgment were to adjudicate MVPP's single claim for relief, for which fees were recoverable and the Rosses were the prevailing party.

MVPP asserts that the trial court determined that the 33.0 hours sought by the Rosses for work on the summary judgment motions were excessive. MVPP does not address the trial court's two reasons for doing so: (1) not all of the briefing dealt directly with the bankruptcy discharge, and (2) it includes time not part of the "defense of the case in this court." CP 56.

Neither of these reasons are a tenable basis for denying attorney's fees. In opposing MVPP's summary judgment, the Rosses did not rely exclusively on the discharge defense, but all the work was directly related to defending against MVPP's single claim for breach of the lease. Taking the matter to the bankruptcy court, after the trial court refused to rule on the summary judgment motions, was part of defending against MVPP's claim.⁵

MVPP cites no authority to support the trial court's failure to award fees for the Rosses' work on the summary judgment motions. Fees should only be discounted under the lodestar method for (1) work on

⁵ State courts have subject matter jurisdiction to enforce the bankruptcy discharge. *In re Watson*, 192 B.R. 739 (9th Cir. BAP 1996).

unsuccessful claims, (2) duplicated or wasteful effort, or (3) unproductive time. *Fiore v. PPG Ind., Inc.*, 169 Wn.App. 325, 279 P.3d 972 (2012). The trial court did not discount fees for work on the summary judgment motions for any of these reasons.

MVPP asserts the Rosses failed to substantiate the reasonableness of 33.0 hours for work on the summary judgment motions, ignoring that the trial court's ruling was not based on a failure to substantiate the time. In substantiating the time, the Rosses provided billing records showing the work done and time spent on a daily basis, and supported it with a narrative (denigrated by MVPP as "one-sentence") summarizing what was shown in the billing records.

MVPP's "argument" boils down to asserting the trial court's ruling that 33.0 hours were excessive was "appropriate." The Rosses have shown that reducing hours for work on single claim, merely because some of the work was on an alternative defense that turned out to be unnecessary, and involved work in a different court, are not tenable bases for reducing a fee request under the lodestar method.

2. The Rosses are not seeking a double-recovery of any fees already recovered in the bankruptcy court.

The Rosses are not seeking a double-recovery. As set forth above, the Rosses only sought to recover fees for work in the trial court that the bankruptcy court did not award under 11 U.S.C. § 105(a).

MVPP asserts that the Rosses were not entitled to recover any attorney's fees in the trial court for work in the bankruptcy court, citing *Sternberg v. Johnston*, 595 F.3d 937 (9th Cir. 2009). There are several problems with this assertion and the authority for it. First, *Sternberg* addresses only the issue of the recovery of attorney's fees as damages for violating the automatic stay under 11 U.S.C. § 362(k)(1). The *Sternberg* court noted that its decision was limited to that issue, and did not address the recovery of attorney's fees for contempt. 595 F.3d at 946, fn. 3.

Even if *Sternberg* applied to the contempt ruling based on violation of the Rosses' discharge, MVPP's proposition that fees are not recoverable once the violation (of the stay or discharge) ended, is not applicable here. MVPP's violation of the discharge did not end until 2014, when MVPP dismissed the action. All of the Rosses fees in the bankruptcy incurred in 2013 would be recoverable under MVPP's expansive and erroneous reading of *Sternberg*.

The only reason the Rosses were in the bankruptcy court was to stop MVPP from violating their discharge by suing them for breach of the lease. The fees incurred in the bankruptcy court were covered by the prevailing party attorney's fee provision in the lease. MVPP cites no authority, nor even attempts to argue, that the fee provision in the lease only applies to fees incurred in a state court action brought for breach of the lease.

C The trial court abused its discretion by not awarding fees for the Rosses' work preparing and presenting their fee request.

The trial court, without providing a reason, did not award any fees for work preparing and presenting the Rosses' fee request. The Rosses' Opening Brief argued that such fees, which included opposing MVPP's reconsideration motion and presenting their own, are recoverable, citing *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 378, 798 P.2d 799 (1999) (cited in *Costanich v. D.S.H.S.*, 164 Wn.2d 925, 933, 194 P.3d 988 (2008)).

MVPP does not address this authority or cite any contrary authority to support the trial court's decision to not award fees for preparing and presenting the Rosses' fee request.

D. MVPP is not entitled to attorney's fees on appeal.

MVPP asserts that the portion of the Rosses' appeal seeking attorney's fees for work in the bankruptcy court that were not awarded by the bankruptcy court, exercising its contempt power, is "frivolous." There are several problems with this assertion.

First, the authority cited by MVPP, *Lee v. Kennard*, 176 Wn.App. 678, 310 P.3d 845 (2013), expressly rejects a request to award attorney's fees as sanctions under RAP 18.9(a), based on one allegedly frivolous issue, when the appeal as a whole is not frivolous. The court stated:

RAP 18.9(a) does not speak in terms of filing one or more frivolous issues or assignments of error— only a frivolous appeal as a whole.

310 P.3d at 854.

Second, there is no support for the underlying basis of MVPP's contention that the appeal of the trial court's denial of fees in the bankruptcy court is frivolous. MVPP's bankruptcy authority dealt with stay violations, not discharge violations, and the stay violations had ended, while MVPP's discharge violation was continuing.

Third, the Rosses were not seeking additional fees under bankruptcy law; they were seeking to recover them under the lease. There is nothing frivolous about this request, as (1) the lease provision providing for attorney's fees to the prevailing party is broad enough to recover fees

in the bankruptcy court, (2) the trial court provided no basis for exercising discretion to deny such fees, and (3) MVPP provided no legal authority that such fees were not recoverable under the lease.

IV. Conclusion

MVPP's brief misrepresents what happened in the trial court, and fails to provide any factual or legal basis for the trial court's decision to not award attorney's fees to the Rosses for certain work for which fees were recoverable as the prevailing party. The trial court abused its discretion in doing so.

The Rosses ask that this Court reverse the trial court's failure to award attorney's fees for the hours worked at issue in this appeal. That will increase the fee award by 57.6 hours, at \$300/hr., for a total increase of \$17,280. In addition, the Rosses seek attorney's fees on appeal under RAP 18.1.

DATED this 10th day of October, 2014.

HULTMAN LAW OFFICE

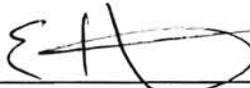
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document has been served by email, by agreement of counsel, on the 10th day of October, 2014, to:

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

Eric R. Hultman