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Court of Appeals
Division III
State of Washington

No. 31361-1

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON DEPARTMENT OF FISH AND WILDLIFE,

Appellant,

v.

ONE 1999 FORD F350 DIESEL PICKUP TRUCK, and a REMINGTON MODEL 77, 7mm RIFLE,

Defendants,

JOHN R. COON and SABRINA K. COON,

Claimants.

APPELLANT'S REPLY/CROSS RESPONSE

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I. INTRODUCTION

The Department of Fish and Wildlife (WDFW) provided timely notice of its intent to seize for forfeiture the Coons' truck and rifles.[1] In arguing to the contrary, the Coons erroneously proceed under the theory that the seizure for forfeiture occurred on November 19, 2011, at the same time as the seizure for evidence. This is contrary to the evidence in the record, which shows that WDFW intended only a seizure for evidence on November 19, 2011, and that the seizure for forfeiture did not occur until January 31, 2012. Because WDFW complied with the notice requirements of RCW 77.15.070(2) by providing notice within 15 days of January 31, 2012, this Court should reverse the Superior Court's order dismissing the case and remand this matter for further proceedings.

If this Court disagrees and affirms the Superior Court's dismissal of WDFW's forfeiture action, this Court should affirm the Superior

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[1] As discussed in detail in WDFW's opening brief, RCW 77.15.070(1) allows a fish and wildlife officer to seize for forfeiture vehicles, equipment, and other property if the officer has probable cause to believe the property was held with the intent of violating, or was used to violate, RCW 77 or a rule of the Fish and Wildlife Commission or the WDFW director. RCW 77.15.070(1). In such cases, WDFW must serve notice of its intent to forfeit on the property's legal owner within 15 days of the seizure for forfeiture. RCW 77.15.070(2).

On January 27, 2012, WDFW received DNA results that tied the Coons and their property to an unlawfully killed deer. CP 56, 76, 103-106. These results provided the probable cause required to commence forfeiture of the Coons' truck and rifles. CP 56, 76. WDFW seized the Coons' property for forfeiture on January 31, 2012 (although no physical seizure occurred because WDFW already held the property, having previously seized it for evidentiary purposes). That same day, WDFW served the Coons with notice of its intent to forfeit the property. CP 56. Such notice was therefore timely under RCW 77.15.070(2).

Court's rulings on attorneys' fees. The Superior Court correctly concluded that WDFW's actions were "substantially justified" for purposes of RCW 4.84.020 and that, therefore, no attorneys' fees should be awarded. The Superior Court also correctly concluded that were attorneys' fees to be awarded, only those fees for services provided by attorney Stephen Graham related to removing the case to the Superior Court and proceedings before that court would have been compensable under RCW 4.84.020.

II. WDFW PROVIDED NOTICE WITHIN 15 DAYS OF THE SEIZURE FOR FORFEITURE AND THUS COMPLIED WITH RCW 77.15.070(2)

As explained at length in WDFW's opening brief, two seizures occurred in this case: one for evidence on November 19, 2011, and a second for forfeiture on January 31, 2012. WDFW provided notice of its intent to forfeit the Coons' property contemporaneously with the seizure for forfeiture. CP 56. In response, the Coons argue that the November 19, 2011, seizure for evidence was, in fact, also a seizure for forfeiture and so notice of WDFW's intent to forfeit the property was required to have been issued within 15 days of November 19, 2011. This argument is contrary to the evidence in the record, especially when considered in the light most favorable to WDFW, the non-moving party below.

A. The November 19, 2011, Seizure Was for Evidence Only, Not Forfeiture

The record shows that the November 19, 2011, seizure was intended as a seizure for evidence only, not a seizure for forfeiture. As discussed in WDFW's opening brief (Opening Brief at 12-14), the record establishes the following with respect to the November 19, 2011, seizure:

- The Property/Evidence Report, issued November 19, 2011, indicates that only a seizure for evidence was intended that day. Critically, Officer Donald Weatherman only marked the box indicating seizure for "Evidence"; he left blank the box for "Seizure for Forfeiture." CP 78.

- Just days after the November 19, 2011, seizure, Officer Weatherman told Mr. Coon that his truck was being held "for evidence." CP 43.

- In a December 28, 2011, memorandum to the Ferry County Deputy Prosecutor, Officer Weatherman stated that "[t]he vehicle was seized for evidence on 11-19-11 and has been in a storage compound under my care to this point." CP 84.

- The seizure for forfeiture was based on DNA evidence that linked tissue collected from the Coons' truck to the illegally killed deer. The laboratory analysis establishing this link was not provided until January 27, 2012. CP 76.

- The January 31, 2012, Notice of Intent to Forfeit (CP 56) expressly states that the November 19, 2011, seizure was for evidence and further indicates that WDFW was commencing a seizure for forfeiture as of January 31, 2012.

Despite this evidence, the Coons argue that the November 19, 2011, seizure was a seizure for forfeiture as well as a seizure for evidence. In so arguing, the Coons point to one statement made by Officer

Weatherman to Mr. Coon in which Officer Weatherman informed Mr. Coon that forfeiture of his property was a possible consequence of unlawful hunting. From Officer Weatherman's Incident Report Form (CP 39): "I asked [Mr. Coon] to be cooperative, that they faced closed season charges and that could cost him his rifle and vehicle." Contrary to the Coons' suggestion, this statement does not indicate that seizure for forfeiture was intended on November 19, 2011. It shows only that Officer Weatherman informed Mr. Coon that forfeiture *could* occur as a result of the commission of illegal hunting. Viewing the record in the light most favorable to WDFW, as the non-moving party below, the Court should not infer from this scant evidence that a seizure for forfeiture was intended on November 19, 2011.

The Coons also point to an April 6, 2012, letter from the Department's Legal Services Administrative Assistant to the Coons' then-attorney acknowledging the Coons' request for a hearing. That scheduling letter mistakenly stated that the seizure for forfeiture occurred November 29, 2011, rather than January 31, 2012. CP 60. But the Department's January 31, 2012, written notice of its intent to seize the property for forfeiture, which preceded the April 6, 2012, scheduling letter, provides the clearest expression of the Department's intention. That notice of intent expressly stated that: ". . . on November 19, 2011,

Enforcement Officers from the Washington Department of Fish and Wildlife (WDFW) *seized for evidence* your 1999 Ford F350 Diesel pickup, Remington Model 77mm rifle, [etc.]." CP 56. Given all of the other evidence in the record, including the January 31, 2012, letter, it is clear that the April 6, 2012, letter was simply mistaken when it said that the November 19, 2011, seizure was for forfeiture, not evidence.

The Coons further claim that the November 19, 2011, seizure could not have been a seizure for evidence because holding the property for evidence was not necessary. But the record in this case demonstrates that the WDFW's initial seizure of the property was, indeed, a necessary part of WDFW's ongoing criminal investigation. In this case, the truck contained forensic evidence: blood and other tissue that the investigating officers initially suspected may have come from the illegally killed deer.[2] CP 32, 36-37. WDFW officers took samples of this blood and tissue on two different occasions: first on November 23, 2011, and again on December 23, 2011 (Officer Weatherman collected the second set of samples because he was not sure whether he collected sufficient samples the first time). CP 44, 75-76.

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[2] In this respect, this case differs from the run-of-the-mill DUI, reckless driving, marijuana possession, or underage drinking case, where, as the Coons point out, seizure of the vehicle for evidence is generally not necessary. Opening Br. of Respondent at 8-9. In such cases, the vehicle will generally not contain forensic evidence, such as blood and tissue, that is critical to the law enforcement investigation and at risk of being lost if the vehicle were not seized.

This investigative work resulted in the establishment of a DNA match between the blood and tissue in the Coons' truck and the illegally killed deer. CP 56, 76, 103-106. Had the truck not been seized for evidence, this forensic evidence would more than likely have been lost (this so because simply hosing out the truck would have destroyed the evidence and foreclosed further investigation). Similarly, seizure of the rifles was necessary to allow an opportunity for forensic testing (the record does not reveal that any such testing actually occurred, but with the seizure for evidence, it could have, had it been necessary). In short, the Coons' claim that seizure of the property for evidence was not necessary is without merit given the facts in the record, especially when viewed in the light most favorable to WDFW, the non-moving party below.

Because WDFW provided written notice of its intent to forfeit the property as required by RCW 77.15.070(2), and otherwise fully complied with the statutory requirements for forfeiture, *State v. Alaway*, 64 Wn. App. 796, 828 P.2d 591 (1992), cited by the Coons, is inapposite. In that case, the state *conceded* that it had not followed the statutory procedures, but argued that the court had inherent forfeiture authority. *Id*. at 800. In reversing the superior court's forfeiture order, the Court of Appeals held that courts have no such inherent forfeiture authority and that because the state did not follow the procedures in the applicable forfeiture statute, the

forfeiture was invalid. In this case, by contrast, WDFW followed the statutory procedures set forth in RCW 77.15.070. Therefore, *Alaway* is not applicable in this case.

B. The Court Should Not Disregard the Weatherman Declaration

The Coons argue that Officer Weatherman's December 26, 2012, Declaration (CP 74-76) and attachments (CP 78-106) should be disregarded. The Superior Court accepted and considered the declaration and attachments. CP 111. This Court should not disregard the Weatherman Declaration.

First, the Coons did not cross-appeal the Superior Court's decision to accept and consider this evidence. The only issue the Coons cross-appealed was the Superior Court's rulings on attorneys' fees. Accordingly, the issue of whether the Weatherman Declaration was properly accepted and considered is not before this Court. RAP 2.4.

Second, the Coons did not assign error to the Superior Court's decision to accept and consider the Weatherman Declaration, as required by RAP 10.3. On that basis as well, this Court should not consider this issue. *Hines v. Data Line Sys., Inc.*, 114 Wn.2d 127, 152 n.9, 787 P.2d 8 (1990) ("Appellate courts will only review claimed error which is included in an assignment of error.").

Finally, even if the Court considers the propriety of accepting and considering the Weatherman Declaration, the Superior Court did not abuse its discretion in accepting and considering this evidence. "The determination of the admissibility of evidence is within the sound discretion of the trial court and will not be overturned on appeal absent an abuse of discretion." *Carlson v. Lake Chelan Cmty. Hosp.*, 116 Wn. App. 718, 737, 75 P.3d 533 (2003). "A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons." *Ameriquest Mortg. Co. v. Office of the Attorney Gen.*, __ Wn.2d __, 300 P.3d 799, 804 (2013). The decision to accept and consider the Weatherman Declaration was not manifestly unreasonable or based on untenable grounds or reasons. Because the Superior Court did not abuse its discretion in accepting and considering the Weatherman Declaration, this Court should not disturb that ruling on appeal.

III. THE SUPERIOR COURT'S ORDERS ON ATTORNEYS' FEES SHOULD BE AFFIRMED

WDFW asks this Court to reverse the Superior Court's order dismissing WDFW's forfeiture action. Should the Court agree and reverse the Superior Court's dismissal order, the Coons are not prevailing parties and are not entitled to attorneys' fees under RCW 4.84.350(1). However, should this Court affirm the Superior Court's dismissal order, it should

also affirm the Superior Court's order denying attorneys' fees to the Coons because WDFW's action was "substantially justified," even if found to be technically incorrect. Furthermore, this Court should affirm the Superior Court's determination that the Coons would only be entitled to fees for work performed by Mr. Graham related to the appeal at the superior court level because only fees incurred at the superior court level are compensable under RCW 4.84.350.

A. WDFW's Action Was Substantially Justified; Therefore, the Superior Court Properly Denied Attorneys' Fees

RCW 4.84.350 allows an award of attorneys' fees and costs to a party prevailing in a judicial review of agency action unless the court finds that the agency action was substantially justified or that, under the circumstances, such an award in unjust. RCW 4.84.350(1) provides, in relevant part:

> Except as otherwise specifically provided by statute, a court shall award a qualified party that prevails in a *judicial review of an agency action* fees and other expenses, including reasonable attorneys' fees, *unless the court finds that the agency action was substantially justified* or that circumstances make an award unjust.

(Emphasis added.)

The term "substantially justified" has been construed to mean that the State's action had a reasonable basis in law and fact. *Dodge City Saloon, Inc. v. Wash. State Liquor Control Bd.*, 168 Wn. App. 388, 405, 288 P.3d

343 (2012) ("An agency action is 'substantially justified' if it ' 'has a reasonable basis in law and fact.' ' "). "Substantially justified" has further been defined to mean "justified to a degree that would satisfy a reasonable person." *Silverstreak, Inc. v. Wash. State Dep't of Labor & Indus.*, 159 Wn.2d 868, 892, 154 P.3d 891 (2007). According to the Supreme Court, "[t]he relevant factors in determining whether [an agency] was substantially justified are, therefore, the strength of the factual and legal basis for the action, not the manner of the investigation and the underlying legal decisions." *Id.*

A superior court's determination of whether agency action was "substantially justified" for purposes of RCW 4.84.350(1) is reviewed for abuse of discretion. *Alpine Lakes Prot. Soc'y v. Wash. State Dep't of Natural Res.*, 102 Wn. App. 1, 19, 979 P.2d 929 (1999). As noted above, "[a] trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons." *Ameriquest Mortgage Co.*, 300 P.3d at 804.

In this case, the Superior Court did not abuse its discretion in concluding that WDFW's action was substantially justified. WDFW's action to seize for forfeiture the Coons' pickup truck was substantially justified in that there was a reasonable basis in law and fact for the action and it was sufficiently justified to satisfy a reasonable person. WDFW's

action to seize the truck for forfeiture was based, in large part, on DNA evidence showing the deer illegally killed adjacent to Highway 395 had been transported in the back of the Coons' truck. CP 76. This evidence created probable cause to believe that the Coons were involved in the illegal killing of the deer and that the truck was used in the commission of the crime (i.e., that the truck was used to transport the illegally killed deer). The truck was initially seized on November 19, 2011. Officer Weatherman was informed of the results of the DNA tests on January 27, 2012. CP 76. WDFW acted to commence forfeiture of the truck promptly upon obtaining the crucial DNA evidence: on January 31, 2012, the Department acted to seize the truck for forfeiture. CP 56.

WDFW's action was based on the reasonable belief that the November 19, 2011, seizure of the truck was for evidentiary purposes only, *see* CP 75, and that the seizure for forfeiture did not occur until January 31, 2012. As the Superior Court found, even if these beliefs are technically incorrect, they are nevertheless substantially justified based on a reasonable interpretation of the law and given the facts of this case. WDFW's action was substantially justified, even if technically incorrect, and for that reason, the Superior Court did not abuse its discretion in declining to award attorneys' fees and costs under RCW 4.84.350.

B. If Respondents Are Entitled to Attorneys' Fees, Any Award of Attorneys' Fees Must Be Limited to Fees Incurred at the Superior Court Level

The Coons argue that the Superior Court erred in holding that only attorney Stephen Graham worked on the petition to remove the forfeiture appeal to superior court. *See* Br. of the Respondents/Cross Appellants at 4 (Assignment of Error 2). Presumably, the Coons believe that if the Superior Court had not denied their request for attorneys' fees, the attorneys' fees award would have been reduced as a result of this finding. The Superior Court did not err in concluding that if an award of attorneys' fees were made, the award would be limited to fees incurred by Mr. Graham at the superior court level.

An award of attorneys' fees and costs under RCW 4.84.350 is only available for fees and costs in seeking judicial review of agency action before the superior court or appellate court; attorneys' fees and costs are not available for fees and costs incurred in pursuing an administrative appeal before the agency. This is so because RCW 4.84.350 only provides for attorneys' fees and costs to be awarded in a judicial review of an agency action. "The statute is silent as to fees incurred at the administrative level. The clear implication is that our Legislature did not intend to make fees incurred at the administrative level available under the act." *Alpine Lakes,* 102 Wn. App. at 19.

All services provided by the Coons' first attorney, Kevin Curtis, were provided *before* this case was removed to superior court. This action originated as an appeal before a WDFW administrative hearings officer. It was later removed to superior court pursuant to RCW 77.15.070(4) on or about May 2, 2012. CP 1-3. Thus, as a general matter, tasks performed and costs incurred by Mr. Curtis prior to that date cannot be the basis of an award of attorneys' fees and costs under RCW 4.84.350.

The Coons argue that those tasks performed by Mr. Curtis related to removing this matter to superior court are compensable under RCW 4.84.350. However, any such tasks are entirely duplicative of tasks later performed by Mr. Graham. Mr. Curtis's work related to removal appears to have been performed on April 17 ("Draft petition to remove forfeiture proceedings."). CP 125-128. But Mr. Graham claims 3.75 hours to "[d]raft petition and summons, legal research on procedure and who to serve," CP 116, and it was Mr. Graham who signed and filed the Petition for Removal. CP 3. Thus, Mr. Curtis should not be compensated for this same task. *See Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983) ("The court must limit the [attorneys' fee award] to hours reasonably expended, and should therefore discount hours spent on unsuccessful claims, duplicated effort, or otherwise unproductive time.").

Furthermore, there was not a sufficient showing that tasks performed by Mr. Curtis were reasonably necessary to achieve the outcome of this case. The fee applicant has the burden of proving the reasonableness of the fee request and "must provide reasonable documentation of the work performed." *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 151, 859 P.2d 1210 (1993) (citing *Bowers*, 100 Wn.2d at 597). With respect to the majority of tasks performed by Mr. Curtis, there was no showing (and indeed, no attempt to show) that such tasks were reasonably necessary to the achievement of the outcome of the litigation. The dismissal of this case (should it stand) appears to have been entirely the result of Mr. Graham's efforts, not the result of any task performed by Mr. Curtis.

In summary, the Superior Court correctly concluded that only tasks performed by Mr. Graham could be the basis of an attorneys' fee award. That conclusion should be affirmed.

IV. RESPONDENTS ARE NOT ENTITLED TO ATTORNEYS' FEES ON APPEAL BECAUSE THEY DID NOT COMPLY WITH RAP 18.1(b)

RAP 18.1(b) requires that a request for attorneys' fees on appeal be set forth in its own separate section of the requester's opening brief. *See* RAP 18.1(b); *Dep't of Labor & Indus. v. Kaiser Aluminum & Chem. Corp.*, 111 Wn. App. 771, 788, 48 P.3d 324 (2002) (". . . RAP 18.1 requires the party to devote a section of its brief to identifying the

applicable law relied on in its request for fees. RAP 18.1(b). This requirement is mandatory."). The failure to devote a special section of the brief to a request for attorneys' fees precludes such an award. *See*, *e.g.*, *Wilson Court Ltd. P'ship v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 710 n.4, 952 P.2d 590 (1998); *Eugster v. City of Spokane*, 121 Wn. App. 799, 816-17, 91 P.3d 117 (2004); *Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC*, 139 Wn. App. 743, 772 n.17, 162 P.3d 1153 (2007) ("A party who fails to comply with [the RAP 18.1] procedure is not entitled to an award of attorney fees.")

Respondents did not devote a separate section of their brief to their request for attorneys' fees on appeal as required by RAP 18.1(b). *See* Opening Br. of Respondents/Cross-Appellants at 14. Instead, the request for attorneys' fees on appeal consists of just two sentences contained within a paragraph in which attorneys' fees at the trial court level are also discussed, and this paragraph is contained within a section generally devoted to arguments about attorneys' fees at the trial court level. This represents a failure to comply with RAP 18.1(b) and this failure precludes an award of attorneys' fees on appeal, even if Respondents prevail.

V. CONCLUSION

This Court should reverse the Superior Court's order dismissing WDFW's forfeiture action. WDFW complied with RCW 77.15.070(2)'s

15-day notice requirement when it provided notice of its intent to forfeit the Coons' property contemporaneously with the seizure for forfeiture, which occurred January 31, 2012. Should the Court disagree and affirm the Superior Court's dismissal, the Court should affirm the Superior Court's rulings on attorneys' fees. Finally, because they failed to comply with RAP 18.1(b), the Coons are not entitled to attorneys' fees on appeal.

RESPECTFULLY SUBMITTED this 17th day of June, 2013.

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 17th day of June, 2013, at Olympia, Washington.

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