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Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

UNIVERSAL LIFE CHURCH MONASTERY STOREHOUSE, a Washington corporation; and VISIONARY VENTURES, INC., a Washington corporation, Appellants, v. R.L.K., LLC, a Washington limited liability company; RODNEY KRAFKA, an individual residing in the state of Washington, and FEREYDOON ABOOSAIDI, an individual residing in the state of Washington, Respondents.	)	No. 80505-3-I UNPUBLISHED OPINION

VERELLEN, J. — Several Washington decisions make passing references to a possible award of attorney fees for bad faith prelitigation misconduct, but in application, that theory is narrow and circumscribed. Where the bad faith conduct involves a prelitigation disregard of judicial authority, then, akin to contempt, a court may impose attorney fees. Otherwise, the doctrine only applies to a short list of five causes of action which inherently involve a form of bad faith allowing an award of attorney fees as damages.

Here, Universal Life Church Monastery Storehouse prevailed at trial on the majority of its claims against Rodney Krafka, R.L.K., LLC, but Universal Life Church does not allege any prelitigation disregard of judicial authority, and none of the five causes of action were implicated. The trial court did not err in rejecting Universal Life Church's request for attorney fees for bad faith prelitigation misconduct. And Universal Life Church failed to establish a statutory or equitable indemnity basis for an award of attorney fees.

Therefore, we affirm.

FACTS

In 2013, Rodney Krafka leased a portion of a commercial building and one parking space behind the building from Fereydoon Aboosaidi. In 2016, Krafka transferred his 2013 lease to R.L.K., LLC.

In 2017, Universal Life Church leased the remainder of the building from Aboosaidi, including the mezzanine and the kitchen, together with the rest of the parking lot behind the building. Visionary Ventures Inc. (VVI), the owner of a neighboring business, entered into an agreement with ULC which permitted VVI to use ULC's leased space. George Freeman was the president of the board of ULC and the president of VVI.[1]

ULC and R.L.K. had ongoing disputes largely because R.L.K. often parked on ULC's leased space.

[1] We refer to Rodney Krafka and R.L.K., LLC collectively as "R.L.K." and we refer to Universal Life Church and Visionary Ventures Inc. collectively as "ULC."

In March 2017, R.L.K. sued Aboosaidi and Freeman for tortious interference with R.L.K.'s parking rights and business and civil conspiracy. ULC filed a motion to intervene, which the trial court denied.

On June 28, 2017, ULC commenced the present action against R.L.K. and Aboosaidi. ULC's initial complaint alleged claims for quiet title and ejectment, declaratory relief, injunctive relief, libel and slander, tortious interference, and fraud. The complaint did not assert any claim against Aboosaidi, but he was named as an additional party. In its prayer for relief, ULC requested "an award of attorney's fees and legal costs against R.L.K. and Krafka in an amount to be determined by the Court."[2]

On March 18, 2018, ULC filed an amended complaint adding claims for damages against R.L.K. for vandalism and trespass and against Aboosaidi for failing to take legal action against R.L.K. and violating ULC's covenant of quiet enjoyment. The prayer for relief maintained ULC's request for attorney fees.

In August 2019, after a five-day bench trial, the court ruled in favor of ULC as to most of its claims. ULC filed a motion for an award of attorney fees based upon RCW 4.24.630, equitable indemnity, and the court's inherent equitable powers "for prevailing on their claim of defamation against Krafka."[3] On August 21, the trial court issued detailed findings of fact and conclusions of law but did not

[2] Clerk's Papers (CP) at 8.

[3] CP at 2579-86.

make any findings or conclusions supporting a statutory or equitable claim for attorney fees.

The trial court awarded defamation damages to ULC for $75,000 and to VVI for $75,000; a permanent injunction against R.L.K. for trespassing; a declaratory judgment recognizing ULC's exclusive possession of ULC's leased premises; an order ejecting R.L.K. from ULC's leased premises and quieting title in ULC's favor; and $54,176 in damages against R.L.K. for trespass.[4] The court dismissed Aboosaidi's claim for forfeiture and ejectment but awarded Aboosaidi attorney fees against R.L.K. based upon the fee provision in their lease agreement.[5]

The court denied ULC's request for attorney fees, finding that "[p]laintiffs did not adequately plead the basis of their claim for fees to put [d]efendants R.L.K. on notice, and [p]laintiffs are not entitled to fees under statute or in equity."[6] The court dismissed "[a]ll other claims, counterclaims, and cross-claims" with prejudice.[7]

ULC appeals.

[4] CP at 562-92, 596-600.

[5] R.L.K. initially appealed, but R.L.K. later moved to withdraw its appeal, which this court granted.

[6] CP at 3076-78.

[7] CP at 592.

ANALYSIS

I. Bad Faith Prelitigation Misconduct

ULC contends it is entitled to attorney fees "for prevailing on [its] claim of defamation against [R.L.K.]" due to R.L.K.'s bad faith prelitigation misconduct.[8]

We review a claim for attorney fees under a theory of bad faith prelitigation misconduct de novo.[9] We follow the American rule requiring a contract, statute, or equitable basis for an award of attorney fees.[10]

Bad faith can warrant a claim for attorney fees.[11] Several Washington cases mention the concept of attorney fees based upon bad faith prelitigation misconduct, but few courts have applied that doctrine and even then, only in narrow circumstances.[12] One way to establish bad faith is through prelitigation misconduct. "Pre-litigation misconduct refers to 'obdurate or obstinate conduct that necessitates legal action' to enforce a clearly valid claim or right."[13]

The court in Rogerson Hiller v. Port of Port Angeles clarified that "[t]he award of attorney's fees for prelitigation misconduct can be compared to a

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[8] Appellant's Br. at 24.

[9] Greenbank Beach & Boat Club, Inc. v. Bunney, 168 Wn. App. 517, 524-28, 280 P.3d 1133 (2012).

[10] City of Seattle v. McCready, 131 Wn.2d 266, 273-74, 931 P.2d 156 (1997).

[11] Greenbank, 168 Wn. App. at 524-28.

[12] See Rogerson Hiller Corp. v. Port of Port Angeles, 96 Wn. App. 918, 927, 982 P.2d 131 (1999) (little precedent for what constitutes bad faith as basis for attorney fees).

[13] Rogerson, 96 Wn. App. at 927 (quoting Jane P. Mallor, Punitive Attorneys' Fees for Abuses of the Judicial System, 61 N.C.L. REV. 613, 632 (1983)).

'remedial fine[ ] imposed by a court for civil contempt' in that the party acting in bad faith is wasting private and judicial resources."[14] And consistent with this observation in Rogerson, the court in Greenbank Beach and Boat Club v. Bunney noted that "[i]n general, a court may resort to its inherent powers only to protect the judicial branch in the performance of its constitutional duties, when reasonably necessary for the efficient administration of justice."[15] And in Greenbank, after observing that prelitigation misconduct refers to "obdurate or obstinate" conduct that necessitates legal action to enforce a clearly valid claim or right, the court stated:

> Prelitigation misconduct may serve as the basis for an award of fees in the case of "enforcement of judicial authority, as where misconduct of a party amounting to contempt of court has caused the opposing party to incur counsel fees, or where a person retains possession of property after a judicial determination of the wrongful character of his possession, thus forcing the party wronged to the expense of further proceedings to recover possession or otherwise enforce his rights."[16]

The Greenbank court held, "Prelitigation misconduct, to be sanctionable by an order to pay the other party's attorney fees, necessarily involves some disregard of judicial authority."[17] Here, ULC makes no argument that R.L.K. engaged in prelitigation misconduct in disregard of judicial authority.

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[14] 96 Wn. App. at 918, 928, 982 P.2d 131 (1999) (quoting Mallor, Punitive Attorneys' Fees, supra at 633).

[15] 168 Wn. App. 517, 525, 280 P.3d 133 (2012).

[16] Id. at 526 (quoting Guay v. Bh. Bldg. Ass'n, 87 N.H. 216, 177 A. 409, 413 (1935)).

[17] Id.

The only other arguable category of bad faith prelitigation misconduct attorney fees are five causes of action that allow an award of attorney fees as damages. Those causes of action are limited to malicious prosecution, wrongful garnishment, wrongful attachment, actions to dissolve a wrongful temporary injunction, and slander of title.[18]

The court in Rorvig v. Douglas added slander of title to this short list, by focusing on the Restatement (Second) of Torts § 633.[19]

The Restatement provides:

> (1) The pecuniary loss for which a publisher of injurious falsehood is the subject to liability is restricted to
>
> (a) the pecuniary loss that results directly and immediately from the effect of the conduct of third persons, including impairment of vendibility or value caused by disparagement, and
>
> (b) the expense of measures reasonably necessary to counteract the publication, including litigation to remove the doubt cast upon vendibility of value of disparagement.[20]

Specifically, the court in Rorvig reasoned that slander of title is a type of the general tort of publication of an injurious falsehood, which is generally limited to disparagement of property.[21] The court held that "[a]ttorney fees incurred in

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[18] Rorvig v. Douglas, 123 Wn.2d 854, 863-64, 873 P.2d 492 (1994).

[19] 123 Wn.2d 854, 863-64, 873 P.2d 492 (1994).

[20] RESTATEMENT (SECOND) OF TORTS: PECUNIARY LOSS § 633 (Oct. 2020 Update).

[21] "The general principle stated in this [s]ection is applied chiefly in cases of the disparagement of property in land, chattels or intangible things or of their quality." RESTATEMENT (SECOND) OF TORTS: PECUNIARY LOSS § 623A cmt a. (Oct. 2020 Update).

removing the cloud from the title and restoring vendibility are necessary expenses of counteracting the effects of slander."[22]

Here, none of the causes of action recognized in Rorvig apply. ULC only pleaded claims of quiet title and ejectment, declaratory relief, injunctive relief, libel and slander, tortious interference, and fraud.

First, ULC relies on R.L.K.'s defamatory statements as the bad faith prelitigation misconduct. But defamation is not one of the five causes of action recognized in Rorvig.

Second, at oral argument ULC emphasized fraud by R.L.K. It is especially troublesome that in 2016, R.L.K. forged a purported 2012 lease giving R.L.K. the right to occupy the mezzanine ultimately leased to ULC. But fraud is not one of the causes of action recognized as a form of bad faith prelitigation misconduct. And neither the findings of fact nor the limited record before us reveals any actionable use of the forged lease by R.L.K.

Even if we apply the reasoning from Rorvig and analyze ULC's claims under the Restatement (Second) of Torts § 623A's general principle of liability for publication of an injurious falsehood, none of ULC's causes of actions qualify as an injurious falsehood disparaging property.[23] And the trial court made no finding of publication as required by Restatement (Second) of Torts § 623A. None of the

[22] Rorvig, 123 Wn.2d at 863.

[23] RESTATEMENT (SECOND) OF TORTS: PECUNIARY LOSS § 623A (Oct. 2020 Update); Rorvig, 123 Wn.2d at 863-64.

five causes of action qualifying for an award of bad faith prelitigation misconduct fees applies here.

Third, at the core of ULC's arguments is the troublesome nature of R.L.K.'s many malicious and fraudulent acts. But the standard urged by ULC would necessarily require an award of attorney fees for any equitable claim based on fraud or on many intentional torts. Such an extension of prelitigation misconduct as a basis for attorney fees would erode the American rule. As recognized in Greenbank, "'[t]o allow an award of attorney fees based on bad faith in the act underlying the substantive claim would not be consistent with the rationale behind the American rule regarding attorney fees.'"[24]

ULC does not establish that the narrow doctrine for an award of attorney fees based upon bad faith prelitigation misconduct applies here.

II. RCW 4.24.630

ULC contends that it is entitled to attorney fees under RCW 4.24.630 for prevailing on its claim of statutory trespass.[25]

[24] Greenbank, 168 Wn. App. at 527 (quoting Shimman v. Int'l Union of Operating Eng'rs, Local 18, 744 F.2d 1226, 1231 (1984)). ULC also relies on an unpublished decision holding that a neighbor using a path across the adjacent owners' property had acted in bad faith, allowing an award of attorney fees in a quiet title action. Gunn v. Riely, 200 Wn. App. 1039 (2017) (unpublished). But Gunn does not address the established limitations on bad faith prelitigation misconduct as a ground for attorney fees.

[25] RCW 4.24.630 is often referred to as the "waste statute." See, e.g., Porter v. Kirkendoll, 194 Wn.2d 194, 211, 449 P.3d 627 (2019).

We review whether a statutory provision authorizes an award of attorney fees de novo.[26]

RCW 4.24.630(1) establishes liability for "(1) removing valuable property from the land, (2) wrongfully causing waste or injury to the land, and (3) wrongfully injuring personal property or real estate improvements on the land."[27] The statute includes recovery for "reasonable attorneys' fees and other litigation-related costs." The statute is designed to prevent the "wrongful invasion of a right in land that is protected by RCW 4.24.630."[28]

Here, ULC did not plead a claim under RCW 4.24.630.[29] The trial court also did not enter any findings of fact or conclusions of law under RCW 4.24.630. The court's conclusions of law containing references to trespass[30] are made only in the context of common law trespass. For example "[t]he court has concluded

[26] Tradewell Grp. Inc. v. Mavis, 71 Wn. App. 120, 126, 857 P.2d 1053 (1993).

[27] Clipse v. Michels Pipeline Const., Inc., 154 Wn. App. 573, 578-79, 225 P.3d 492 (2010).

[28] Colwell v. Etzell, 119 Wn. App. 432, 438, 81 P.3d 895 (2003).

[29] In ULC's first amended complaint, ULC pleaded claims for quiet title and ejectment; declaratory relief; injunctive relief; libel and slander; tortious interference; fraud; and damages. ULC concedes that it did not plead a claim under RCW 4.24.630. In its opening brief, ULC argues that the trial court entered declaratory relief in favor of ULC under CR 57 and RCW 7.24, neither of which ULC pleaded in its complaint. And the trial court entered an order ejecting R.L.K. from the premises and an order quieting title against R.L.K. for exclusive possession of the property based on RCW 7.28.010, a statute that ULC also did not plead. ULC contends that its "request for attorney's fees based on RCW 4.24.630 . . . should be treated no differently." Appellant's Br. at 17. But ULC provides no authority that would compel the trial court to consider RCW 4.24.630 in this setting.

[30] See CP at 587-88.

after hearing all of the evidence that Krafka and R.L.K. trespassed upon ULC's property and converted ULC's property to their own use."[31] The conclusions of law do not mention statutory trespass or RCW 4.24.630. And common law trespass does not trigger an award of attorney fees under RCW 4.24.630. Because ULC failed to plead a claim of statutory trespass and the court did not enter findings or conclusions under RCW 4.24.630, ULC is not entitled to attorney fees under that statute.[32]

III. Equitable Indemnity

ULC contends that it is entitled to attorney fees under equitable indemnity for prevailing on its trespass claim. We review a claim for attorney fees under a theory of equitable indemnity de novo.[33]

Equitable indemnity, also known as the ABC rule, allows an innocent party to recover attorney fees from a wrongdoer for their wrongful act or omission.[34] A plaintiff, "B," must prove "(1) a wrongful act or omission by A toward B; (2) such act or omission exposes or involves B in litigation with C; and (3) C was not connected with . . . the wrongful act or omission of A toward B."[35]

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[31] CP at 590.

[32] To the extent ULC contends it satisfied the second and third grounds for statutory trespass under RCW 4.24.630, its failure to allege or obtain findings supporting a claim under RCW 4.24.630 preclude an award of attorney fees under that statute.

[33] Newport Yacht Basin Ass'n of Condo. Owners v. Supreme Nw., Inc., 168 Wn. App. 86, 105, 285 P.3d 70 (2012).

[34] Tradewell, 71 Wn. App. at 126-27.

[35] Manning v. Loidhamer, 13 Wn. App. 766, 769, 538 P.2d 136 (1975).

Specifically, "'where the acts or omissions of a party to an agreement or event have exposed one to litigation by third persons—that is, to suit by persons not connected with the initial transaction or event—the allowance of attorney's fees may be a proper element of consequential damages.'"[36] But a plaintiff "may not recover attorney fees under a theory of equitable indemnity if, in addition to the wrongful act or omission of A, there are other reasons why B became involved in litigation with C."[37] The ABC rule contemplates equitable recovery for a "third party [that is] dragged into litigation by other parties."[38] "[I]n order to award fees under the theory of equitable indemnification, the evidence must satisfy all [three] elements of the doctrine."[39]

[36] Evanston Ins. Co. v. Penhall Co., 13 Wn. App. 2d 863, 879, 468 P.3d 651 (2020) (citing Armstrong Constr. Co. v. Thomson, 64 Wn.2d 191, 195, 390 P.2d 976 (1964)), review denied, 196 Wn.2d 1040, 479 P.3d 713 (2021).

[37] Tradewell, 71 Wn. App. at 128.

[38] Lamar Outdoor Advertising v. Harwood, 162 Wn. App. 385, 397, 254 P.3d 208 (2011); see also Aldrich & Hedman, Inc., v. Blakely, 31 Wn. App. 16, 19, 639 P.2d 235 (1982) ("[w]here the natural and proximate consequence of the acts or omissions of a party to an agreement or an event have exposed one to litigation with a third person, equity may allow attorney's fees as an element of consequential damages."); Manning, 13 Wn. App. at 772 ("'where the wrongful act of the defendant has involved the plaintiff in litigation with others or placed him in such relation with others as makes it necessary to incur expense to protect his interest, such costs and expenses, including attorneys' fees, should be treated as the legal consequences of the original wrongful act and may be recovered as damages'") (quoting 22 AM. JUR. 2D Damages, § 166 (1965)); Tradewell, 71 Wn. App. at 126 ("where the natural and proximate consequences of a defendant's wrongful act put the plaintiff in litigation with others and the action generating the expense is instituted by a third party not connected with the original transaction.").

[39] Tradewell, 71 Wn. App. at 126-27.

Here, it is undisputed that R.L.K. trespassed on ULC's leased property and that the landlord, Aboosaidi, was not connected to R.L.K.'s trespass.

ULC argues that it can recover under the ABC rule because it, "B," had "no choice" but to sue its landlord Aboosaidi, "C," when it also sued R.L.K., "A." But ULC is not a third party that was dragged into litigation. ULC commenced this litigation against R.L.K. and Aboosaidi in an attempt to efficiently resolve a variety of claims in one proceeding. ULC made a pragmatic decision to initiate litigation, which is distinct from ULC being "dragged into" litigation with Aboosaidi because of the wrongful acts or omissions of R.L.K. Because ULC commenced this action and was not a party unwillingly brought into the litigation by another party, the ABC rule is inapplicable.

We need not address the trial court's alternative rationale that ULC did not give adequate notice of its theories for an award of attorney fees, or whether attorney fees as a form of damages was adequately presented to the court prior to judgment.

IV. Fees on Appeal

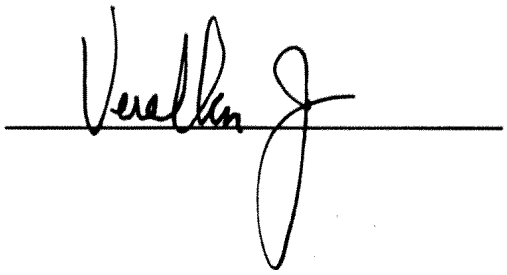
ULC contends that it is entitled to attorney fees for prevailing on its statutory and equitable claims. But ULC is not the prevailing party.

R.L.K. argues that it is entitled to attorney fees under RAP 18.9 because ULC's claims for attorney fees were frivolous. An appeal is frivolous if it "presents no debatable issues and is so devoid of merit that there is no reasonable

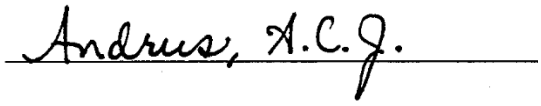
possibility of reversal."[40] Because ULC raised debatable issues on appeal, ULC's appeal is not frivolous.

R.L.K. contends that it is entitled to costs under RCW 4.84.080. RCW 4.84.080 provides that the prevailing party on appeal is entitled to two hundred dollars, sometimes referred to as "statutory attorney fees."[41] Because R.L.K. is the prevailing party on appeal, R.L.K. is entitled to costs on appeal, including statutory attorney fees of $200 under RCW 4.84.080, upon R.L.K.'s compliance with RAP 14.4(a).

Therefore, we affirm.



WE CONCUR:



[40] Streater v. White, 26 Wn. App. 430, 434, 613 P.2d 187 (1980).

[41] RCW 4.84.080; 14A DOUGLAS J. ENDE, WASHINGTON PRACTICE: CIVIL PROCEDURE § 36:17, at 677-78 (2018).