

Court of Appeals No. 62766-0-I

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COURT OF APPEALS

DIVISION I

OF THE STATE OF WASHINGTON

RK PICTURE PERFECT PAINTING, INC., a Washington Corporation,

Respondent,

vs.

JOHNSON DESIGN HOMES CORP., a Washington corporation; and
JOHNSON CHEN and JANE DOE CHEN, a marital community,

Appellant.

RESPONDENT'S BRIEF

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I. INTRODUCTION

This appeal arises from the trial court at trial de novo from Mandatory Arbitration (Hon. Michael Fox) awarding judgment in the sum of \$12,437.50 to Respondent RK Picture Perfect Painting, Inc. (hereafter “ Plaintiff RK Picture”). The judgment included attorney’s fees of \$12,535.17 to Wershow & Ritter and \$3,500 to Hollenbeck, Lancaster, Miller & Andrews as Appellant Johnson Design Homes (hereafter “Defendant Johnson Design”) failed at trial to improve its position from the award of \$12,437.50 by the arbitrator at Mandatory Arbitration to Plaintiff RK Picture.

II. STATEMENT OF THE CASE

The matter below concerned a suit for money due Plaintiff RK Picture, a painting subcontractor, from Defendant Johnson Design, a general contractor. Defendant Johnson Design counterclaimed for damages to certain floor tiles allegedly caused by Plaintiff RK Picture.

Defendant Johnson Design hired Plaintiff RK Picture, “...to paint a ‘spec house’ being built by the defendant as general contractor for \$34,000. The contract provided: ‘Any other work to be done not listed above will be at the rate of \$50.00 an hour per man.’ And ‘Note: No touch up at this price.’ CP 42 (Finding #2).

“Plaintiff performed work under the contract in a generally satisfactory manner although some performance problems occurred.” CP 43 (Finding #4). However Judge Fox clarified the “performance problem” in Finding #11. “The Defendant directed Plaintiff to perform the touch up work.” CP 43. And in Finding #12, “The necessity for the clean up was **not the fault of Plaintiff.**” [emphasis added] CP 43.

Judge Fox found, “R.K. did tape and mask the upstairs bathroom floors and other areas...” CP 44 (Finding #14). But, the taping and **masking was removed and redone by Johnson Homes...** [emphasis added] CP 44.

Plaintiff RK Picture spray painted as required. Some of the spray misted and fell upon the second floor bathroom tiles. CP 44 (Finding #16). However Judge Fox’s Finding #17 states:

Defendant failed to carry its burden of proof on its allegation that the ‘misting’ caused significant and non-repairable discoloration of the tiles on the second floor bathroom floors. The limited evidence and exhibits presented **failed to establish any significant damage, or that Plaintiff would not have been able to clean up the misting residue, given an opportunity to do so by Defendant.** [emphasis added] CP at 44.

Appellant in its Brief ignored the Judge’s finding that Plaintiff did no harm. (Br. App 1) in Appellant’s “Verities [*sic*] and Assignments of Error.”

Judge Fox further found, “The market value of the residence was not adversely affected by the tile situation.” CP 44 (Finding #18)

Neither the arbitrator nor the Judge found credibility in Defendant Johnson Design’s counterclaim. CP 44 (Conclusion #5)

Appellant makes much of the act (not found in the Findings of Fact) of Plaintiff RK Picture billing Defendant Johnson Design \$2,781.25 “for time spent correcting subcontractor’s own defective work.” Br. App 5. Yes, Plaintiff RK Picture did try to clean up the mist on the tile, but the “damage” to the tile was the fault of Defendant Johnson Design. Plaintiff RK Picture charged for its time spent trying to correct a fault that was occasioned by Defendant Johnson Design. The 11 pages referred to at Br. App 5 consist of testimony showing that Plaintiff RK Picture did spend time cleaning the tile. This is undisputed. These 11 pages of testimony do not show that the cleaning was the fault of Plaintiff RFK Picture. It’s work was “defective” because Defendant Johnson Design acted so that the work could not be made effective.

III. RESPONSE TO APPELLANT’S ASSIGNMENTS OF ERROR

“Issues Pertaining to Assignment of Error #1.” Br. App. 2

Appellant simply ignores the Findings of Fact and Conclusions of Law. Appellant tries to re-argue the case, substituting its own interpretation of the evidence for that of Judge Fox. The gravamen of

this appeal is defective simply because the trial judge, after receiving the testimony and the evidence, concluded that, “Defendant/ Counterclaimant failed to meet its burden of proof that the necessity for the clean up was caused by the failure of Plaintiff to perform in a workmanlike manner.” CP 44 (Conclusion #2).

This Conclusion derives from Finding #17, “...the limited evidence and exhibits presented failed to establish any significant damage.” CP 44. The trial judge found no damage done to Defendant Johnson Design by Plaintiff RK Picture.

“Issues Pertaining to Assignment of Error #2.” Br. App. 3

Again, Appellant presents its theory of the evidence and assigns error to the Findings of Fact of the trial judge. Appellant attempts to re-try the case. Appellant sets forth Washington case law as to whether Judge Fox was within authority to include in his award of damages to Plaintiff RK Picture compensation for its unpaid clean up work. But this argument is irrelevant. Plaintiff RK Picture (unlike the subcontractor in Appellant’s authority) did not bill for time spent to clean up its own defects. The trial court found, “The necessity for the clean up was not the fault of the Plaintiff.” CP 43 (Findings #12) Plaintiff RK Picture’s clean up work was done to remediate a problem caused by Defendant Johnson

Design. Obviously Plaintiff RK Picture should not work for free to clean up a mess caused by the request of Defendant Johnson Design.

Issues Pertaining to Assignment of Error #3.” Br. App. 3

Appellant wishes for reversal of the award of attorney’s fees based on MAR 7.3. The grounds for reversal are dependent upon its first two assignments of error, each of which seeks to substitute its own interpretation of the facts for those found by the trial judge. Defendant Johnson Design failed to improve its position at trial de novo and therefore is responsible for Plaintiff RK Picture attorney’s fees under MAR 7.3, “The court shall assess costs and reasonable attorney fees against a party who appeals the ward and fails to improve that party’s position on the trial de novo.”

Appellant does not dispute the amount of attorney’s fees awarded to Plaintiff RK Picture.

IV. RESPONSE TO APPELLANT’S ARGUMENT AND AUTHORITY

1. Appellant’s First Assignment of Error is, “Denying the Appellant general contractor the costs to remedy defects, the trial court applied the wrong standard for measuring damages in a construction contract case.” Br. App 1. Issues of law are reviewed de novo. But in order for the trial court to err in applying a standard for measuring

damages, there must be damages to measure. As discussed above at pages two and three, the trial court specifically found that Defendant Johnson Design suffered no damages in its counter claim. Consequently there is no issue of law for this court to review regarding the measure of damages.

Defendant Johnson Design objects to the facts found by Judge Fox. The standard of review for errors of fact is a fact will not be overturned if it is supported by substantial evidence. Substantial evidence exists, “if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise.” *King Co. v. Wash. State Boundary Review Board*, 122 Wn.2d 648, 675 (1993)

2. Appellant’s Second Assignment of Error “The trial court erroneously allowed damages to the subcontractor [Plaintiff RK Picture] for time spent by the subcontractor attempting, unsuccessfully, to correct its own defective work.” Br. App 3. Yet as discussed above at page four, Plaintiff RK Picture’s work was not found to be defective. Plaintiff RK Picture charged Defendant Johnson Design for clean up work that was the fault of Defendant Johnson Design. Consequently there is no issue of law for this court to review regarding the award to Plaintiff RK Picture for work done by Plaintiff RK Picture.

3. Appellant's third assignment of error. This assignment is based on Defendant Johnson Design gaining reversal for the first two assignments of error. In addition Appellant also claims the trial court lacked jurisdiction to award the Judgment of January 30, 2009, the judgment that included attorney's fees. CP 57, 58. Br. App 11.

. It is true that the original judgment (November 24, 2008) did not include attorney's fees. CP 46,47. Defendant Johnson Design's appeal was perfected January 7, 2009. Defendant Johnson Design argues, "...however in this case issues regarding attorney fees and costs were briefed, ruled upon and included in the second judgment¹ now on appeal." Br. App 11,12.

But the issues regarding attorney's fees were not ruled upon in the November 24 judgment, although Judge Fox did cross out the attorney's fees awards in #2, #3 of CP 47. (Judgment November 24)

In open court on January 30, 2009 Hon. Michael Fox stated that at the time he signed the Judgment and Order of November 24, 2008 he had not realized that the trial was a trial de novo from an award in Mandatory Arbitration. In November he denied the attorney's fees

¹ The term "second judgment" is confusing. There was a first judgment but all parties concede that the second judgment superseded the first judgment. The second judgment is that of November 24, totaling \$13,103.40. Defendant Johnson Design appealed that judgment. Plaintiff RK Picture cross appealed. due to the lack of an award of attorney's fees. When the third judgment, January 30, 2009 came forth Plaintiff RK Picture withdrew its cross appeal.

required by MAR 7.3 because he thought MAR had not occurred. In January he actually ruled on the issue of attorney's fees and granted them in the January 30 Judgment.

However the January 30 Judgment came after this Court perfected the appeal. The trial court needed permission from this Court to enter its Order of January 30. Consequently on February 5, Plaintiff RK Picture moved this Court for an Order Granting Permission for Formal Entry of Trial Court Decision Rap[sic] 7.2(e). Commissioner Mary Neel on March 5, 2009 granted permission for formal entry of trial court decision. Consequently the January 30, 2009 Judgment, including attorney's fees, was presented to this Court as the Judgment of Judge Fox.

In his own words, Judge Fox explained that contrary to Appellant's present argument, Judge Fox did not rule on the issue of attorneys fees:²

From the verbatim transcript of January 30, 2009:

[p.2, lines 4,5]

THE COURT: Good morning. I wanted to have a record this morning because I think this [sic] is all my fault.

[p.3 lines 24,25]

As I said, I made a mistake here and I think the primary reason is that I

² Appellant is correct, however, that the issue of attorney's fees was briefed. See Br. App 11,12 cited above.

[p.,4,5]

1 never looked at the arbitrator's award. I think that at
2 the time of the case, I think that I knew subjectively
3 that there had been an arbitration, but I never looked
4 at the award and I wasn't aware of what the arbitrator's
5 decision was.

6 In the findings, I did not intend to rule on
7 anything concerning eligibility for attorney's fees
8 under the award because I didn't see that that was
9 before me...

[material deleted from original]

15 As you will notice, [referring to Judgment, November 24] I've
stricken out a lot of

16 the things because I still didn't know at that point
17 about the arbitration award. It may have been that
18 something had been filed and I hadn't seen it or I
19 missed it. But, at any rate, I certainly didn't -- I
20 must have been looking at the material below "Ordered,
21 adjudged and decreed."

22 At the time that I signed this, I did not know
23 as it recites here, and defendant having failed to
24 improve its position at trial de novo as set forth in
25 the findings and conclusions and the Court applying MAR

[p.5, line 1]

7.3. That was inadvertent that I missed that.

RP p. 2-5 (January 30, 2009)

More succinctly "Clerk's Minutes" of January 30, 2009 notes that
Appellant's attorney declined to attend the January 30 hearing and, "The
Court finds that RK is entitled to attorney fees since the time of the
arbitration. Post judgment interest set at 12%. Total Judgment of
\$29,138.57." CP 59

Appellant cites three cases supporting its position that Judge Fox lacked jurisdiction to issue his Judgment of January 30, on the grounds that the matter was already perfected in the Court of Appeals. These authorities may have been persuasive prior to 1976 when our Supreme Court promulgated RAP 7.2. Defendant Johnson Design argues opinions from 1904, 1938 and 1947³. They are clearly superseded by the modern rule RAP 7.2.

ATTORNEY'S FEES ON APPEAL, RAP 18.1(b)

There is no doubt that Plaintiff RK Picture is entitled to its attorney's fees as set forth in the Judgment (CP 57, 58). Such attorney's fees arise from Defendant Johnson Design having failed to improve its position from MAR to trial de novo. MAR 7.3. Washington law provides that if attorney's fees were awarded below, they shall also be awarded on appeal if the party receiving the award below prevails in the Court of Appeals,

In *Pudmaroff v. Allen*, 138 Wash.2d 55, 69 (1999) the Court specifically recognized attorney's fees on appeal arising from attorney's fees awarded in trial de novo:

Pudmaroff requests attorney fees under MAR 7.3 and RAP 18.1(j). Supplemental Br. of Resp't at 19; *see also* RAP 18.1(b). The trial court and Court of Appeals awarded him fees under MAR 7.3 because Allen

³ *Aetna v. Thompson*, 34 Wash 610; *Van Horne v. Van Horne*, 194 Wash. 606; *Sewell v. Sewell*, 28 Wn.2d 394

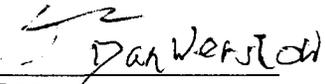
did not improve her position with respect to the arbitration award. For the same reason, we award Pudmaroff attorney fees here. MAR 7.3; RAP 18.1(a).

VI CONCLUSION

Plaintiff RK Picture asks this court to deny Defendant Johnson Design's appeal, thereby reaffirming the Judgment of January 30, 2009 and granting Plaintiff RK Picture its attorney's fees on appeal.

June 29, 2009


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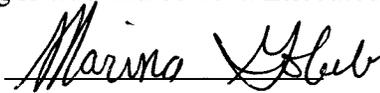
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DECLARATION OF SERVICE

On 2009 I caused a copy of Respondent's Brief via ABC Legal Messenger to be served on:

Jami Elison (counsel for Appellant)
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Seattle, Washington June 25 2009



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